R. v. Morin and Daigneault, [1996] 3 C.N.L.R. 157

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Saskatchewan Provincial Court

Meagher P.C.J.

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[1996] 3 C.N.L.R. 157

Her Majesty the Queen v. Bruce Albert Morin and Dennis Daigneault

Case Summary

The two accused, both Métis within the meaning of s.35 of the Constitution Act, 1982, were identically charged with several violations under the Saskatchewan Fishery Regulations made pursuant to the Fisheries Act, R.S.C. 1985, c.F-14. The accused are lifetime residents of the Turnor Lake district in northwest Saskatchewan.

After considering the briefs of counsel, the judge ruled that the issue would be "did the Accused have an Aboriginal right to fish". The judge further refined the direction of his decision by noting that the decision would not consider the rights of Métis to trap or hunt, the issue of self-government for Métis, the right to fish commercially, nor for ceremonial, social or sustenance purposes, and that it would have no bearing on Métis Aboriginal title. The judge further noted that the application of the decision was to be site specific, i.e., to cover the area loosely known as Treaty 10 or perhaps a little larger area.

Held: Not guilty.

1. The Royal Proclamation, 1763, the British North America Act, 1867, the Imperial Order-in-Council of 1870, s.25 of the Canadian Charter of Rights and Freedoms and s.35 of the Constitution Act, 1982 confirm the Aboriginal right to fish, hunt and trap in the area of northwest Saskatchewan and that right extends, if not explicitly, at least implicitly to the Métis.
2. The Métis accused possess an Aboriginal right to fish. The Métis people and in particular the ancestors of both of the accused were well established in northwest Saskatchewan well before 1870. The evidence established that the people in the area of Turnor Lake currently live as a community and that they live basically off the land as they have since the early 1800s. The evidence also established that fish was always in abundance in northwest Saskatchewan and that it was an important part of the Métis diet from the earliest times continuing to the present.
3. The Crown relied on the Dominion Lands Act, R.S.C. 1906, c.55 and Order-in-Council 1459 in its argument that the rights of the Métis were extinguished. Both pieces of legislation relate to the issue of scrip, but both are silent as to the meaning and scope of scrip. Specifically no mention is made of hunting, fishing and trapping rights in this legislation nor in the application for scrip and the scrip document itself. The assumption that scrip recipients of northwest Saskatchewan surrendered their title to land and at the same time their Aboriginal right to fish cannot be made on a reading of the scrip documents or the legislation. There is no statute or order that has extinguished the Métis right to fish.

4. Scrip recipients were dealt with as individuals and not as a group of people such as the Indians when they signed treaties. Based on oral history evidence and expert testimony, the Métis at the time of the issue of scrip understood that their fishing, hunting and trapping lifestyle would not be disturbed.
5. The Crown, with Treaty 10 and the issuance of scrip, with no improper motive, arbitrarily divided the Aboriginal community into two groups - Indian and Métis. That division of equals resulted in unequal benefits. The Métis have not received and are not receiving the same benefits under the law as Indian people. To grant one Aboriginal people benefits under the law that is not granted to the other gives rise to discrimination under s.15(1) of the Charter.
6. The accused were discriminated against under the Fishery Regulations in that they were required to purchase a fishing licence whereas an Indian person was required to obtained a licence but at no cost. The Regulations infringed the accuseds' right to equality under the law and as a result the Regulations were of no force and effect against the accused pursuant to s.52(1) of the Constitution Act, 1982. The non-compliance with s.15(1) could not be justified under s.1 of the Charter.
7. The appropriate administrative authorities were urged to resolve the inconsistencies that existed between the two Aboriginal groups by entering into meaningful discussions with the Métis people regarding fishing rights.

P.M. McAdam, for the Crown. C.J. Chartier and J. Teillet, for the accused.

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MEAGHER P.C.J.

MEAGHER P.C.J.:— Both accused are identically charged with several violations of the Saskatchewan Fisheries Regulations made pursuant to the Fisheries Act, *R.S.C. 1985, c.F-14*. While they are charged separately the evidence and argument was applied to both at trial and so this decision is rendered as if they were jointly charged.

Defense was produced and argued on two fronts. Firstly, the ordinary or standard defense on the facts and should it fail then the constitutional defense is to be considered.

Since each count must be dealt with separately considering the ordinary defense the charges are listed for reference.

1. On or about December 1, 1993, at Moberly Lake did engage in fishing by means of a net without a license. In violation of s.26(a) of the Saskatchewan Fishery Regulations made pursuant to the Fisheries Act R.S.C., c.F-14, s.1.
2. On or about December 1, 1993, at Moberly Lake did place a net in that body of water during a closed season. In violation of s.26(e) of the Saskatchewan Fishery Regulations made pursuant to the Fisheries Act R.S.C., c.F-14, s.1.
3. On or about December 1, 1993, at Moberly Lake did fail to properly mark nets. In violation of s.27 of the Saskatchewan Fishery Regulations made pursuant to the Fisheries Act R.S.C., c.F-14, s.1.

