NATIVE LAW

VOLUME NO. 4

JUNE TO NOVEMBER 1978

Prepared by

Ava Kanner
Under Contract to the
Department of Indian and Northern Affairs
Assisted by Jeffrey Ross

HUNTING, TRAPPING

AND FISHING

GUIDE TO USE

Volume 4, 4(a) - Hunting, Fishing, Trapping

Table of Contents	pp. 3-4, Vol. 4
Subject Breakdown	pp. 5-6, Vol. 4
Alphabetical Case Index	pp. 768-775, Vol. 4(a)

GUIDE TO USE:-

The cases reported in these volumes appear under their main subject at final instance and/or at all levels.

The Table of Contents lists the cases reported in the volume as well as related cases appearing in other volumes.

Volume IX contains resumés of all the cases with specific details noted, i.e. the cases referred to and the statutes considered in each judgment. The list of cases referred to notes only those cases which are reported in these volumes.

LIST OF VOLUMES

VOLUME	SUBJECT	PAGES
1.(a)	Aboriginal Rights	13-379
1.(b)	Aboriginal Rights	380-822
1.(c)	Aboriginal Rights	823-1593
	(Index)	1594-1602
2.	Reserve Lands	9-359
2.(a)	Reserve Lands	360-727
	Lands off Reserve - Crown as Trustee	743-986
	(Index)	728-738,987
3.	Taxation	5-237
	(Index)	238-241
4.	Hunting, Fishing, Trapping	11-600
4.(a)	Hunting, Fishing, Trapping	601-767
	(Index)	768-775
	Treaties	779-1110
	(Index)	1111
	Constitutional	1116-1424
	(Index)	1425-1427
5.	Band	5-163
	(Index)	164-166
6.	Civil Rights - Civil Status	6-237
	(Index)	238-240
	Family	245-543
	(Index)	544-548
7.	Liquor	6-154
	(Index)	155-157
	Traffic	160-223
	(Index)	224-226
	Other Offences	229-274
	(Index)	275
8.	Procedure	7-157
	(Index)	158-161
	Jurisdiction of Courts	164-186
	(Index)	187
9.	Case Résumés	5-281
	(includes alphabetical listing and page/vol. citation)	282-302

TABLE OF CONTENTS

	Page
R. V. Cardinal (1974) SCR 695; (1975) 22 DLR (3d) 716; (1972) 22 DLR (3d) 716	11
R. v. Catagas (1978) 1 WWR 282; (1977) 3 WWR 706	54
R. v. Commanda (1939) 3 D.L.R. 635	62
R. v. Cooper (1969) 1 D.L.R. (3d) 113	68
R. v. Daniels (1968) SCR 517; (1966) 57 D.L.R. (2d) 365	73
R. v. Dennis and Dennis (1975) 22 CCC (2d) 152	110
R. v. Derrikson (1977) 16 N.R. part 3 231; (1975) 4 WWR 761; (1975) 20 CCC (2d) 157; (1977) 16 N.R. part 3 249 (Prov. Crt.)	127
R. v. Discon and Baker (1968) 67 D.L.R. (2d) 619	149
R. v. Francis (1970) 3 CCC 165; (1969) 1 NBR (2d) 886	161
R. v. Frank (1978) 1 SCR 95; (1976) 24 CCC (2d) 321	174
R. v. George (1966) SCR 267; (1964) 45 DLR (2d) 709; (1964) 41 DLR (2d) 31	193
R. v. Hill, 101 C.C.C. 343	227
R. v. Isaac, 13 N.S.R. (2d) 460	237
R. v. Jim, 26 C.C.C. 236	277
Kallooar v. R. (1965) 50 W.W.R. (N.S.) 602	280
R. v. Kogogolak (1959) 28 W.W.R. (N.S.) 376	288
R. V. Koonungnak (1964) 42 C.R. 143	297
R. v. Kruger & Manuel (1978) 1 SCR 104; (1975) 5 WWR 167; (1975) 19 CCC (2d) 162; (1974) 6 WWR 206	322
R. v. Kupiyana (1972) 2 W.W.R. 418	399
R. v. Laprise (1977) 3 W.W.R. 379	405
R. v. Little Bear (1958) 26 W.W.R. 335; (1958) 25 W.W.R. 580	409
R. v. McLeod (1930) 2 W.W.R. 37	419
R. v. McPherson (1971) 2 W.W.R. 640; (1971) 1 W.W.R. 299	425

