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Supreme Court of Canada Rejects Provincial Ability to Justify Infringements of Treaty Rights: R. v. Morris, 2006 SCC 59

Charles F. Willms, Kevin O'Callaghan, and Efrat Arbel, Vancouver

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On Dec. 21, 2006, the Supreme Court of Canada issued its ruling in *R. v. Morris*, 2006 SCC 59. In a 4:3 decision, the Court set aside the conviction of the accused members of the Tsartlip Indian Band, finding that, sections of British Columbia's *Wildlife Act*, prohibiting hunting at night with a light, were overbroad and infringed upon the Treaty right of the accused to hunt. The protection of the Treaty rights, falling within Federal jurisdiction, prevailed over the provincial laws.

Although the decision related to a narrow question of treaty interpretation in relation to section 88 of the *Indian Act*, the majority decision contains a number of statements which appear to be inconsistent with other decisions of the Court on treaty rights, in particular *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3. S.C.R. 388 and *R.* v. *Marshall*, [1999] 3 S.C.R. 533. It may be that the Crown Provincial is prohibited by the operation of s. 88 of the *Indian Act*, from infringing a treaty right, even if the infringement could be justified under the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Time will tell whether the Court intended to create a separate legal regime in respect of the relationship between the Crown Provincial and aboriginal persons holding treaty rights.

Background

The accused individuals are both members of the Tsartlip Indian Band of the Saanich Nation. They were hunting at night when they shot at a decoy deer set up by British Columbia provincial conservation officers to trap illegal hunters. They were arrested and charged with several offences under the *Wildlife Act*, including: (1) hunting wildlife with a firearm during prohibited hours (s. 27(1)(d)); (2) hunting by the use or with the aid of a light or illuminating device (s. 27(1)(e)); (3) hunting without reasonable consideration for the lives, safety or property of other persons (s. 29); and (4) in the case of Mr. Olsen only, discharging a firearm at wildlife from a motor vehicle (s. 28(1)).

The evidence at trial was that the Tsartlip had hunted at night for generations. Prior to the incidents leading up to this case, they had received confirmation from the Minister of Forests that members of the Tsartlip Band would not be prosecuted in connection with the exercise of hunting and fishing rights pursuant to the North

Saanich Treaty (the "Treaty"). However, after the retirement of the conservation officer with whom they had this understanding, a decoy operation was organized to trap night hunters. The Tsartlip were not forewarned of the operation and no discussion took place after the charges were laid.

At trial, the accused asserted their Treaty right "to hunt over the unoccupied lands . . . as formerly". The Crown conceded that the accused have a right to hunt, but asserted a ban on night hunting. The accused countered the Crown's claim on grounds that they were observing safe hunting practices, that the particular night hunt for which they were charged was not dangerous, and that provincial regulations cannot affect their Treaty rights.

The trial judge found that "[n]ight hunting with illumination was one of the various methods employed by the Tsartlip [people] from time immemorial". However, despite the evidence that night hunting by Tsartlip hunters had yet to result in an accident, he concluded that the accused did not have a treaty right to hunt at night because hunting at night with an illuminating device was "inherently unsafe". In the result, the trial judge entered convictions pursuant ss. 27(1)(d) [night hunting] and (e) [using a light] of the *Wildlife Act.* On appeal, both the summary conviction appeal judge and the majority of the Court of Appeal upheld the convictions based on the prohibition of night hunting.

On appeal to the Supreme Court of Canada, the only provisions at issue were s. 27(1)(d) and (e) of the Act. The issue before the Court was whether a provincial government acting within its constitutionally mandated powers can interfere with treaty rights and, if so, to what extent.

Analysis

A majority of the Court (per Deschamps, Abella, Binnie and Charron JJ.) held that the Tsartlip's right to hunt at night with the aid of illuminating devices is protected by the North Saanich Treaty.