4. On or about December 1, 1993, at Un-Named Lake (NL 56o 41' WL 108o 15') did engage in fishing by means of a net without a license. In violation of s.26(a) of the Saskatchewan Fishery Regulations made pursuant to the Fisheries Act R.S.C., c.F-14, s.1.
5. On or about December 1, 1993, at Un-Named Lake (NL 56o 41' WL 108o 15') did place a net in that body of water during a closed time. In violation of s.26(e) of the Saskatchewan Fishery Regulations made pursuant to the Fisheries Act R.S.C., c.F-14, s.1.
6. On or about December 1, 1993, at Moberly Lake and Un-Named Lake (NL 56o 41' WL 108o 15') did engage in fishing using a gill net having a mesh size smaller than specified in violation of s.29(1) of the Saskatchewan Fishery Regulations made pursuant to the Fisheries Act R.S.C., c.F-14, s.1.

All locations are in the Province of Saskatchewan

The Issue

Has the defense satisfied the court within what is termed a standard defense that the accused are not guilty. If they have, that is the end of the matter. If the court is prepared to convict on one or more charges in the face of the standard defense then consideration is to be given to the constitutional argument that the accused as Metis people have an unextinguished existing Aboriginal right to fish and thus are not subject to the regulations as charged.

The Facts

It is agreed by Crown and defense counsel that both of the accused are Metis and lifetime residents of Turnor Lake District of Saskatchewan. On December 1, 1993, they proceeded to set their nets under the ice on Moberly Lake. While in the process they were approached by Conservation Officer Vernon Larson and Officer Luke Perkins. After an exchange of conversation it became clear that neither accused had a fishing licence but that Alfred Morin, Bruce's father, had gone to Buffalo Narrows that day and would be purchasing a licence. The Conservation Officers were satisfied with that explanation and they then instructed the accused individuals to mark their nets with their name and fishermen's number so that the officers would know, on a future inspection, who the nets belonged to. That procedure was deemed satisfactory until the accused could return the next day to mark the nets with the licence number which is the usual practice.

According to Vernon Larson the two defendants asked if there was a quota set for Fox Lake (Unnamed Lake) and he told them it was not an open lake and therefore there was no quota. They asked if it was alright to set some nets to see if there was fish in the lake. They were not expressly told not to set nets but Larson told them they would have to first go through the local biologist. The officers returned the next day, December 2, and found two nets in Fox Lake and several in Moberly. They were marked with Dennis' name and fishing number. No licence had been issued to Alfred Morin on behalf of the defendants for reasons that will be addressed. As a result, all of the nets in Moberly and Fox that had been set by the accused were seized.

Dennis Daigneault bought his own licence for Moberly on December 3.

Now turning to each charge. Count one, fishing with a net without a licence in Moberly Lake and count two, placing a net in that body of water during a closed season. I find the accused not guilty on both counts. Both Crown and defense agree that the offences fall within the category of strict liability and therefore the usual defenses apply. I find from the evidence that the practice in

the north has been one of general leniency with regard to enforcing regulations - particularly in years past. Concerning the licence it is clear that the Resource Officers accepted the defendants statement that Alfred Morin was in Buffalo Narrows intending to buy a licence for Moberly for Dennis Daigneault. I accept the evidence of Clarabelle Beaudin who had worked in a fish plant in the north for over 30 years. She testified that it was not uncommon for fishermen to bring in their catch and buy a licence on the day of sale because otherwise they would not have money to buy the licence. A kind of catch 22 situation.

I accept the evidence of Alfred and Cecile Morin that they took a catch of fish that had been caught at Forbisher Lake the day before to sell at Buffalo Narrows fish plant and that indeed he did sell his catch on December 1. I am satisfied that Alfred Morin went to the Resource Office on two occasions on December 1 in order to buy the mentioned licence but while the office was open no one was there. All necessary effort was made by Alfred Morin. Alfred and Cecile had to return home in the late afternoon because their children were home alone from school. Both accused had reason to believe they were fishing with the licence and following the usual practice and I am satisfied that the onus of due diligence has been met. Fisheries Act, *R.S.C. 1985, c.F-14, s.78.6*.

As to count 2 I am satisfied on the evidence that both accused understood from past practice that when the fish plant was open the lakes were open. Clearly the Buffalo Narrows fish plant was in fact open. How the parties knew that it was open is not in evidence. Also, obviously Forbisher Lake was open because there was the catch taken there on November 30th and sold by Alfred on December 1. The court assumes that the catch was made within the regulations since there is no evidence before me to the contrary. A factor that cannot be overlooked and may contribute to the above practices, is the distances and costs involved in getting around the north. Fishermen must by necessity limit their travel and make every trip count. Alfred Morin stated each trip from Turnor to Buffalo Narrows cost about $40.00. I gather that is for fuel alone.

As to count 3 I would find the two accused guilty as charged under the ordinary or standard defense. When the Resource Officers met the accused setting nets on Moberly they were asked if they had set other nets and the reply was that three more were set a short distance away. Clearly, and it is agreed by the defendants, they were asked to mark the nets with their name and fisherman's number which would suffice until they could correct the situation by writing in their licence number when it was obtained. The next day - December 2 the Conservation Officers checked and found the stakes were not marked. The two accused simply took it upon themselves that it was not necessary to mark as requested. Defense counsel argued de minimus non curat lex. In my view the court cannot conclude any one subsection less important than the other. Counsel cites Would v. Hetherington, [1932] 4 D.L.R. a decision of the Manitoba Court of Appeal. From my reading of the majority decision the court found for the defendant on grounds other than de minimis non curat lex.

