LAX KW'ALAAMS INDIAN BAND V CANADA (ATTORNEY GENERAL)

Court of Appeal for British Columbia (Newbury, Chiasson and Bennett JJ)
23 December 2009
2009 BCCA 593

Canada – constitutional law – *Charter of Rights and Freedoms* – application for declaration of rights under s 35(1) *Constitution Act 1982* – right of the Lax Kw'alaams Band to harvest fisheries resources commercially – equivalency of Coast Tsimshian's practice of trading in eulachon grease to a modern right to fish commercially – Consideration of pleadings – breach of fiduciary duty through restriction of right to harvest resources

Facts:

The appellants in this case were the Law Kw'alaams Indian Band, a fishing people who inhabited land along the northwest coast of British Columbia. This appeal is from the Supreme Court of British Columbia in relation to a decision regarding an application by the Law Kw'alaams for a declaration of existing Aboriginal rights under s 35(1) of the *Constitution Act 1982 ('*Canadian *Constitution')* to harvest and sell fisheries resources (defined as all species of fish, shellfish and aquatic plants) in their claimed territories, for commercial purposes. While they were successful in proving they are an Aboriginal group descendent from the Coast Tsimshiam who had lived and fished in the Prince Rupert area at the time of contact with Europeans, and that the harvest and consumption of fish resources remained an integral part of their distinctive culture, they were unable to demonstrate that trade in any fish or fish products, other than eulachon grease, could properly be described as integral to their distinctive culture. Furthermore, the court held that the practice of trading in eulachon grease was not an evolved Aboriginal right equivalent to a modern right to fish commercially.

In this appeal the Court of appeal of British Columbia had to determine whether the pre-contact Coast Tsimshian practice of harvesting and trading euchalon and euchalon grease entitled the Lax Kw'alaams to a modern Aboriginal right protected by s 35(1) of the *Canadian Constitution* to harvest marine resources for commercial purposes. Alternatively, the Court had to decide whether the Crown breached a fiduciary obligation by restricting the ability of the Lax Kw'alaams' to harvest fisheries resources. In deciding the first issue of whether the Lax Kw'alaams had a modern Aboriginal right to harvest marine resources for commercial purposes, the court had to address whether the correct approach was to classify the right as a single-species right or a more general right to fish commercially. Additionally, the Court had to decide whether the trial judge erred in: failing to consider the eulachon fishery in the context of the pre-contact Coast Tsimshan way of life; failing to consider the Aboriginal right in modern-day circumstances; and incorrectly analysing the geographical element of the rights claims.

Held, dimissing the appeal and upholding the decision to dismiss the Lax Kw'alaams' claim for a declaration that they held an Aboriginal right to harvest and sell fisheries resources on a commercial scale, per Newbury J, Chiasson and Bennett JJ agreeing:

1. The correct statement of the law is that 'the specificity with which the claim must be characterized does not pertain to the species fished, rather it relates to persons, area and purpose.' The facts of each case will determine the nature and breadth of the practice, custom or tradition in question and at the end of the analysis, of the right to be accorded constitutional status. In some cases, the practice by its very nature will refer to only one species, while in other cases the practice will be a wider one and may include a particular purpose or specific location. Here, the trading and production of eulachon grease happens to be tied to one specific species

of fish, for use incidental to particular wealth exchange processes: [33]–[35], [37]–[38]; *R v Van der Peet* [1996] 2 SCR 507, applied; *R v Sappier* [2006] 2 SCR 686, applied.

2. While the appellants contend that there is no principled basis to distinguish eulachon fishing from other kinds of fishing, there is a significant distinction between Coast Tsimshian activities with respect to the use of eulachon as a luxury item and the subsistence harvesting of salmon, halibut and other fish. This distinction is not an arbitrary or unprincipled one, and recognises the pre-contact way of life of the Coast Tsimshian: [41]–[43].

3. Aboriginal rights must be determined flexibly; they must be permitted to maintain contemporary relevance in relation to the needs of the claimants and their practices, traditions and customs and not be frozen in time. However, in this case there did not exist, prior to European contact, a practice of trading in fish and fish products that could be said to be integral to their distinctive society and that could be said to be the precursor of a modern commercial fishery. The commercial fishery right sought by the Lax Kw'alaams cannot be said to be the logical evolution of the trading practices with respect to the eulachon grease: [45]–[48].

4. There is evidence to support a finding regarding the necessity for the limited permission from the Nisga'a for the Lax Kw'alaams to take eulachon from the Nass River prior to contact. However, if the trial judge denied the claim solely on the ground that the Lax Kw'alaams did not occupy the Nass River fisheries exclusively she would have erred. Nevertheless, her conclusion turned primarily on the findings that: the Coast Tsimshian did not carry on any significant trade in fish or fish products except eulachon grease prior to contact; and 'the ancient trade' in luxury goods including eulachon grease was not and could not by its nature and purpose be regarded as as harvesting and trading all species of fish on a scale akin to commercial:[50]–[56].

4. It was in the trial judge's discretion in light of the pleadings and the course the trial had taken to not consider some lesser rights (defined as sale to sustain the community) subsumed in trade of fish on a commercial scale. Further, there is no basis to find that the trial judge erred in declining to consider a similar argument in relation to an Aboriginal Right to harvest fish resources for food, social and ceremonial purposes: [58], [62], [65]; *Ahousaht Indian Band v Canada (Attorney General*), cited.

5. Concerning the claim that the Crown has a fiduciary duty to ensure that the Lax Kw'alaams have continued non-exclusive opportunities in the commercial fishery to sustain their community, once a claim to an existing Aboriginal right protected by s 35(1) of the Canadian *Constitution* has failed, it is not open to the claimant to assert a fiduciary duty on the part of the Crown to found the same right. It is not in keeping with the honour of the Crown to do so. There is thus no right on the part of the Lax Kw'alaams approaching a 'private law duty' owed to them by the Crown: [76]–[77].