1994 CarswellBC 1731, 52 B.C.A.C. 296, 86 W.A.C. 296, [1995] 2 C.N.L.R. 229

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R. v. **Williams**

Regina, Respondent and Arnold **Williams**, Bernard Pascal, Keith James and Albert Pascal, Appellants CC930029 Reynold Joe, Appellant CC930030 Harold Pascal and Jason Wallace, Appellants CC930031 Henry Sauls, Appellant CC930032

British Columbia Court of **Appeal**

Donald J.A., Hinds J.A., Hollinrake J.A.

Heard: November **18, 1994**
Judgment: December 6, **1994**
Docket: CA018391

Proceedings: Affirmed (1993), [1994] 3 C.N.L.R. 173, 1993 CarswellBC 901 (B.C. S.C.)

Counsel: Harold Pascal, for himself and other Appellants.

P.G. Plant, for Respondent.

Subject: Public; Civil Practice and Procedure

Native Law --- Practice and procedure — Jurisdiction — Provincial Court

Accused claiming provincial Court not having jurisdiction over matters "beyond the treaty frontier" -- Wildlife Act, S.B.C. 1982, c. 57 — Criminal Code, R.S.C. 1985, c. C-46.

Accused were convicted of obstructing peace officers, mischief in relation to property and hunting with a firearm and light over cultivated land. Accused appealed on the ground that the provincial Court was without jurisdiction as the charges related to matters occurring "beyond the treaty frontier", namely, in places not surrendered or ceded to Crown by treaty. Held, the appeal was dismissed. The issue of juridical jurisdiction had been conclusively decided. No aboriginal jurisdiction superior to laws intended to govern provincial inhabitants survived the assertion of sovereignty. There was no residual aboriginal sovereignty capable of displacing the general jurisdiction of the provincial Court to try persons, whether aboriginal or non-aboriginal, for offences under the Act and the Code throughout the province, whether or not the alleged offences took place "beyond the treaty frontier". Accordingly, the provincial Court had jurisdiction.

Mr. Justice Hollinrake:

1 On page 8, paragraph 18, line 2, of my reasons for judgment dated December 6, 1994, delete the word "unsurrounded" and substitute therefor the word "unsurrendered", so that the sentence shall read as follows: "In my opinion both *Delgamuukw* and *Sparrow* conclusively decide the issue before us whether the offence occurred on "unsurrendered Hunting Grounds" or not."

Mr. Justice Hollinrake:

1 This matter comes before the Court by way of an application for leave to appeal from the decision of a summary conviction appeal court judge and, if leave be granted, an appeal.

2 The appellants are all aboriginal people.

3 I say at the outset that Crown counsel conceded that the issue before the Court is a question of law alone and, that being so, did not oppose the application of the appellants for leave to appeal.

4 I would grant leave to appeal.

5 I turn now to the appeal itself.

6 The appellants were not represented by counsel. The reason for this is well known by all the parties and I need not deal with it. Appearing before us was the appellant Harold Pascal who stood as spokesperson for himself and the other appellants. There was before the Court a factum and legal argument forming part of a notice of motion filed on behalf of the appellants. That factum was signed by Bruce Clark and the legal argument was signed by all the appellants "per ... Bruce Clark". Mr. Pascal, in addition to the submissions he made to the Court adopted everything found in the documents that had been filed by Mr. Clark.

7 The sole issue before the Court is whether the Provincial Court of British Columbia had jurisdiction over the appellants who had been charged with obstructing peace officers (s. 129(a) *Criminal Code*), mischief in relation to property (s. 430(3)(b) *Criminal Code*), and hunting with a firearm and a light over cultivated land (*Wildlife Act*, R.S.B.C. c. 57, ss. 27 (1)(e) and 40(1)(a)).

8 At trial in the provincial court the appellants objected to the court taking jurisdiction and not guilty pleas were deemed.