Counts 4 and 5 are the same as 1 and 2 but the locale is Unnamed Lake or Fox Lake as it is usually known. The defendants maintain that it is a practice in the north to set two or three nets in a lake in order to test if the catch would warrant buying a licence for further fishing. I accept such practice does exist. The circumstances here however are different. As I have already indicated I am satisfied that the defendants were told the lake was closed and that they would have to check with the local biologist. That caution in my view was an override to any existing practice and it was ignored. I find the two defendants guilty on counts 4 and 5 on the ordinary defense.

As to count 6, it is clear that the conservation officers did not follow the prescribed procedure in measuring net size and as a result there is no accurate Crown evidence before the court in

that respect. The defendant Bruce Morin said that he didn't know what size nets were to be used in Moberly or Fox Lake and further that all of the nets they had with them were either 4 1/2" or 5".

However, considering the lack of Crown evidence benefit of the doubt is given to the Accused and Count 6 is dismissed on the facts.

Having found both accused would be guilty on counts 3, 4, and 5 considering the "ordinary or standard defense" I will now turn to the constitutional question.

Constitutional Issue

Clearly, this issue has the potential of having considerable impact for the Northern Metis if accepted by the Court. It is obvious that both Crown and defense counsel have treated the subject accordingly considering the great volume of material filed and extensive argument. Initially, there was some difficulty if not confusion in determining the issue before the court as it related to this defense. I indicated to Counsel during the hearing, it would have been preferable to have a case that concentrated on the constitutional question alone. A similar comment has been made by the Supreme Court in Sparrow [R. v. Sparrow, *[1990] 1 S.C.R. 1075*, *[1990] 3 C.N.L.R. 160*, *[1990] 4 W.W.R. 410*, *70 D.L.R. (4th) 385*, *46 B.C.L.R. (2d) 1*, *56 C.C.C. (3d) 263*, *111 N.R. 241*] that charges under penal statutes are not necessarily the best vehicle for determining a constitutional issue.

Considerable discussion surrounded the issue of the defendants' right to "fish commercially" particularly after counsel filed their first briefs and the subsequent defense motion asking the Court to direct the Crown away from the issue of commercial fishing. I agreed with the Crown that the defendants' evidence seemed to point in that direction, however, after reviewing the notes of the judge at the pre-trial conference and correspondence between the parties, I concluded that it was not the intention of the parties that the issue should be so confined. Accordingly, I took the position that it is the obligation of the court to bring the issue into focus. After considering the briefs of Counsel and argument I ruled that the issue would be "did the accused have an Aboriginal right to fish". In effect, did that right exist with their ancestors from the time of the declaration of British sovereignty to the passing of the Constitution Act, 1982, ss.35(1) and 52 and if it did exist was it lawfully extinguished at any time.

It is important to refine the direction of this decision still further and in doing so I am assisted by comments of both Counsel.

This decision will not consider the rights of Metis to trap or hunt although I gratuitously offer the view that the same arguments could apply. This decision will not consider the issue of self-government for Metis and it will have no bearing on Metis Aboriginal title. It is understood that in the broad sense any application of this decision must be site specific and in that respect it will cover the area loosely known as Treaty 10 or perhaps a little larger. I reject the Crown argument that I should consider a narrower application. Further, I will not consider whether the Metis have a right to fish for commercial purposes nor for ceremonial, social, nor for food nor for sustenance. I mention the above exclusions because considerable material and argument has crept in surrounding all of the above aspects and while is has been helpful and interesting it tended to cloud the real issue.

The courts through many decisions have quite clearly set out the procedure to be followed in determining whether the mentioned Aboriginal right exists. The most definitive and important decision of course is that of the Supreme Court of Canada in R. v. Sparrow *(1990), 70 D.L.R. (4th) 385* [*[1990] 1 S.C.R. 1075*, *[1990] 3 C.N.L.R. 160*, *[1990] 4 W.W.R. 410*, *46 B.C.L.R. (2d) 1*, *56 C.C.C. (3d) 263*, *111 N.R. 241*]. It is the current benchmark to be followed.

As stated, both Counsel agreed that the accused are Metis and come within s.35(1) of the Constitution Act, 1982, it reads as follows:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada. (emphasis mine)

The burden of proving the "existing aboriginal rights" is on the defendants.

Before launching into the evidence it will be helpful to briefly review some of the relevant statutes that relate to Aboriginal rights. The Royal Proclamation of 1763 set the tone for dealing with Aboriginal people in North America and recognized their pre-existing rights. It may have been through necessity that the Proclamation allowed autonomy for the Indians in their own territories. France was defeated at the Plains of Abraham but the Indians were not. The Royal Proclamation declared the British Crown's domination over a large area of North America and through it assured the Indians that there would be no further incursion into their territory without consent. Professor Slattery in his essay "The Hidden Constitution, The Aboriginal Rights in Canada" [(1984) 32 Am. J. Comp. L. 361] had this to offer:

> The Proclamation of 1763 has a profound significance for modern Canada. Under its terms, Aboriginal peoples held continuing rights to their lands except where those rights had been extinguished by voluntary cession.

Through the Proclamation the British Crown cast its influence and laid claim to a vast part of North America which is generally conceded to include Rupert's Land which had been granted to the Hudson Bay Company. Rupert's Land included an area that is now northwest Saskatchewan, an area covered by Treaty 10 and the general site of Moberly and Fox Lakes.

The Charter [of Rights and Freedoms] of 1982, s.25, has guaranteed the Aboriginal rights and freedoms that have been recognized by the Royal Proclamation of 1763. It may be said that the Royal Proclamation is now part of the Canadian Constitution.

