R. *v.* Howard, [1994] 2 S.C.R. 299

George Henry Howard *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**The Attorney General of Canada,
the United Indian Councils and the
Ontario Federation of Anglers and Hunters** *Interveners*

Indexed as: R. *v.* Howard

File No.: 22999.

1994: February 22; 1994: May 12.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for ontario

Indians -- Fishing rights -- Treaty -- Whether 1923 treaty extinguished Hiawatha Band's fishing rights on Otonabee River.

Indians -- Validity of treaty -- Treaty surrendering fishing rights not ratified by order-in-council -- Whether treaty valid.

Courts -- Appellate courts -- Jurisdiction -- Main issues factual and subject of concurrent findings in courts below -- Findings of courts below affirmed in absence of palpable and overriding error.

The appellant, a status Indian and a member of the Hiawatha Band whose reserve is located in Ontario, was convicted of unlawfully fishing during a prohibited period. The trial judge concluded that the treaty signed by the representatives of the Band in 1923 had extinguished the fishing rights held by the Band in the Otonabee River area where the offence occurred. Both the summary convictions appeal court and the Court of Appeal upheld the conviction.

Held: The appeal should be dismissed.

The issues in this case are essentially factual in nature and the subject of concurrent findings in the courts below. In the absence of palpable and overriding error which affected the trial judge's assessment of the facts, an appellate court should not reverse the conclusions of the lower court. On a careful review of the factual record, there is no basis for overturning the result reached by the courts below. By the clear terms of the 1923 treaty, the Hiawatha Band surrendered any remaining special rights to hunt and fish in the Otonabee River area. The historical context does not provide any basis for concluding that the terms of the 1923 treaty are ambiguous or that they would not have been understood by the Hiawatha signatories.

The 1923 treaty was not invalidated by the absence of a federal order-in-council ratifying it since there was no legal or constitutional requirement of an order-in-council to ratify the treaty. Further, to the extent that the government commission negotiating the treaty went beyond its original mandate, it is clear that the Government of Canada was made aware of this fact and ratified the treaty by its subsequent conduct.

Cases Cited

Applied: *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501 (C.A.), leave to appeal refused, [1993] 3 S.C.R. vi; *Gooderham and Worts, Ltd. v. Canadian Broadcasting Corp.*, [1947] A.C. 66.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35(1).

Fisheries Act, R.S.C. 1970, c. F-14.

Inquiries Act, R.S.C. 1906, c. 104.

Ontario Fishery Regulations, C.R.C. 1978, c. 849, s. 5(1)(*b*) [rep. & sub. SOR/81-293, s. 2; rep. & sub. SOR/82-500].

APPEAL from a judgment of the Ontario Court of Appeal (1992), 8 O.R. (3d) 225, 55 O.A.C. 189, [1992] 2 C.N.L.R. 122, dismissing the accused's appeal from a judgment of a summary convictions appeal court rendered March 9,

1987, upholding his conviction for unlawfully fishing during a prohibited period. Appeal dismissed.

William B. Henderson and *Alan D. Pratt*, for the appellant.

J. T. S. McCabe, Q.C., for the respondent.

John B. Edmond, for the intervener the Attorney General of Canada.

Thomas R. Berger, Q.C., for the intervener the United Indian Councils.

Timothy S. B. Danson and *Stephen Reich*, for the intervener the Ontario Federation of Anglers and Hunters.

The judgment of the Court was delivered by

GONTHIER J. -- The appellant is a status Indian and member of the Hiawatha Band of Indians whose reserve is located on the south shore of Rice Lake in Ontario. The appellant was fishing off the reserve when he caught a few pickerel fish out of season on the Otonabee River, contrary to s. 5(1)(*b*) of the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849 (made pursuant to the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended). The appellant was convicted and fined $100 by the Ontario Provincial Court on January 10, 1986. At trial and throughout the various appeals, the appellant has raised s. 35(1) of the *Constitution Act, 1982* in defence of the charge against him. Section 35(1) stipulates:

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

This section provides a constitutional guarantee against legislative infringement of "existing" aboriginal or treaty rights. On October 19, 1993, the following constitutional question was stated by Lamer C.J.:

> If the appellant has an existing right to fish within the meaning of s. 35 of the *Constitution Act, 1982*, is s. 5(1)(*b*) of the *Ontario Fishery Regulations* inapplicable to him by virtue of s. 35 of the *Constitution Act, 1982*?