9 Harold Pascal and Jason Wallace were acquitted and the others found guilty.

10 The basis of the appeals of Harold Pascal and Jason Wallace is their assertion that while they were acquitted it was for the wrong reasons. Their acquittal was on the merits and they say the charges against them should have been dismissed on the ground that the provincial court judge had no jurisdiction to entertain them. The law is clear that an appeal is taken from the judgment of the court and not the reasons for that judgment. See: *Cole v. Cole*, [1943] 3 W.W.R. 532, 536 (B.C.C.A.).

11 In my view the proper disposition of the appeals of Harold Pascal and Jason Wallace is that they be quashed and I would so order.

12 I turn now to the other appellants.

13 Their position is that the Provincial Court of British Columbia was without jurisdiction as the charges re-

lated to matters occurring "beyond the treaty frontier", that is to say, in places which had not been surrendered or ceded to the Crown by treaty. These appellants say that in such a case neither the federal nor the provincial governments have legislative authority to constitute courts with jurisdiction over aboriginal people.

14 They say that *Delgamuukw*, [1993] 5 W.W.R. 97 (B.C.C.A.) and *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 do not settle this issue of juridical jurisdiction. The Crown's position as set out in its factum is that:

> The courts in their considered disposition of Sparrow and Delgamuukw specifically answered issues that undermine the Appellant's argument for a separate juridical jurisdiction. The reasoning in those cases provides a complete answer to the assertion that provincially constituted courts lack jurisdiction over aboriginal people in British Columbia.

15 The summary conviction appeal court judge, Cohen J., accepted the Crown's submissions and dismissed the appeals.

16 I quote at length from his judgment.

> The respondent's position is that the Provincial Court as constituted by the Provincial Court Act, S.B.C. 1969, c. 28, has absolute jurisdiction throughout the Province and there is no reservation of jurisdiction in respect of either aboriginal people or offenses committed in any part of the Province which may not have been ceded by treaty. The respondent claims further that the proposition that aboriginal people are not subject to the laws of Canada or the laws of British Columbia has been conclusively rejected. On this point, the respondent relies most heavily on the decision in ***Delgamuukw v. The Queen***, [1993] 5 W.W.R. 97 (B.C.C.A.) and contends that this case provides a complete answer to the appellants' arguments. With this contention, I agree. At pp.151-152, Macfarlane J.A., with whom Taggart and Wallace JJ.A. concurred, said:
>
> > 165. Rights of self-government encompassing a power to make general laws governing the land and resources in the territory, and the people in that territory, can only be described as legislative powers. They serve to limit provincial legislative jurisdiction in the territory and to allow the plaintiffs to establish a third order of government in Canada. Putting the proposition another way: the jurisdiction of the plaintiffs would diminish the provincial and federal share of the total distribution of legislative power in Canada.
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> > . . . . .
> >
> > 167. It was on the date that the legislative power of the Sovereign was imposed that any vestige of aboriginal law-making competence was superseded. This likely occurred when the mainland colony was founded and became a territory under the jurisdiction of the Imperial Parliament in 1858.
> >
> > 168. Even if this view is inaccurate, a continuing aboriginal legislative power is inconsistent with the division of powers found in the Constitution Act, 1867 and introduced into British Columbia in 1871. Sections 91 and 92 of that Act exhaustively distribute legislative power in Canada.
> >
> > . . . . .
> >
> > 170. Any doubt that aboriginal people are subject to this distribution is eliminated by s. 91(24), which awards legislative competence in relation to Indians to Parliament.

> 171. With respect, I think that the trial judge was correct in his view that when the Crown imposed English law on all the inhabitants of the colony and, in particular, when British Columbia entered Confederation, the Indians became subject to the legislative authorities in Canada and their laws. In 1871, two levels of government were established in British Columbia. The division of governmental powers between Canada and the Provinces left no room for a third order of government.

In a separate concurring judgment Wallace J.A. said at p. 200:

> 372. ...As a settled colony, the common law in British Columbia automatically came into force in 1846 when the Oregon Boundary Treaty established Britain's exclusive sovereignty north of the 49th parallel. It thereby superseded any indigenous system of laws.

