Treaty Rights vs. Provincial Legislation

Ezra Eilliott Lefthand v. Her Majesty the Queen (Alta.) and Joseph Eagle Child v. Her Majesty the Queen (Alta.)

BACKGROUND:

The case involves two men, Lefthand and Eagle Child, who were caught fishing with bait in the Livingstone River when there was a provincial fishing ban in place at the time. Both men qualify as "Indians" under Treaty No. 7. This status, modified by the Natural Resources Transfer Agreement (NRTA) found in the Schedule to the Constitution Act, 1930, affords them the right to hunt or fish for food. Specifically, section 12 of the NRTA reads:

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.

Aboriginal treaty rights, including the rights under Treaty No. 7 and the NRTA, are given Constitutional protection by Section 35(1) of the Constitution Act, 1982. It provides:

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

As their only defence, Lefthand and Eaglechild raised their Aboriginal rights cited above. They argued that the provincial regulations should not apply to them, because provincial regulations cannot trump their constitutionally protected treaty rights.

THE DECISIONS

The two men were tried separately, but in both cases, the trial judge found that there was no prima facie infringement of their aboriginal rights and both were convicted. On appeal, Lefthand was acquitted and Eagle Child's conviction was upheld. In Lefthand's case, the Queen's Bench justice found that although the legislative objective of conservation was compelling, the Crown had failed to show that it had acted in accordance to its fiduciary duty towards Aboriginals for two reasons:

1. The Crown had not sufficiently consulted with the Aboriginal communities that use the Livingstone River for food.

2. In calculating the threshold levels of fish in the Livingstone River , the province included

the number of fish expected to be killed by recreational fishing without taking into account Aboriginal food interests in the river. The trial judge viewed this as giving priority to recreational fishers, which is inconsistent with the fiduciary duty owed to Aboriginals.

In so holding, Lefthand was acquitted. The Crown appealed the acquittal and Eagle Child appealed his conviction. The case made its way to the Alberta Court of Appeal.

The Court of Appeal Decision reversed the Queen's Bench decision. It re-instated Lefthand's conviction and dismissed Eagle Child's appeal.

The Alberta Court of Appeal held the treaty was expressly created as "subject to any provincial regulations" as long as any infringements on aboriginal rights by provincial legislation are justified. Along the same line of reasoning as the trial judge, the Court of Appeal found that the objective of the legislation that prohibited hunting at the time was reasonable, therefore justifying any infringement on Aboriginal Right.

Leave to Appeal was denied by the Supreme Court of Canada, meaning that the Supreme Court found no potential errors in the Alberta Court of Appeal Decision.

Sources:
Constitution Act, 1930 Statutes of Great Britain (1930), 20-21 George V, chapter 26.
R. v. Lefthand, 2008 CarswellAlta 195 (Supreme Court of Canada).
R. v. Lefthand, 2007 CarswellAlta 850 (Alberta Court of Appeal).
R. v. Lefthand, 2005 CarswellAlta 1512 (Alberta Court of Queen's Bench).
R. v. Lefthand, 2004 CarswellAlta 153 (Alberta Provincial Court).