Next of course is the British North America Act of 1867 [now Constitution Act, 1867] which gives jurisdiction to the federal Parliament concerning Indians, but it neither abrogates nor derogates from Aboriginal rights that existed at that time.

The Imperial Order-in-Council of 1870 admitting Rupert's Land and the Northwest Territories into the Canadian Confederation is a significant document and also considered part of the Canadian Constitution. It protected the existing rights of the Indian (Aboriginal) people with a caution to the Canadian government that:

> ... the claims of the Indian tribes ... will be considered and settled in conformity with the equitable principals which have uniformly governed the British Crown in its dealing with the Aboriginals.

That brings us full circle to the Constitution Act of 1982 and s.35(1).

The Supreme Court in Sparrow (supra) (pg. 406 [D.L.R.; p. 178 C.N.L.R.]) summarized the significance of s.35(1):

> It is clear, then that s.35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and

> other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s.35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Metis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

and further on that same page

> In our opinion, the significance of s.35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 says the following about s.35(1), at p. 100:
>
> > ... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.
>
> The approach to be taken with respect to interpreting the meaning of s.35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself.

and on page 407 [D.L.R.; p. 179 C.N.L.R.]

> The nature of s.35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.

In my view, it is common ground that the noted statutes and orders confirmed the Aboriginal right to fish, hunt and trap in the area of northwest Saskatchewan and that right extended, if not explicitly, at least implicitly to the Metis.

It is incumbent on the defendants to prove that their right to fish was established and extended back through their ancestors living in the same area of northwest Saskatchewan. That the right was exercised continuously as a community until the passing of s.35(1) of the Constitution Act. It is also common ground that such rights must be shown to have existed at the time of the declaration of British sovereignty.

There is no agreement on the date of the declaration of British sovereignty. As Crown Counsel stated, no evidence or law has been placed before the Court as to the date of assertion of British sovereignty. After examining the issue I am persuaded to agree with the Crown that sovereignty was asserted with the Imperial Order of 1870 when Rupert's Land and Northwest Territories were admitted into confederation.

What approach by the defendants is acceptable to the court in attempting to discharge the burden of proving that the defendants ancestors continuously lived as a community in the area now known as northwest Saskatchewan and that fishing was an integral part of their lifestyle giving rise to the Aboriginal right to fish?

Since the Aboriginal people had no written language to record their history it is accepted that the courts should allow oral history and the testimony of experts such as anthropologists, geographers, etc., who have studied the Aboriginal people.

Mr. McAdam, counsel for the Crown, speaking to Professor Tough's qualifications to testify as an expert very fairly put such evidence in perspective. I quote from Mr. McAdam from page 495 of the transcript:

> We do have the difficult situation in this case much of what my learned friends want to put before the court is historical records. It's information that there is no one alive today that can come forward and testify before you. I certainly have no problem at all with seeing Professor Tough qualified as an expert to testify about what happened, when it happened, who was involved and those sorts of things to provide this court with the historical foundations and historical facts that are necessary for the court to make its decisions with respect to the matters that are being raised by the Defense.

The first witness in this area was Marie Symes-Greham. She is classified as a Land Use Planner and Economist. She spent approximately 10 years at Pinehouse, an Aboriginal community, in northern Saskatchewan and her knowledge is experience oriented rather than theoretical. Her testimony indicated that her research or her studies covered three areas, land use study, occupant study and harvest study. It would seem that her research concentrated on interviews with local trappers, hunters, and fishermen and in part that information would be transferred to maps which would indicate the area covered by those individuals pursuing their activities. Her work indicated that she had traced land use for two or three generations back and essentially it did not change.

Ms. Symes-Grehem interviewed Archie Daigneault and William Morin the fathers of the two accused. From information given to her she compiled maps which showed the general area that both elders carried on their trapping, fishing and hunting. A map was shown to the court and in general the area covered by the two elders would be roughly Treaty 10.

I will now consider the evidence of Frank Tough an Associate Professor with the Department of Native Studies at the University of Saskatchewan. Part of his studies covered historical geography of western Canada and the historical cultural geography of Native people.

From his testimony we learn that the fur trade gave rise to the Metis or half-breed as they were then called. The fur traders married Indian women, in part for economic reasons in order to be friendly to the Indians since they were an integral part of the fur industry. The product of this inter-marriage - the Metis - in turn became an important part of the fur trade since they worked the York boats that hauled the furs from northwest Saskatchewan all the way down the Red River for shipment overseas.

When asked if the Metis could be defined in a geographic area, Professor Tough replied:

> The Metis people do have a distinct geography which is partly laid down by the fur trade and the fur trade companies. It reflects their history. Basically, wherever you have well established fur trade posts you have the creation of the Metis population.

When asked if the Metis were part of the Aboriginal people his reply was:

> Oh yes, I mean, they are of the land. You know what we can discern from the historical written record of their consciousness is they identify with the land, they identify with the birthright, they see themselves as being Native. They don't see themselves as being white in this fur trade era.

The Professor went on to describe how the area of Ile a la Crosse, La Loche and Buffalo Narrows was a very strategic transport corridor. He called it a meeting place or a contact zone

for the Cree and Dene. It was a happening place. Trading posts were established in the area by the fur trade companies.

Professor Tough estimated that the fur trade was plied with the assistance of the Metis until the 1870s and that the traders and of course the Metis started the settlement and trading posts in the area of Ile a la Cross as early as 1778 with Peter Pond.