The focus of the argument before this Court and the courts below was whether the appellant has an existing right to fish in the area in question. The parties agreed that a treaty entered into on November 5, 1818 (Treaty No. 20) did not extinguish the fishing rights of the Hiawatha Band on the Otonabee River. The point of controversy between the parties and the central issue which we must resolve is as to the effect of a treaty signed on November 15, 1923 ("1923 Treaty").

Judge Batten, in the Ontario Provincial Court, described the background leading to the 1923 Treaty in the following terms:

> It appears from the evidence that a government commission had been set up to examine the allegations that native people still had hunting rights to lands lying north of the 45th parallel, referred to as the northern lands. In the course of its work, the commission visited the various bands of natives, including those at Hiawatha, and listened to representations from members of same concerning this issue. The proceedings were recorded and … make for fascinating reading in many aspects. It soon was apparent that members of the band and their forbears had in fact hunted in areas other than that which was the subject matter of the commissions [*sic*] work. Time and time again, despite the attempts of the commissioners to restrict the evidence to the northern lands, there was evidence given as to the use of other lands,

> which were heretofore thought to be covered by pre-existing treaties. In particular, one Johnson Paudash, a First World War veteran, and a civil servant with the federal government, pointed out with the assistance of maps and other documents, that the description of land in an earlier treaty was inaccurate. The net result of all of this was that the Treaty of 1923 was in due course prepared and signed by seven representatives of the Hiawatha Band at Rice Lake.

The above was based on the documentary record and usefully summarizes an important part of the extrinsic evidence concerning the 1923 Treaty.

The other extrinsic evidence before Batten Prov. Ct. J. was provided by two witnesses, Ian Victor Basil Johnson and Ralph Joseph Loucks. Ian Johnson, a claims coordinator with the Union of Ontario Indians, was qualified as an expert witness in respect of Indian treaties and testified on behalf of the appellant. Ralph Loucks, a member of the Hiawatha Band born in 1913 and Chief for approximately 25 years, was called by the Crown.

Ian Johnson described the circumstances leading to the signing of the 1923 Treaty relying on his reading of the documentary record as he had no personal knowledge of the events or persons involved. He suggested that because the Indians were led to believe that the Commission was interested only in the northern lands, they may not have been aware that other lands were included in the Treaty. He also testified that some of the signatories did not understand English.

Ralph Loucks testified that he had known the seven Hiawatha signatories personally. He stated that they all could read English, that three or four of them were businessmen, that three or four were at some time also Chiefs

of the Hiawatha Band and that two men, Hanlon Howard and Johnson Paudash, were "almost as smart as any lawyer regarding Indian treaties or legal paper" (C.O.A., at p. 94). Johnson Paudash, it will be noted, was the one responsible for bringing the Commission's attention to the errors regarding lands described in or thought to be governed by earlier treaties.

The 1923 Treaty consists of four general "whereas" clauses and a number of paragraphs describing the lands covered by the Treaty and the various obligations of the parties. The whereas clauses describe the general background to the Treaty related by Batten Prov. Ct. J. and quoted above. The lands covered by the Treaty are described in three paragraphs. The first paragraph essentially deals with the lands north of the 45th parallel or the northern lands. The second paragraph pertains to lands which had been brought to the attention of the commissioners by Johnson Paudash. The third paragraph is the one at the heart of this litigation. The conveying clause and third paragraph read as follows:

> NOW THEREFORE THIS TREATY WITNESSETH that the said tribe and the Indians composing the same … do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for His Majesty the King and His Successors forever, all their right, title, interest, claim, demand and privileges whatsoever, in, to, upon, or in respect of the lands and premises described as follows, that is to say:
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> . . .
>
> AND ALSO all the right, title, interest, claim, demand and privileges whatsoever of the said Indians, in, to, upon or in respect of all other lands situate in the Province of Ontario to which they ever had, now have, or now claim to have any right, title, interest, claim, demand or privileges, except such reserves as have heretofore been set apart for them by His Majesty the King.