Page

R. v. Mirasty, 1 W.W.R. 343 430

R. v. Morley (1932) 2 W.W.R. 193 440

R. v. Moses (1970) 3 O.R. 314 468

R. v. Myran (1976) 2 S.C.R. 137 479

R. v. Nippi (1969) 70 W.W.R. 390 489

R. v. Paus (1969) 68 W.W.R. 46 494

R. v. Penasse & McLeod (1972) 8 C.C.C. 2 (d) 569 504

R. v. Prince (1964) S.C.R. 81; (1963) 40 W.W.R. (N.S.) 234 509

R. v. Pritchard (1973) 32 D.L.R. (3d) 617 524

R. v. Rider (1969) 1 C.C.C. 193 530

R. v. Rodgers (1923) 3 D.L.R. 414 534

Sero v. Gault (1922) 64 D.L.R. 327 545

R. v. Sigeareak (1966) S.C.R. 645; (1966) 55 W.W.R. 1 552

R. v. Sikyea (1964) S.C.R. 642; (1966) 43 D.L.R. (2d) 150; (1962) 40 WWR 494 571

R. v. Simon, 124 C.C.C. 110 601

R. v. Smith (1935) 3 D.L.R. 703 607

R. v. Strongquill (1953) 8 W.W.R. (N.S.) 247 615

R. v. Syliboy (1929) 1 D.L.R. 307 641

R. v. Tom Tom (1978) 1 W.W.R. 275 650

R. v. Tootalik, 74 W.W.R. (N.S.) 740; 9 C.R.N.S. 92 657

R. v. Wesley (1932) 4 D.L.R. 774 673

R. v. Wesley (1976) 25 CCC (2d) 309 691

R. v. White & Bob (1966) 52 D.L.R. (2d) 481; (1965) 50 D.L.R. (2d) 613 716

Hunting, trapping and fishing

1. Treaties

R. v. Commanda (1939) 3DLR 635

R. v. Cooper (1969) 1 DLR (3d) 113

R. v. Discon and Baker (1968) 67 DLR (2d) 619

R. v. Francis (1970) 3 CCC 165;
(1969) 1 NBR (2d) 886

R. v. George (1966) SCR 267; (1964) 45 D.L.R.
(2d) 709; (1964) 41 D.L.R.

R. v. Little Bear (1958) 26 WWR 335, (1958)
25 WWR 580

R. v. Mirasty, 1 WWR 343

R. v. Moses (1970) 3 O.R. 314

R. v. Nippi (1969) 70 WWR 390

R. v. Penasse and McLeod (1972) 8 CCC (2d) 569

R. v. Rider (1969) 1 CCC 193

R. v. Sikyea (1964) SCR 642; (1966) 43 D.L.R.
(2d) 150; (1962) 40 WWR 494

R. v. Wesley (1932) 4 D.L.R. 774

R. v. Wesley (1976) 25 CCC (2d) 309

R. v. White and Bob (1965) 50 D.L.R. (2d) 613;
(1966) 52 D.L.R. (2d) 481

2. Statutes

(a) Colonial Laws

R. v. Syliboy (1929) 1 D.L.R. 307

(b) Federal Laws

R. v. Catagas (1978) 1 WWR 282; (1977) 3 WWR 706

R. v. Cooper (1969) 1 D.L.R. (3d) 113

R. v. Daniels (1968) SCR 517; (1966) 57 D.L.R. (2d) 365

R. v. Derriksan (1977) 16 N.R. part 3 231; (1975) 4 WWR 761; (1975) 20 CCC (2d) 157; (1977) 16 N.R. part 3 249 (Prov. Crt.)