There is a strong indication that the Metis remained in the area and carried on their lifestyle.

Professor Tough was asked by Mr. Chartier at page 533 of the transcript:

> Q. Are you familiar with this area of northwest Saskatchewan?
>
> A. Well you have a very large Metis population here. I mean, its, you know - it can be easily visualized as a Metis homeland.

When asked why the population remained in the area he replied:

> The hunting, trapping and fishing economy after 1870 remains viable for decades and decades and decades, so they were not - in other places the Metis population was forced to change their economic orientation. So I would say the viability of the local economy meant that a lot of Metis have not had to, say, move out of here.

From the evidence of Louis Morin, father of the accused Bruce Morin we learn that he lived in the general area of northwest Saskatchewan all his life and an inference can be drawn that his father did as well. He said his father lived off the land. Morin stated that his father died in the 1950s and at the time his age would be in the 70s as he put it. A little rough mathematics would place Morin's father's birth at around 1880. An inference can be drawn that Louis Morin's grandfather would have lived in the area well before 1880.

I am satisfied that the Metis people, in particular the ancestors of both of the accused, were well established in the area of Turnor Lake and generally in northwest Saskatchewan well before 1870.

I accept from the evidence that people in the area of Turnor Lake are currently living as a community and basically off the land as they have since the early 1800's.

The contemporary lifestyle of the Metis in the area was described by both defendants as well as Louis Morin and the other Metis witnesses. They all testified that they preferred to live on "bush food" as it was described. Bush food is of course the product of hunting, fishing and trapping. I am satisfied from the evidence and material filed that fish was always in abundance in northwest Saskatchewan and that it was an important part of the Metis diet from the earliest times and has continued to the present.

Since I have found that the defendants' possessed an Aboriginal right to fish it is now incumbent on the court to determine whether or not those rights were extinguished at any time. That burden now shifts to the Crown.

Extinguishment

The Crown relies mainly on two pieces of legislation in its argument that the rights of the Metis were extinguished. Both relate to the issue of scrip. The first is s.6(f) of the Dominion Lands Act, R.S.C. 1906, c.55. It provides as follows:

> 6. The Governor in Council may, - ... (f) grant lands in satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title. (emphasis mine)

Next is Order-in-Council 1459. The order-in-council provides in part as follows:

> On a report dated 12 July, 1906, from the Superintendent General of Indian Affairs, stating that the Aboriginal title has not been extinguished in the greater portion of that part of the Province of Saskatchewan which lies north of the 54th parallel of latitude and in a small adjoining area of Alberta; that the Indians and half-breeds of that territory are similarly situated to those whose country lies immediately to the south and west, whose claims have already been extinguished by, in the case of those who were Indians a payment of gratuity and annuity and the setting aside of lands as reserves, and in the case of those who are half-breeds by the issue of scrip; and they have from time to time pressed their claims for settlement on similar lines; that is in the public interest that the whole of a territory included within the boundaries of the Province of Saskatchewan and Alberta should be relieved of the claims of the Aborigines; and that $12,000.00 has been included in the estimates for expenses in the making of a treaty with the Indians and in settling the claims of the half-breeds and for paying the usual gratuities to the Indians.

Both documents speak only of title and are silent as to the meaning and scope of scrip. Specifically no mention is made of hunting, fishing and trapping rights. To the contrary, Treaty 10 provides in part as follows at page 10 of Exhibit D8:

> Now therefore the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada for his Majesty the King and his successors for ever all their rights, titles and privileges whatsoever to the lands included in the following limits ...

and further at page 11:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations or hunting, trapping and fishing throughout the territory surrendered. ...

It is argued that the Crown intended the scrip recipients of northwest Saskatchewan surrendered their title to land and at the same time their Aboriginal rights to fish. That assumption cannot be made on the reading of either document. There may be an argument that s.2 of Order-in-Council 1459 extinguished land title to the scrip recipients but nothing further could be read into it particularly following the directions of the Supreme Court in Sparrow (supra) at page 401 [D.L.R.; pp. 174-75 C.N.L.R.]. The Court quoted with approval Mr. Justice Hall in Calder and in doing so explicitly set out the burden placed on the Crown.

> ... "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain' " (emphasis added). The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

The application for scrip and the scrip document itself is also silent as to hunting, fishing or trapping rights. I will refer to those documents at a later point.

My conclusion is that there is no statute or order that has extinguished the Metis right to fish.

The conclusion I have reached is further supported by the following evidence provided at the hearing.

We know that James McKenna, acting as both Treaty 10 and scrip commissioner attended to the area of Ile a la Crosse in the fall of 1906. He was followed by Thomas Borthwick in the summer of 1907 to take care of adhesions to Treaty 10 and issue further scrip. We also know from reading Treaty 10 and the reports of the Commissioners (Exhibit D8) that the Indians were "duly convened in council" and that there were "certain chiefs and headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty ...". The documents and reports are silent as to how the issuance of scrip was handled. It seems apparent the Metis were treated as individuals and to gain some insight into their understanding of the impact of scrip one must again look at oral history and the testimony of the experts.

Louis Morin impressed me as a sincere, honest and intelligent 73 year old lifelong resident of northwest Saskatchewan. He is the father of the accused Bruce Morin. While he is of mixed white and Indian blood, fitting the definition of Metis, he both called himself and considered himself to be a non-status or non-treaty Indian. All of the Metis witnesses, including the accused consider themselves as non-treaty Indians.