This paragraph has been referred to as the "basket clause" and it is relied on by the Crown as extinguishing the appellant's right to fish. The only other term of the Treaty of relevance was a clause near the end of the document which stipulated that the Treaty was subject to an "attached" agreement entered into between the province of Ontario and the Government of Canada.

The courts below have unanimously held that any rights to fish on the Otonabee River existing in 1923 were surrendered by the basket clause contained in the 1923 Treaty. At trial, Batten Prov. Ct. J. concluded:

> … I find no credible evidence that there is a basis for interpreting the 1923 Treaty as containing any terms not found therein, or for omitting any terms that are found therein, on the grounds that the native signatories were either misled, or were not aware of the full contents thereof, nor is there any evidence that representations were made to the band that the Indians would retain any particular lands or any particular rights thereon. There was real consideration given by its terms, and monies were paid. My conclusion is that the lands where the offence is alleged to have occurred, if not ceded by the earlier treaty of 1818, were in fact ceded by the 1923 Treaty, and included in that would be any special rights as to fishing.

The appellant appealed to the District Court of Ontario. Jenkins Dist. Ct. J., however, agreed with the trial judge. Jenkins Dist. Ct. J. wrote that on the basis of reading the transcript he was unable to conclude that the Indians were misled or that there was any appearance of sharp dealings on the part of the Commission.

The Court of Appeal examined the 1923 Treaty as well as its background and came to the same conclusion as the two courts below: (1992), 8 O.R. (3d) 225, 55 O.A.C. 189, [1992] 2 C.N.L.R. 122. After reviewing the essential provisions of the Treaty, the court wrote (at pp. 227-28 O.R.):

> … we are unable to give effect to the suggestion that the "basket" clause, which refers to "all other lands situate in the Province of Ontario", must be read to mean "all other lands situate in the Province of Ontario not already covered by an existing treaty", so as to exclude the surrender of fishing rights in the area covered by the 1818 treaty. We find no ambiguity in the treaty which would justify interpreting the treaty against the Crown, and we are unable to find any reasonable construction other than that, on its plain wording, the 1923 treaty extinguished the fishing rights held by the Band on the Otonabee River. [Emphasis added.]

The court also held that the signatories had sufficient knowledge and understanding of the terms of the 1923 Treaty to bind the Band and thereby refused to overturn the factual findings of the trial judge. The evidence of Ralph Loucks at trial and the testimony of Johnson Paudash before the Commission were pointed to in support of this result. The court found no evidence to rebut the inference of knowledge and understanding which it drew from a reading of the minutes of the Band in Council when the Treaty was signed (pp. 229-30 O.R.). Those minutes disclose that the Treaty was read aloud and considered by the Council before it was signed and that Johnson Paudash was the person who moved that the Band agree to the Treaty (C.O.A., at p. 168).

I am in substantial agreement with the conclusions reached by the courts below. The historical context summarized above does not provide any basis for concluding that the terms of the 1923 Treaty are ambiguous or that they would not have been understood by the Hiawatha signatories. The basket clause was a conveyance in the broadest terms. Its wording mirrored the general terms of cession contained in the general operative clause quoted above. The lands it pertained to were clearly identified as "all other lands situate in the Province of Ontario". Furthermore, the broad nature of the clause and its wide sweeping effect is underlined by the presence of only one enumerated exception, "reserves … set