R. v. Francis (1970) 3 CCC 165; (1969) 1 NBR (2d) 886

R. v. Frank (1978) 1 SCR 95; (1976) 24 CCC (2d) 321

R. v. George (1966) SCR 267; (1964) 45 D.L.R. (2d) 709; (1964) 41 D.L.R. (2d) 31

R. v. Kupiyana (1972) 2 WWR 418

R. v. Rider (1969) 1 CCC 193

R. v. Sikyea (1964) SCR 642; (1966) 43 D.L.R. (2d) 150; (1952) 40 WWR 494

R. v. Simon, 124 CCC 110

(c) Migratory Birds Convention Act

R. v. Catagas (1978) 1 WWR 282; (1977) 3 WWR 706

R. v. Daniels (1968) SCR 517; (1966) 57 D.L.R. (2d) 365

R. v. George (1966) SCR 267; (1964) 45 D.L.R. (2d) 709; (1964) 41 D.L.R. (2d) 31

R. v. Kupiyana (1972) 2 WWR 418

R. v. Sikyea (1964) SCR 642; (1966) 43 D.L.R. (2d) 150; (1962) 40 WWR 494

(d) Natural Resources Transfer Agreement

R. v. Cardinal (1974) SCR 695; (1975) 22 D.L.R. (3d) 716; (1972) 22 D.L.R. (3d) 716

R. v. Daniels (1968) SCR 517; (1966) 57 D.L.R. (2d) 365

R. v. Frank (1978) 1 SCR 95; (1976) 24 CCC (2d) 321

R. v. Little Bear (1958) 25 WWR 335; (1958) 25 WWR 580

R. v. McPherson (1971) 2 WWR 640; (1971) 1 WWR 299

R. v. Mirasty, 1 WWR 343

R. v. Myron (1976) 2 SCR 137

R. v. Nippi (1969) 70 WWR 390

R. v. Prince et al (1964) SCR 81; (1963) 40 WWR (N.S.) 234

R. v. Smith (1935) 3 D.L.R. 703

R. v. Strongquill (1953) 8 WWR (N.S.) 247

R. v. Wesley (1932) 4 D.L.R. 774

(e) Provincial Laws

R. v. Cardinal (1974) SCR 695; (1975) 22 D.L.R. (3d) 716; (1972) 22 D.L.R. (3d) 716

R. v. Dennis and Dennis (1975) 22 CCC (2d) 152

R. v. Frank (1978) 1 SCR 95; (1976) 24 CCC (2d) 321

R. v. Hill, 101 CCC 343

R. v. Isaac, 13 NSR (2d) 460

R. v. Jack (1975) WWD 135

R. v. Jim, 26 CCC 236

R. v. Kruger and Manuel (1978) 1 SCR 104; (1975) 5 WWR 167; (1975) 19 CCC (2d) 162; (1974) 6 WWR 206

R. v. Laprise (1977) 3 WWR 379

R. v. Little Bear (1958) 26 WWR 335; (1958) 25 WWR 580

R. v. McLeod (1930) 2 WWR 37

R. v. Mirasty, 1 WWR 343

R. v. Morley (1932) 2 WWR 193

R. v. Moses (1970) 3 OR 314

R. v. Myron (1976) 2 SCR 137

R. v. Nippi (1969) 70 WWR 390

R. v. Paus (1969) 68 WWR 46

R. v. Prince et al (1964) SCR 81; (1963) 40 WWR (N.S.) 234

R. v. Pritchard (1973) 32 DLR (3d) 617

R. v. Rodgers (1923) 3 D.L.R. 414

Sero v. Gault (1922) 64 D.L.R. 327

R. v. Smith (1935) 3 D.L.R. 703

R. v. Strongquill (1953) 8 WWR (N.S.) 247

R. v. Syliboy (1929) 1 D.L.R. 307

R. v. Wesley (1932) 4 D.L.R. 774

R. v. Wesley (1976) 25 CCC (2d) 309

R. v. White and Bob (1966) 52 D.L.R. (2d) 481; (1965) 50 D.L.R. (2d) 613

(f) Territorial Ordinances

Kaalooar v. R. (1965) 50 WWR (N.S.) 602

R. v. Kogogolak (1959) 28 WWR (N.S.) 376

R. v. Koonungnak (1964) 42 C.R. 143

R. v. Sigeareak (1966) SCR 645; (1966) 55 WWR 1

R. v. Smith (1935) 3 D.L.R. 703

R. v. TomTom (1978) 1 WWR 275

R. v. Tootalik, 74 WWR (N.S.) 740; 9 CRNS 92

3. Reserves

(a) Hunting and fishing off reserve

R. v. Commanda (1939) 3 D.L.R. 635

R. v. Derrikson (1977) 16 N.R. part 3 231; (1975) 4 WWR 761; (1975) 20 CCC (2d) 157; (1977) 16 N.R. part 3 249 (Prov. Crt.)