The Court interpreted the Treaty to find that it included the full panoply of hunting practices in which the Tsartlip people had engaged historically, including the practice of night hunting. The Court placed considerable emphasis on the trial judge's finding that night hunting has long been an accepted practice of the Tsartlip people, and that the right to hunt at night had always included the right to hunt with the aid of illuminating devices. Further, the Court found that the language of the Treaty supports the view that the right to hunt "as formerly" means the right to hunt according to the methods used by the Tsartlip before the Treaty, including the method of night hunting with the aid of illuminating devices. The Court thus concluded that the use of guns, spotlights and motor vehicles reflected the current state of the evolution of the Tsartlip's historic hunting practices, and that "changes in method do not change the essential character of the practice, namely, night hunting with illumination" (at para.33).

The Court was clear that while the Treaty did not confer upon the Tsartlip a right to hunt dangerously, it also did not preclude them from the right to hunt at night. The Court concluded that it could not have been within the common intention of the parties to completely ban night hunting, which was a long-accepted method of hunting for food. Such a blanket exclusion, held the Court, should not be implied as a matter of law, at paras. 39-40:

> 39. If a night hunt is dangerous in particular circumstances, it can (and should) be prosecuted under s. 29. Here, the appellants were acquitted of dangerous hunting. The implicit limitation found by our colleagues the Chief Justice and Fish J. has a scope that interferes with the time-honoured right instead of allowing for the right to be exercised subject only to principled

> limitations. Protected methods of hunting cannot, without more, be wholly prohibited simply because in some circumstances they could be dangerous. All hunting, regardless of the time of day, has the potential to be dangerous.
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> 40. . . . To conclude that night hunting with illumination is dangerous everywhere in the province does not accord with reality and is not, with respect, a sound basis for limiting the treaty right.

Having found that the Tsartlip's treaty rights include the right to hunt at night and with illumination, the Court turned to consider whether were constitutionally valid under ss. 91 and 92 of the *Constitution Act, 1867* and under s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5.

The Court found that the impugned provisions of the *Wildlife Act* were valid provincial legislation under s. 92(13) of the *Constitution Act, 1867*, as it dealt with property and civil rights. However, validly enacted laws that impair "an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians" will be inapplicable to the extent of the impairment. That being said, the law provided that provincial laws of general application that interfere with Federal jurisdiction may nonetheless be found applicable by incorporation under s. 88 of the *Indian Act*, with the exception that if the legislation is in conflict with a treaty right then the treaty right is protected from interference.

Looking to previous jurisprudence, the Court concluded that insignificant interference with a treaty right would not engage the protection afforded by s. 88 of the *Indian Act*. As such, the Court held that provincial laws or regulations "that place a modest burden on a person exercising a treaty right or that interfere in an insignificant way with the exercise of that right do not infringe the right." The protection of treaty rights in s. 88 of the *Indian Act* will apply where a conflict between a provincial law of general application and a treaty is such that it amounts to a *prima facie* infringement. The Court defined *prima facie* infringement to include "anything but an insignificant interference" with the right in question, or an infringement that inflicts a "meaningful diminution" on the impugned right, explaining as follows, at para.55:

> 55. Where a *prima facie* infringement of a treaty right is found, a province cannot rely on s. 88 by using the justification test from *Sparrow* and *Badger* in the context of s. 35(1) of the *Constitution Act, 1982*, as alluded to by Lamer C.J. in *Côté* at para. 87. The purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government acting within its constitutionally mandated powers can be justified. This justification analysis does not alter the division of powers, which is dealt with in s. 88. Therefore, while the *Sparrow/Badger* test for infringement may be useful, the framework set out in those cases for determining whether an infringement is justified does not offer any guidance for the question at issue here.

The result of the Court's analysis is provincial legislation, if it is found to be a *prima facie* infringement of a Treaty right, cannot be justified, and will therefore be struck down or held inoperable as unconstitutional.

In the result, the Court determined that the prohibition set out in s. 27(1)(d) and (e) of the *Wildlife Act* was absolute, over-broad, and thus inconsistent with the common intention of the parties to the Treaty in that they completely eliminate a chosen method of exercising Treaty rights. The Court's conclusions were as follows, para.60:

> 60. We have no difficulty concluding, therefore, that the categorical ban on night hunting and hunting with illumination constitutes a *prima facie* infringement of a treaty right. A categorical prohibition clearly constitutes more than an insignificant interference with a treaty right. Although provincial laws of general application that are inapplicable to aboriginal people can be incorporated into federal law under s. 88 of the *Indian Act*, this cannot happen where the effect would be to infringe treaty rights. Because paras. (d) and (e) of s. 27(1) of the *Wildlife Act* constitute a prima facie infringement, they cannot be incorporated under s. 88 of the Indian Act.