apart … by His Majesty the King". The appellant stressed that the reference to the attached agreement previously mentioned created an ambiguity since it referred only to the northern lands, whereas the Treaty included other lands. The reference to the northern lands in the agreement, as in the many other documents referred to us, was merely a reference to the general context leading to the 1923 Treaty. The Treaty is not in any way inconsistent with the agreement. The agreement did not prevent the Treaty from including other lands or render it ambiguous because other lands were added. In fact, the agreement was apparently not attached to the Treaty and as far as the Hiawatha Indians were concerned, there is absolutely no evidence that they were misled by its content or that it shaped their intention in any way. The 1923 Treaty does not raise the same concerns as treaties signed in the more distant past or in more remote territories where one can legitimately question the understanding of the Indian parties (compare *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1036; and *Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501 (C.A.), at pp. 515-16, leave to appeal refused October 14, 1993, [1993] 3 S.C.R. vi). The 1923 Treaty concerned lands in close proximity to the urbanized Ontario of the day. The Hiawatha signatories were businessmen, a civil servant and all were literate. In short, they were active participants of the economy and society of their province. The terms of the Treaty and specifically the basket clause are entirely clear and would have been understood by the seven signatories.

This case is similar to *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, in that the issues are essentially factual in nature and the subject of concurrent findings in the courts below. The reasoning in *Bear Island* is equally applicable to this case. In the absence of palpable and overriding

error which affected the trial judge's assessment of the facts, an appellate court should not reverse the conclusions of the lower court. After carefully reviewing the factual record, I am of the view that there is no basis for overturning the result reached by the courts below. By the clear terms of the 1923 Treaty, the Hiawatha Band surrendered any remaining special rights to hunt and fish in the Otonabee River area.

The appellant and one of the interveners, the United Indian Councils, challenged this result on the basis that the 1923 Treaty was invalid because the commissioners had exceeded their original mandate and that therefore an order-in-council of the Governor General in Council was necessary to ratify the Treaty as signed. This argument is premised on the assertion that an order-in-council was legally required for the Treaty to be valid. There was evidence before us that orders-in-council were passed when the Government of Canada supplied the funds to acquire lands in Western Canada in 1907 and 1921 (Treaty No. 10 and Treaty No. 11). *Gooderham and Worts, Ltd. v. Canadian Broadcasting Corp.*, [1947] A.C. 66 (P.C.), was also referred to us. That case, however, involved a statutory requirement that the Governor General in Council approve certain leases entered into by the predecessor to the Canadian Broadcasting Corporation. In the present case, an order-in-council was required pursuant to the *Inquiries Act*, R.S.C. 1906, c. 104, to appoint the commissioners, but there was no legal or constitutional requirement of an order-in-council to ratify the Treaty. To the extent that the commissioners negotiated a treaty which went beyond the northern lands, it is abundantly clear, and on this point we agree with the Court of Appeal, that the Government of Canada was made aware of this fact and ratified the Treaty as drafted by its subsequent conduct. The province of Ontario provided

the Government of Canada with the funds which were disbursed pursuant to the terms of the Treaty. However, as the appellant noted, the Treaty process for the surrender of the lands in Canada is federal in nature and it was the Government of Canada which was ultimately responsible for both the Treaty and the disbursement of funds. In December 1923, the commissioners forwarded their report and the Treaty to the Government of Canada. The report is an overview of the process leading to the conclusion of the Treaty. The report and the Treaty taken together leave no doubt that the Government of Canada was aware of the content of the 1923 Treaty at the time the funds were paid to the Indians.

For the above reasons, I am of the view that the 1923 Treaty was valid and that the Hiawatha Band surrendered any special rights existing at that time to hunt and fish in the Otonabee River area. The constitutional question therefore does not arise. The appellant's plea has been properly denied and his conviction must stand.

I would dismiss the appeal.

The appellant has requested costs as between solicitor and client against the respondent and the intervener, the Attorney General of Canada, and a special award of costs against the intervener, the Ontario Federation of Anglers and Hunters. I find neither of these appropriate and would make no order as to costs.

Appeal dismissed.

Solicitors for the appellant: Lang, Michener, Toronto.

Solicitor for the respondent: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.

Solicitors for the intervener the United Indian Councils: Berger & Nelson, Vancouver.

Solicitors for the intervener the Ontario Federation of Anglers and Hunters: Danson, Recht & Freedman, Toronto.