R. v. Francis (1970) 3 CCC 165; (1969) 1 NBR (2d) 886

R. v. Frank (1978) 1 SCR 95; (1976) 24 CCC (2d) 321

R. v. Mirasty, 1 WWR 343

R. v. Moses (1970) 3 OR 314

R. v. Nippi (1969) 70 WWR 390

R. v. Prince et al (1964) SCR 81; (1963) 40 WWR (N.S.) 234

R. v. Rider (1969) 1 CCC 193

Sero v. Gault (1922) 64 D.L.R. 327

R. v. Sigeareak (1966) SCR 645; (1966) 55 WWR 1

R. v. Smith (1935) 3 D.L.R. 703

R. v. Strongquill (1953) 8 WWR (N.S.) 247

R. v. Syliboy (1929) 1 D.L.R. 307

R. v. Wesley (1976) 25 CCC (2d) 309

R. v. White and Bob (1966) 52 D.L.R. (2d) 481; (1965) 50 D.L.R. (2d) 613

(b) Hunting and fishing on reserve

R. v. Cardinal (1974) SCR 695; (1975) 22 D.L.R. (3d) 716; (1972) 22 D.L.R. (3d) 716

R. v. Daniels (1968) SCR 517; (1966) 57 D.L.R. (2d) 365

R. v. George (1966) SCR 267; (1964) 45 D.L.R. (2d) 709; (1965) 41 D.L.R. (2d) 31

R. v. Hill, 101 CCC 343

R. v. Isaac, 13 N.S.R. (2d) 460

R. v. Jim, 26 CCC 236

R. v. Kogogolak (1959) 28 WWR (N.S.) 376

R. V. McLeod (1930) 2 WWR 37

R. v. McPherson (1971) 2 WWR 640; (1971) 1 WWR 299

R. v. Morley (1932) 2 WWR 193

R. v. Penasse and McLeod (1972) 8 CCC (2d) 569

R. v. Rodgers (1923) 3 D.L.R. 414

Charlie Cardinal *Appellant*;

and

The Attorney General of Alberta *Respondent.*

1972:December 7; 1973: June 29.

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Indians—Constitutional law—Provincial Statute prohibiting trafficking in big game—Validity of legislation—Applicability to Indians on Reserve—Wildlife Act, R.S.A. 1970, c. 391—B.N.A. Act.

The appellant, a treaty Indian, at his home on an Indian Reserve in Alberta, sold a piece of moose meat to a non-Indian. He was charged with unlawful trafficking in big game, in breach of s. 37 of the *Wildlife Act*, R.S.A. 1970, c. 391. It is uncontested that what he did was, in fact and in law, within the prohibitions of that Act. The appellant was acquitted at trial on the ground that the *Wildlife Act* was *ultra vires* of the Legislature in its application to the appellant as an Indian on an Indian Reserve. An appeal by way of a stated case was dismissed. On a further appeal to the court of Appeal, the judgment at trial was reversed. The appellant was granted leave to appeal to this Court.

Held (Hall, Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Fauteux C.J. and Abbott, Martland, Judson, Ritchie and Pigeon JJ.: Section 12 of the Alberta Natural Resources Agreement of 1929, between the Government of Canada and the Government of Alberta, made the provisions of the *Wildlife Act* applicable to all Indians, including those on Reserves, and governed their activities throughout the province, including Reserves. By virtue of s. 1 of the *B.N.A. Act*, 1930, it has the force of law, notwithstanding anything contained in the *B.N.A. Act*, 1867, any amendment thereto, or any federal statute.

Section 91 (24) of the *B.N.A. Act*, 1867, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over lands reserved

Charlie Cardinal *Appelant*;

et

Le Procureur général de l'Alberta *Intimé.*

1972: le 7 décembre; 1973: le 29 juin.