And at pages 224-225, His Lordship said:

> 480. A claim of self-government of the nature which the plaintiffs advance; namely, a right to govern the territory, themselves and the members of their Houses in accordance with Gitksan, and Wet'suwet'en laws, and a declaration that the Province's jurisdiction is subject to the plaintiffs' jurisdiction, is a claim which is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846.
>
> 481. Thus, upon the exercise of sovereignty, any powers of government of the indigenous people were superseded by the introduction of the common law and the jurisdiction of the Imperial Parliament. As Brennan J. stated in Mabo in relation to the aborigines in the colony of New South Wales at pp. 25-26:
>
> > The common law thus became the common law of all subjects within the Colony who were equally entitled to the law's protection as subjects of the Crown...
> >
> > . . . . .
> >
> > Thus the Meriam people ... became British subjects owing allegiance to the Imperial Sovereign entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided. (Emphasis added.)
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> 482. Any possibility that aboriginal powers of self-government remained unextinguished was eliminated in 1871 by the exhaustive distribution of powers between the Province and the Government of Canada when British Columbia joined Confederation pursuant to the Terms of Union, 1871. Sections 91 and 92 of the Constitution Act, 1867 which provide for this division of powers have been repeatedly interpreted as distributing all legislative jurisdiction between Parliament and the provincial legislatures.
>
> 483. I agree with the conclusion of the trial judge that the plaintiffs, after 1846 and certainly after 1871, no longer retained any aboriginal right of self-government or jurisdiction over the territory nor any jurisdiction to govern the members of the Houses in accordance with Gitksan and Wet'suwet'en laws. As he observed at p. 386:
>
> > After that [the establishment of the separate colony of British Columbia in 1858] aboriginal customs, to the extent they could be described as laws before the creation of the colony, became customs which depended upon the willingness of the community to live and abide by them, but they ceased to have any

> force, as laws, within the colony.
>
> Then, at the time of union of the colony with Canada in 1871, all legislative jurisdiction was divided between Canada and the province, and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts.
>
> 484. Section 35(1) of the Constitution Act, 1982 cannot revive or entrench any self-government jurisdiction of the plaintiffs since it is confirmed to aboriginal rights which existed in 1982. As I have made clear, no aboriginal rights of government existed after 1871.
>
> I accept the respondent's submission that the result in ***Delgamuukw*** makes it plain that no aboriginal jurisdiction superior to laws intended to govern all inhabitants of this Province survived the assertion of sovereignty. Furthermore, as ***Delgamuukw*** upheld the finding of McEachern C.J.B.C. (as he then was) that the Royal Proclamation has never applied to this Province, the appellants cannot rely upon the Royal Proclamation as support for their position.
>
> I conclude that the decision in ***Delgamuukw*** is binding upon this Court and governs the issues raised in the instant appeals. As, in my view, correctly stated by the Crown submission: "There is no residual aboriginal sovereignty capable of displacing the general jurisdiction of the Provincial Court to try persons, whether aboriginal or non-aboriginal, for offenses under the Wildlife Act and Criminal Code throughout British Columbia, whether or not the alleged offenses took place 'beyond the treaty frontier'.

17 I agree with these reasons expressed by Cohen J. in dismissing the appeals of the appellants.

18 In my opinion both *Delgamuukw* and *Sparrow* conclusively decide the issue before us whether the offence occurred on "unsurrounded Hunting Grounds" or not.

19 That being so, I would dismiss the appeals of the appellants other than Harold Pascal and Jason Wallace.

20 Mr. Pascal submitted to us that should we dismiss the appeals, as I would do, we should exercise the jurisdiction given to this Court by s. 37 of the *Supreme Court Act* and grant leave to appeal to the Supreme Court of Canada.

21 In my view this is a jurisdiction this Court should exercise sparingly. I think that this Court should exercise that jurisdiction only in the most exceptional circumstances. With respect, I do not think it can be said this case is such that this Court should grant leave to appeal to the Supreme Court of Canada. I do not question the significance of this case to the aboriginal people but in my view it is one that should go through the usual channel of seeking leave to appeal to the Supreme Court of Canada from that Court.

22 In result, I would quash the appeals of Harold Pascal and Jason Wallace and dismiss the appeals of the remaining appellants.

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