The Court proceeded to allow the appeal, set aside the convictions and enter acquittals.

Dissent

In dissent, Chief Justice McLachlin, Justice Bastarach, and Justice Fish, held that the impugned ban on night hunting with a firearm was valid provincial legislation that applied to the accused.

As regards the interpretation of the Treaty, the dissent found that a treaty must be interpreted in a manner that best reconciles the interests of its parties. Section 27(1)(d) of the *Wildlife Act* places safety limitations on the right to hunt, by providing that the right must be exercised reasonably, and does not include the right to hunt in an inherently hazardous manner. The dissent concluded that a ban on night hunting with a firearm was a reasonable exercise of the Province's regulatory power in defining this internal limit. Since the regulation of dangerous hunting fell outside the scope of the treaty right to hunt, no treaty right was engaged.

The dissenting justices determined that a provincial law of general application that does not affect a treaty right, and does not otherwise touch upon core "Indianness", applies without recourse to s. 88 of the *Indian Act*. The dissent determined that provincial legislation "that falls outside the internal limits on the treaty right that the parties to the treaty would have understood and intended would not encroach on the treaty right" (at para. 92).

As no aboriginal right was in play, and the provincial law does not otherwise go to "Indianness", the dissent found the law applies *ex proprio vigore* [of its own power].

Conclusion

The majority's ruling is significant in two particular ways. First, the Court determination of the standard necessary to constitute "*prima facie* infringement" was expansive. The Court found the term sufficiently broad as to include anything that is not an insignificant interference with that right (at para.53). Second, the ruling suggests that once a *prima facie* infringement of a treaty right is shown, Provincial infringement of a treaty right cannot be justified. This finding suggests that a province otherwise acting within its constitutional powers will be unable to enforce or act pursuant to legislation that affects a treaty right. This second observation is of particular significance because it raises many issues, unanswered by the Court's decision in this case. For example, if the Province cannot justify an infringement, can the Province ever grant an authorization that would infringe treaty rights?

These two findings will no doubt impact future court rulings as to the scope of constitutionally permissible action on the part of provincial governments. The statement of the majority of the Court in paragraph 55 appears to be a signal that, although the Crown is indivisible, two different legal regimes govern Crown conduct when treaty rights are in issue: the Crown Federal being able to justify an infringement of a treaty right while the Crown Provincial cannot ever justify such an infringement. If that is the case, then the process of reconciliation

of aboriginal interests with the sovereignty of the Crown in relation to treaty rights is solely, or primarily, a matter between the Crown Federal and aboriginals. The majority decision leaves little scope for a meaningful consultation process between the Crown Provincial and aboriginal groups holding treaty rights. Its impact on modern treaties, which have specific provisions concerning the relationship of provincial laws to treaty rights, remains to be seen.

For more information on the subject of this bulletin, please contact the author:

Charles F. Willms
604 631 4789
cwillms@van.fasken.com

Kevin O'Callaghan
604 631 4839
kocallaghan@van.fasken.com

For More Information About Our Aboriginal Practice Group

Vancouver

Charles F. Willms**
604 631 4789
cwillms@van.fasken.com

Kevin O'Callaghan
604 631 4839
kocallaghan@van.fasken.com

Calgary

Sandy Carpenter
403 261 5365
scarpenter@cgy.fasken.com

Peter Feldberg
403 261 5364
pfeldberg@cgy.fasken.com

Toronto

Charles Kazaz
416 868 3517
ckazaz@tor.fasken.com

Neal Smitheman
416 868 3441
nsmitheman@tor.fasken.com

Montréal

Anne Drost
514 397 4334
adrost@mtl.fasken.com

Québec City

Jean M. Gagné
418 640 2010
jgagne@qc.fasken.com

**National Director