Présents: Le Juge en Chef Fauteux et les Juges Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon et Laskin.

EN APPEL DE LA COUR SUPRÊME DE L'ALBERTA, DIVISION D'APPEL

Indiens—Droit constitutionnel—Législation provinciale interdisant le commerce du gros gibier—Validité de la législation—Applicabilité aux Indiens vivant dans une réserve indienne—Wildlife Act, R.S.A. 1970, c. 391—Acte de l'Amérique du Nord britannique.

L'appelant, un Indien visé par les traités, a vendu chez lui dans une réserve indienne en Alberta, un morceau de viande d'orignal à un non-Indien. Il a été accusé de commerce illégal du gros gibier, en violation de l'art. 37 du *Wildlife Act*, R.S.A. 1970, c. 391. Il n'est pas contesté qu'il ait commis, en fait et en droit, un acte visé par les interdictions de cette loi. Lors de son procès, l'appelant a été acquitté pour le motif que la loi *Wildlife Act* est *ultra vires* des pouvoirs de la législature en ce qui concerne son application à l'appelant en tant qu'Indien vivant dans une réserve indienne. Un appel sur exposé de cause a été rejeté. Sur appel subséquent à la Cour d'appel, le jugement de première instance a été infirmé. L'appelant a obtenu l'autorisation d'appeler à cette Cour.

Arrêt: L'appel doit être rejeté, les Juges Hall, Spence et Laskin étant dissidents.

Le Juge en Chef Fauteux et les Juges Abbott, Martland, Judson, Ritchie et Pigeon: L'article 12 de la Convention sur les ressources naturelles de 1929, conclue entre le Gouvernement du Canada et le Gouvernement de l'Alberta, a eu pour effet de rendre les dispositions du *Wildlife Act* applicables à tous les Indiens, y compris ceux qui se trouvent dans les réserves, et de régir leurs activités dans toute la province, y compris dans les réserves. En vertu de l'art. 1 de *l'Acte de l'Amérique du Nord britannique*, 1930, il a force de loi, nonobstant toute disposition de *l'Acte de l'Amérique du Nord britannique*, 1867, modification s'y rapportant, ou toute loi fédérale.

L'article 91(24) de *l'Acte de l'Amérique du Nord britannique*, 1867, a donné au Parlement canadien l'autorité législative exclusive relativement aux

for the Indians. A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) was to create enclaves within a Province within the boundaries of which provincial legislation could have no application. Section 91(24) does not purport to define areas within a province within which the power of a province to enact legislation, otherwise within its powers, is to be excluded. Section 37 of the *Wildlife Act* does not relate to Indians, *qua* Indians, and is applicable to all Indians, including those on Reserves.

The purpose of s. 12 of the Agreement is to secure to the Indians of the province a continuing supply of game and fish for their support and subsistence. It could not have been intended that the controls which would apply to Indians in relation to hunting and fishing for purposes other than for their own food, should apply only to Indians not on Reserves.

Per Hall, Spence and Laskin JJ., *dissenting*: Apart entirely from the exclusive power vested in the Parliament to legislate in relation to Indians, its exclusive power in relation also to Indian Reserves puts such tracts of land beyond provincial competence to regulate their use or to control resources thereon. It is only Parliament that may legislate in relation to Reserves once they have been recognized or set aside as such. Indian Reserves are enclaves which are withdrawn from provincial regulatory power. During its existence as such a Reserve is no more subject to provincial legislation than is federal Crown property or any other enterprise falling within exclusive federal competence. Not only provincial game laws but other provincial regulatory legislation can have no application, of its own force, to such Reserves, at least where it is sought to subject Indians thereon to such legislation.

