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A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditors rights, animals, grain, import/export and other matters in an agricultural context.

Thursday, November 5, 2010 - Issue 213

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Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

- * A justice of the Alberta Court of Queen's Bench has dismissed the appeal of two Treaty 6 Indians who were convicted of carrying on commercial fishing operations without a license, contrary to the provisions of Alberta's Fishing Regulations. The Court rejected arguments that the Alberta provincial court had no jurisdiction to deal with offences committed on Indian Reserves, and that commercial fishing was a protected Treaty right. The Court, referring to a number of Supreme Court and Appellate decisions, observed that the law was "well settled". (*R. v. Cardinal*, [CALN/2010-030](#), [2010] A.J. No. 1245, Court of Queen's Bench of Alberta)

**** NEW CASE LAW ****

R. v. Cardinal; [CALN/2010-030](#), Full text: [2010] A.J. No. 1245; Court of Queen's Bench of Alberta, B.A. Browne, J., October 26, 2010.

Fishing -- Aboriginal Law -- Whether Commercial Fishing is a Protected Treaty Right.

Ernest Cardinal and William James Cardinal (the "Cardinals") appealed to the Alberta Court of Queen's Bench from a conviction and sentence imposed upon them by an Alberta provincial Court judge. Ernest Cardinal had been convicted on 7 counts that he did knowingly sell fish or attempt to sell fish that had not been caught pursuant to a license that authorizes the selling of fish, contrary to s. 9(4)(a) of the General Fishing (Alberta) Regulation (the "Regulations"). William James Cardinal was convicted on 1 count under the same section of the Regulations.

The provincial Court judge sentenced Ernest Cardinal to a 3 month intermittent jail term and 3 years probation. William James Cardinal was placed on 3 years probation and was fined \$2,300.00.

The Cardinals were members of the Beaver Lake Cree Nation, and was a signatory to Treaty No. 6.

The Cardinals raised a number of issues on appeal, including the following:

1. Whether the Provincial Court Judge had territorial jurisdiction to hear four charges because they occurred in a Reserve.
2. Whether the right to engage in commercial fishing was a treaty right constitutionally protected by the principle of inter-jurisdictional immunity.

Decision: Browne, J. reduced Ernest Cardinal's sentence from 90 days intermittent jail to 60 days intermittent jail, but dismissed all other grounds of appeal [at para. 86].

Browne, J. considered the following issues:

1. Whether the Provincial Court Judge had territorial jurisdiction to hear four charges because they occurred in a Reserve.

The Cardinals argued that the Alberta Provincial Court had no jurisdiction with respect to a number of the charges, on the grounds that the offences occurred on an Indian Reserve, and that the provincial Fishing Regulations had no application on Reserves. They also argued that only the federal government could legislate with respect to Reserves, and that the power to do so is withdrawn from provincial regulatory power. The Cardinals relied upon the wording of s. 12 of Treaty No. 6.

Browne, J. rejected this argument based on the decision of the Supreme Court of Canada in *Cardinal v. Attorney General of Alberta*, 1973 CanLII 8 (S.C.C.), [\[1974\] S.C.R. 695](#) in which Martland, J., at p. 170:

The use of the phrase "throughout the Province, including Reserves" can have no other meaning but that Indian Reserves form a part of the province in which they are situate, even if the Federal government has exclusive jurisdiction to legislate with respect to them for certain purposes. It should also be noted that the Cardinal case itself involved the trial in the Provincial Court of Alberta of a charge involving the sale in this province of a piece of moose meat on a reserve by an Indian to a non-Indian.

2. Whether the right to engage in commercial fishing was a treaty right constitutionally protected by the principle of inter-jurisdictional immunity.

Browne, J. rejected this argument based on the decision of the Supreme Court of Canada in *R. v. Horseman*, 1990 CanLII 96 (S.C.C.), [\[1990\] 1 S.C.R. 901](#), in which Cory, J. stated, at p. 396:

In summary, the hunting rights granted by the 1899 Treaty were not unlimited. Rather they were subject to government regulation. The 1930 Agreement widened the hunting territory and the means by which the Indians could hunt for food thus providing a real quid pro quo for the reduction in the right to hunt for purposes of commerce granted by the Treaty of 1899. The right of the Federal Government to act unilaterally in that manner is unquestioned. I therefore conclude that the 1930 Transfer Agreement did not alter the nature of the hunting rights originally guaranteed by Treaty No. 8 .

.The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but was rather an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement. Thus the application of s. 42 to Indians who are hunting for commercial purposes is not precluded by s. 88 of the Indian Act.

Browne, J. observed, at para. 57 to 96, that after *Horseman*, a number of decisions of the Supreme Court of Canada and the Alberta Court of Appeal had found, "without exception", that the right to hunt and fish for commercial purposes has been extinguished by operation of law.

Browne, J. observed, at the conclusion of her decision [at para. 87] that despite the thorough nature of the arguments put before her, the law is, and had been settled for some time.

**** CREDITS ****

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.

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