



HANDOUT

CANADIAN TREATY CASES

Consider the following quotes from Canadian Courts.

In 1897 the Privy Council, then the highest court of appeal in Canada, stated...

Their lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right in their annuities...beyond a promise and agreement, which was nothing more than a personal obligation by its governor.

Attorney-General of Canada: Re Indian Claims, [1897] A.C. 199 at 213 (P.C.)

In 1964 the Northwest Territories Court of Appeal quoted this passage from the 1897 decision of the Privy Council and went on to state...

While this [statement by the Privy Council] refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties... can stand on any higher footing. It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement", like any other, can, of course be breached and there is no law of which I am aware that would prevent Parliament by legislation...from doing so.

It is, I think, clear that the rights given to the Indians by their treaties...have been taken awayHow are we to explain this apparent breach of faith on the part of the Government...?

Regina v. Sikyea [1964] 2 C.C.C. 325 – this decision was affirmed by the Supreme Court of Canada in *Regina v. Sikyea* [1964] S.C.R. 642. Hall, J., speaking for the Court stated "I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal setting, and there is nothing which I can usefully add to what he has written."

In 1984, two years after changes to the Constitution recognized and affirmed treaty rights, the Supreme Court of Canada stated...

The Treaty was an exchange of solemn promises between the Micmacs [the First Nation] and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man....

R. v. Simon [1985] 2 S.C.R. 387 at 411.





CANADIAN TREATY CASES ...CONTINUED

In 1995 the Supreme Court stated...

...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. ... the honour of the Crown is always at stake in its dealing with Indian people. It is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned.

It has been recognized that aboriginal and treaty rights are not absolute. The reasons in Sparrow [another Supreme Court of Canada case] made it clear that aboriginal rights may be overridden if the government is able to justify the infringement.

R v. Badger [1996]1 S.C.R. 771.





YOU BE THE JUDGE

THE TEST

The Constitution protects treaty rights. The courts have decided that this means that a law that infringes a treaty right must be *justified* or the law will be found not to apply to the exercise of the treaty right. There are two stages to determining if a law is justified.

The first step in finding out if a law is justified is to ask if it was passed for a "compelling and substantial objective." This means that the law must be trying to reconcile the fact that Canada was already occupied by Aboriginal peoples with the fact that people from other countries also ultimately claimed Canada for their own. Examples of purposes that would meet this test include conservation, economic and regional fairness or the fact that non-Aboriginal people have for many years made their living from using the resource in question (such as fisheries).

The second step takes into account the fact that the honour of the Crown is always at stake in dealing with Aboriginal peoples and the special trust relationship between the government and Aboriginal peoples. In this step a number of matters are considered such as...

- whether there has been as little infringement as possible to achieve the objective
- whether there has been consultation with the First Nation in question
- whether some sort of priority has been given to the exercise of the treaty right over other ways a resource could be used





HANDOUT

THE CASES

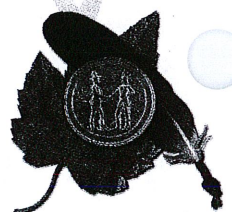
R. v. LEFTHAND [2005] A.J. No. 1370

Ezra Lefthand, a member of the Stoney Nation – Bearspaw Band entitled to fishing rights under Treaty 7, was charged with fishing with earthworms contrary to the Alberta Fishery Regulations. There was evidence that fishing with worms was a traditional method of fishing. The Court found that the prohibition against fishing with bait infringed upon Ezra Lefthand's treaty right to fish. The Court had to consider whether this prohibition was a justified infringement of a treaty right to fish.

The ban against live bait was part of a ban on taking any fish from the lake. Only catch and release fishing was allowed. This was done to maintain fish populations at a level that would ensure the population of fish did not decline. There was evidence that more fish die when caught and released if live bait is used because the fish take the bait deeper into their mouths. It was also noted that there were a number of other locations nearby where fishing with live bait was allowed. There was no consultation with the First Nation regarding the bait ban.

QUESTIONS FOR THOUGHT

1. Was there a "compelling and substantial" objective for the law that prohibited the use of bait? If so, what was it?
2. Was the ban of bait fishing consistent with the honour of the Crown and the special relationship between the Crown and First Nations? What factors suggest that the ban did or did not meet this test? Consider...
 - Was there as little infringement as possible to meet the objective of the legislation?
 - Was there consultation?
 - What sort of priority, if any, was given to the exercise of treaty fishing rights?





THE CASES

R. v. COUILLONNEUR [1996] S.J. No. 305

Pierre Couillonneur, a member of the Canoe Lake First Nation entitled to fishing rights under treaty 10, was charged with fishing with a gill net smaller than allowed under the *Fisheries Act*. The Court found that this was an infringement of Pierre Couillonneur's treaty right to fish. The Court had to go on to consider if this infringement was justified.

Evidence showed that although there were no specific concerns about fish population levels in Canoe Lake (where Pierre Couillonneur was fishing) the restriction on gill net size was designed to prevent the capture of smaller fish. Allowing fish to reach a certain size before being caught helps to maintain fish population levels by allowing fish to mature and reproduce. There was evidence that the fish population levels had not always been stable and that at times in the past the population of certain species was very low.

There was also evidence that the restriction had not prevented members of the First Nation from being able to feed themselves, that most complied with the regulation and that conservation was in keeping with the traditional beliefs and philosophies of Aboriginal Peoples. Non-Aboriginal fishing was subject to much more restrictive rules including out-of-season and catch limit rules. There had been no consultation with the First Nation specifically on this regulation.

QUESTIONS FOR THOUGHT

1. Was there a "compelling and substantial" objective for the law that restricted the size of gill nets? If so, what was it?
2. Was the restriction on gill net size consistent with the honour of the Crown and the special relationship between the Crown and First Nations? What factors suggest that it did or did not meet this test? Consider...
 - Was there as little infringement as possible to meet the objective of the legislation?
 - Was there consultation?
 - What sort of priority, if any, was given to the exercise of treaty fishing rights?



DECISIONS OF THE COURTS

R. v. LEFTHAND

The Court found that the bait ban was passed for a “compelling and substantial objective” of conservation of the fish resources. However, the Court found that the bait ban could not be justified under the second step because it was inconsistent with the honour of the Crown for three reasons. First there was no consultation with the First Nation. Second the bait ban did not infringe as little as possible on the treaty right to fish. Third the bait ban did not give the priority to treaty fishing rights that would be consistent with the Crown’s special relationship with First Nations. The regulations allowed catch and release of fish purely for sport even though some fish would die as a result of that activity. The bait ban was not a justified infringement of the treaty right to fish and Ezra Lefthand was acquitted of the charge.

R. v. COUILLONNEUR

The Court found that the law was passed for the valid objective of conservation and was based on sound biological science and good resource management. The Court also decided that the law honoured the special trust relationship between Aboriginal Peoples and the government. The Court noted that although there was no consultation with the First Nation, treaty fishing rights were given priority over other uses and the restriction on gill net length infringed the treaty right as little as possible. All other methods could be lawfully used. Pierre Couillonneur was found guilty of the offence.