Morin was asked by Mr. Chartier, defense counsel, the meaning of a Cree word which I took to be Metis and his reply was "look after ourself" and asked where it came from and this 73 year old's reply was "from the old people." He was asked about the role of the Elders and he said they gathered and told stories. "They tell about their past and everything, you know, they tell stories, share stories each other."

I accept that his knowledge of scrip came from speaking to the "old people" over the years. Again, when asked what Metis meant he replied in Cree which he translates to mean "boss of himself or look after himself." My impression is that Cree is his first or working language.

> Morin was asked if he knew what scrip meant. His reply:
>
> all I know is scrip ... it's when they came around and gave out scrip and some of them took scrip and some of them ... didn't take it.

He was asked if it made a difference who took treaty and who took scrip to which he replied:

> Well to be honest, nobody understood too much of what they were doing to the people in this.

He said he heard a lot of talk about scrip for instance at page 306 of the transcript.

> A guy from La Loche was telling us yesterday. We sat there and he was telling us about his mom told him when the scrip people come there in La Loche. They made a - they put two tents there and two R.C.M.P.'s with the red suit were standing on both side of the door and they were going, coming in and out and the mission, I think, one of bishop was inside there sitting with them. That's what the guy was telling us yesterday.

That is an indication the scrip recipients were dealt with one at a time and not as a group of people such as the Indians.

He was asked if he had ever talked to anybody who actually took scrip and his answer was that old Ross Cummings talked about it at meetings. At one such meeting in 1977 Louis Morin acted as interpreter when Ross Cummings, then an old man, related his scrip experience at a meeting attended by "a lot of people". He was asked by Counsel what Cummings had to say about scrip his answer was "he said we were promised we won't lose no hunting or fishing right. Trapping would be there forever and that's what we were promised, he said".

> Q Did he make any mention or did he make any mention about what would happen with respect to the children?
>
> A Well really what he's saying there was every 25 years they're suppose to come back and give a scrip.

When asked by Counsel how long that would last the answer was:

> Well that I don't - as long as the sun walks he said he talks in Cree. We say when the sun is going around in Cree we say as long as the sun walks.

The same Ross Cummings was interviewed in 1976 in part by Jacques Chartier who spoke in Cree with Cummings and then translated a tape of that interview, exhibit D3 to English. Chartier asked the question:

> Did they know they were giving up their rights to hunt, fish and trap and the use of their land.

Cummings answered:

> The big boss (scrip commissioner) said I won't tell you guys what to do as long as the sun moves. I won't tell you guys what to do. I'll look after you. We'll look after you. That's what I heard him say. There was a lot of people outside that heard him say that too. You'll be given money and the money man (Indian agent) will give you money to use. If you are given money, the money man will give you equipment to use. As long as the sun is moving they will always look after you. That's when they took the land and they took the money. The Treaties first and then the half-breeds. That's when I became a non-treaty and took scrip.

Further in exhibit D3 asked even if he took scrip would he still be able to hunt and fish his answer:

> Yes, yes nobody was told anything until maybe 20 years later and then they started telling us. 20 years - after that scrip. Everybody hunted, we hunted everywhere and then all of a sudden they started to come after us. Then we had to pay for everything we did. We pay everything. Pay everything. Worse every year. Even now worse everything.

It seems clear that the impression given to the Indian and Metis population was that you had to make a choice and it made little difference whether you were Indian or Metis and whether you took treaty or scrip. The impression was clearly there that all people were divided into one group or the other and by in large the Metis or half-breed took scrip and the Indians took treaty although it is clear that many Metis or half-breeds also took treaty. Morin indicated the Metis took scrip because they wanted to be "the boss of themselves".

In that respect it is of interest to examine exhibit D6 the Affidavit of the same Ross Cummings applying for scrip before the Commissioner. He was 18 years old at the time. A notation

indicates his mother took treaty and she advised Ross to take scrip because he was a half-breed. It is important to note that neither the Affidavit or the land scrip certificate itself (exhibit D5) makes reference to fishing, trapping or hunting rights extinguishment.

While still considering the evidence of Chartier as it concerned his conversations with Ross Cummings I am of the opinion the following exchange is rather important. The court asked what did the people do with the scrip and Chartier gave the reply attributed to Cummings:

> Well the way he said there was people there right away trying to get the scrips out of hands of the people that received them he said. And one of them - he said he sold the scrip to somebody, McDonald or somebody. He doesn't really - I think that's what his exact words were now. He got maybe $60.00 he said, maybe, and he said that's the last he seen of it.
>
> Q There were people there as soon as it was handed out to buy it from them, is that it?
>
> A There was people buying right on the spot.
>
> Q Did you get the impression that he knew what he could do with this scrip or really what it was?
>
> A Well he didn't want to be treaty is what he said.

The Crown, through the scrip commissioners, knew that virtually all of the scrip recipients immediately sold their scrip or gave it to the church. The Crown had previous knowledge of that procedure when dealing with the Indians and Metis when settling in Treaty 6 territory.

Louis Morin was speaking of the Keesee (ph) people of Buffalo Narrows and said:

> And when they got scrip, they gave that scrip paper to the Bishop. He's suppose to put the money in the bank. And they are both dead twenty years ago and they were ninety years old when they died. They never seen the money yet.

The Crown argues that because the Metis wanted to be "boss of themselves" they knew they were giving up their rights. It is difficult to follow that logic. The Crown knew and the Metis knew they could not move out of the territory to take up their scrip claims and if they were to remain the inescapable conclusion had to be that they would continue to hunt and fish in order to live. One thing they did know and did not want was to be confined on a reservation.

While the Metis did sell their scrip, it is apparently difficult to know how much it sold for. The documents, it is suggested, may show an inflated price. According to Professor Tough, the Metis had little knowledge of money since transactions were carried on with "made beaver" pelts. The

trading posts preferred to receive the pelts and the Metis were given credit with which they could acquire goods from the post.

Did the consequences arising out of the issue of scrip apply only to the recipients or to all of their descendants? Again, all available material is silent. A question was asked in the application if the applicant's parents received scrip - there is no enlightenment as to the meaning of the question although it is assumed if the answer was yes scrip could be denied. If that was the intended application why was scrip granted to infant children. That was evidently done as an examination of exhibits D11 and D12, the scrip register, will show grants to infants. Ross Cummings' understanding that the scrip commissioners would come around every twenty-five years seems to take on some meaning. I only mention the possibilities since there was no clear unambiguous direction as to the effect of taking scrip.

In my view, the Metis knew they would not and could not move out of the territory. There was no plan for them to do so. The Crown knew they could not move the Battleford - the nearest point to claim land. That meant they would stay where they were and if they were to be "boss of themselves" they would have to carry on with their familiar lifestyle of hunting, trapping and fishing.

It has been held the Court must take a broad liberal and generous interpretation of the evidence and legislation when ascertaining Aboriginal rights. Mr. Justice Dickson of the Supreme Court of Canada in Guerin v. Canada, *[1985] 1 C.N.L.R. 120* [*[1984] 2 S.C.R. 335*, *[1984] 6 W.W.R. 481*, *13 D.L.R. (4th) 321*, *55 N.R. 161*] had this to say [at p. 137 C.N.L.R.]:

> ... where by statute, agreement, or perhaps by unilateral undertaking one party has an obligation to act for the benefit for another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

The Supreme Court in Sparrow [at p. 180 C.N.L.R.] referred to the Guerin decision as follows:

> This court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The sui generis nature of Indian title and the historic powers and responsibilities assumed by the Crown constituted the source of such fiduciary obligation. ... The Government has the responsibility to act in a fiduciary capacity with respect to the Aboriginal peoples. The relationship between the government and the Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historical relationship.

I find the defendants have proven through the evidence and to the criteria set forth in Sparrow that they, as Metis of northwest Saskatchewan have an Aboriginal right to fish and that the right arose prior to 1870. I find that no legislation or agreement with the Crown has extinguished that right, I refer in particular to the Dominion Lands Act, 1906 and Order-in-Council 1459.

From the oral history evidence, and the expert testimony I find that the Metis at the time of the issue of scrip understood that their fishing, hunting and trapping lifestyle would not be disturbed.

To repeat the words of the Supreme Court in Sparrow [at pp. 174-175 C.N.L.R.]:

> The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

I have no hesitation in finding the Crown has failed to discharge the burden of proving the defendants' Aboriginal right to fish has been extinguished.

Justification?

Indian or Metis - Is there a difference?

Having held that the Metis (defendants) right to fish has not been extinguished the court is expected to consider whether or not the regulations are justified. The burden of proof is on the Crown. I have received the impression from comments of defense counsel that the defendants acknowledge that regulation of the fishery is necessary and desirable. They do not argue with the need of regulations. In my view, the resolution goes beyond justification as I will now explore.

After hearing all of the local "Metis" witnesses, including the defendants, testify that they considered themselves to be non-status or non-treaty Indians even though they are categorized as Metis, and after reading the exhibits I have come to the inescapable conclusion that the Crown, with Treaty 10 and the issuance of scrip, with no improper motive, arbitrarily divided the Aboriginal community into the two groups - Indian and Half-breed. That division of equals resulted in unequal benefits. The Metis have not received and are not receiving the same benefits under the law as the Indian people.

It was recognized from the earliest days that the division was really artificial and that the two peoples lived very much alike and in the exact same area. The artificial division is finally recognized, in my view, in s.35(1) of the Charter. The following is a review of early writings giving support to my finding.

First and perhaps most authoritative is the report of Treaty Commissioner McKenna dated January, 1907 in reporting on his visit to Ile a la Crosse I quote from page 8, of Exhibit D8:

> It is difficult to draw a line of demarkation between those who classed themselves as Indians and those who elected to be treated with as half-breeds. Both dress alike and follow the same mode of life. It struck me that the one group was, on the whole, as well able to provide for self-support as the other.

On December 11, 1935, The Honourable T.C. Davis, Attorney General for Saskatchewan wrote a letter to The Honourable T.A. Crerar, a Minister in the federal government and Superintendent General of Indian Affairs. Mr. Davis was discussing the "half-breed problem" and I quote in part from that letter, Exhibit D23:

> When the treaties were made with the Indians they were given the right to elect as to whether they would become treaty Indians or accept scrip. ... At these points, and on the Indian reserves and about them, the Indian population so called is really largely half-breed. There are very few full-blooded Indians and those who are on the reserves generally have a strain of white blood. Those who are not treaty Indians and are half-breeds are therefore approximately in the same category as those who are on reserves.

The Minister was suggesting to the federal government that the half-breeds should be administered under the Department of Indian Affairs and allowed to become treaty so that they could live on the reserves.

The Premier of Saskatchewan, W.J. Patteson wrote the Honourable D.A. Crerar and I quote in part, Exhibit 23(a):

> As you are no doubt aware, the issue of scrip provided very little real benefit to these people (Metis) and most of them are today landless and without resources.

The Premier was following the theme put forward by his Minister T.C. Davis in 1935 suggesting that the Indians should share land with the Metis.

In another letter dated September 1, 1938, Exhibit D23(c) Attorney General Davis to the Honourable T.A. Crerar discussed the parallel concerns that each had. The federal government of course is responsible for the welfare of the Indians and the provincial government for the welfare of the Metis or half-breed. Mr. Davis was suggesting that the two departments work together to solve this common concern. I quote from his letter:

> Everyone recognizes that, in many instances, there is very little difference between the half-breed and the treaty Indian, and that if it had not been for the giving of half-breed scrip, a lot of these people, now treated as half-breeds, would have been admitted to treaty, and would have been treaty Indians.

One of Mr. Davis' proposals was that the Dominion Government accept into treaty all half-breeds who desired to enter treaty and who would then become entitled to the rights and privileges of treaty Indians.

Exhibit 23b is a letter dated February 28, 1938 from the Indian agent at Battleford, Saskatchewan to Dr. Thomas Robertson, Inspector of Indian Affairs at Regina. He is reporting on the trapping, hunting, and fishing resources available to the Aboriginal people and the last paragraph of his letter is as follows:

> I have paid very little if any distinction, between treaty Indians and non-treaty or half-breed as they all work together and live the same form of life and the country left to them would soon come back to a certain extent, it is the annual outside outfits that do the harm.

Exhibit 23h is a report dated August 10, 1939. It was compiled by Father J.B. Ducharme an Oblate missionary located at La Loche. The report was forwarded to the Provincial Minister of Municipal Affairs as well as the appropriate federal department. Father Ducharme stated he compiled a report because the provincial government apparently has seriously taken notice of the half-breed question as he called it and was endeavouring to reach a solution.

> I write Indians and Metis (I.M.); in fact the difference is nominal. I have here brothers, some of whom are Indians and others are Metis, even a case where the father is Metis and the son is an Indian.

Father Ducharme is rather scathing in his condemnation of the "scrip racketeers" that followed the treaty party and who he claims exhorted the Indians to accept scrip so that they could buy it from them at a "vile price".

Exhibit D10 is the final report of the Alberta and Saskatchewan Fishery Commission of 1911. The report discusses the claim of the Indians and half-breeds to special consideration when dealing with the fisheries:

> To intelligently handle this question it will be necessary to go into the subject more fully then at first site it may appear desirable, and for the sake of brevity the term "Indian" is meant to include half-breed as well, and one term might well include them both for it has been repeatedly stated to the commissioners that there are few, if any, purebred Indians in existence at the present time, referring especially to those living in the north. The distinction is that the half-breed is a Canadian Citizen while the Indian can be made so only with difficulty under our present Indian Act.

I find that the two Aboriginal peoples of northwest Saskatchewan may be distinguished from the rest of society in the area but are not distinct from one another. To grant one Aboriginal people benefits under the law that is not granted to the other gives rise to discrimination under 15(1) of the Charter of Rights and Freedoms.

Conclusion and Disposition

I am irresistibly drawn to the conclusion that the defendants have been discriminated against under the Fishery Regulations, most particularly in that they are required to purchase a fishing license under the Regulations Schedule 1. An Indian is required to obtain a license but at no cost. The Indian and Metis of northwest Saskatchewan are two "similarly situated" groups of people and yet are not "similarly treated" giving rise to discrimination contrary to s.15(1) of the Charter of Rights and Freedoms.

Section 15(1) has not been argued before me at this hearing so I do not propose expanding my reasons further. The dissenting decision of Mr. Justice McIntyre of the Supreme Court of Canada in Andrews v. Law Society of British Columbia, *[1989] 2 W.W.R. 289* fully analyzed 15(1). His analysis was approved by the rest of the Court even though they disagreed with his application in that case. Justice McIntyre quoted with approval the lower court decision of Madame Justice McLachlin (now of the Supreme Court of Canada) at page 300:

> ... the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are "similarly situated be similarly treated" and conversely, that persons who are "differently situated be differently treated" ...

I find that the Saskatchewan Fishery Regulations are an infringement of the defendants' right to equality under the law as guaranteed by s.15(1) of the Charter and the result is the regulations have no force or effect as against the defendants. Section 52(1) of the Charter. Counts 3, 4, and 5 are dismissed.

I have considered s.1 of the Charter and I am of the opinion that non-compliance with 15(1) can not be justified in this case.

I would like to add that I am more comfortable with my decision after reading the recent unreported (as of this date) decision of Justice Cosgrove of the Ontario Court (General Division) in R. v. Harold Perry [since reported *[1996] 2 C.N.L.R. 161* and 167]. I would echo Justice Cosgrove's sentiment by urging the appropriate administrative authorities to resolve the inconsistencies that exist between the two Aboriginal groups by entering into meaningful discussions; in this case with the Metis people regarding fishing rights.

My thanks to counsel for their diligent work and learned submissions showing considerable grasp of this relatively uncharted territory.

Accused found not guilty.