Section 10 of the Agreement provides that all Indian Reserves are to continue to be administered by the Government of Canada for the purposes of Canada. That points clearly to the exclusion of Reserves from provincial control. Section 12 is concerned with Indians as such, and with guaranteeing to them a continuing right to hunt, trap and fish for food

Indiens et aux terres reservées aux Indiens. Une législature provinciale ne saurait légiférer relativement aux Indiens ou relativement aux réserves indiennes, ce qui est loin de dire que l'art. 91(24) avait pour effet de créer des enclaves dans une province à l'intérieur des limites desquelles la législation provinciale ne pourrait pas s'appliquer. L'article 91(24) ne vise pas à définir des secteurs d'une province dans lesquels le pouvoir d'une province de légiférer, qui serait autrement de sa compétence, doit être exclu. L'article 37 du *Wildlife Act* ne vise pas les Indiens en tant qu'Indiens, et est applicable à tous les Indiens, y compris ceux qui se trouvent dans les réserves.

L'article 12 de la Convention vise à assurer aux Indiens de la province la continuation d'un approvisionnement en gibier et poisson pour leur soutien et leur subsistance. On ne pouvait entendre que les règles qui s'appliqueraient aux Indiens relativement à la chasse et à la pêche à des fins autres que pour se nourrir, devaient s'appliquer seulement aux Indiens hors des réserves.

Les Juges Hall, Spence et Laskin, *dissidents*: Indépendamment du pouvoir exclusif dont le Parlement du Canada est investi pour faire des lois relatives aux Indiens, le pouvoir exclusif qu'il possède également en ce qui concerne les réserves indiennes place de telles étendues de terre en dehors de la compétence provinciale lorsqu'il s'agit de réglementer leur usage ou de contrôler les ressources qui s'y trouvent. C'est seulement le Parlement qui peut faire des lois concernant les réserves une fois que celles-ci ont été reconnues ou réservées comme telles. Les réserves indiennes constituent des enclaves qui sont soustraites au pouvoir de réglementation provincial. Une réserve, tant qu'elle existe en tant que telle, n'est pas plus soumise à la législation provinciale que l'est un bien de la Couronne fédérale ou toute autre entreprise relevant d'une compétence fédérale exclusive. Non seulement les lois provinciales sur la conservation de la faune mais les autres lois provinciales de caractère réglementaire ne peuvent s'appliquer à de telles réserves du seul fait de leur mise en vigueur, du moins si l'on cherche à y assujettir des Indiens vivant dans ces réserves.

L'article 10 de la Convention prévoit que toutes les réserves indiennes doivent continuer à être administrées par le gouvernement du Canada pour les fins du Canada. Ceci indique clairement que les réserves échappent au contrôle provincial. L'article 12 s'intéresse aux Indiens en tant que tels, et a pour objet de leur garantir un droit continu de chasse, de piégeage

regardless of provincial game laws which would otherwise confine Indians in parts of the province that are under provincial administration. Section 12 of the Agreement cannot, in view of s. 10 thereof and in view of s. 91(24) of the *B.N.A. Act*, have the effect of subjecting Indians on a Reserve to the Alberta *Wildlife Act*.

et de pêche pour leur nourriture, indépendamment des lois provinciales sur la conservation de la faune qui restreindraient autrement les Indiens dans les parties de la province qui sont soumises à l'administration provinciale. L'article 12 de la Convention ne peut pas, étant donné l'art. 10 de cette Convention et étant donné l'art. 91(24) de *l'Acte de l'Amérique du Nord britannique*, avoir pour effet de soumettre les Indiens d'une réserve au *Wildlife Act* de l'Alberta.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], overruling the judgment of the Court below. Appeal dismissed, Hall, Spence and Laskin JJ. dissenting.

APPEL d'un jugement de la Cour suprême de l'Alberta, Division d'appel[1], infirmant un jugement de la Cour d'instance inférieure. Appel rejeté, les juges Hall, Spence et Laskin étant dissidents.

R. F. Roddick and *L. R. Cunningham*, for the appellant.

R. F. Roddick et *L. R. Cunningham*, pour l'appelant.

W. Henkel, *Q.C.*, and *B. A. Crane*, for the respondent.

W. Henkel, *c.r.*, et *B. A. Crane*, pour l'intimé.

The judgment of Fauteux C.J. and of Abbott, Martland, Judson, Ritchie and Pigeon JJ. was delivered by

Le jugement du Juge en Chef Fauteux et des Juges Abbott, Martland, Judson, Ritchie et Pigeon a été rendu par

MARTLAND J.—On December 8, 1970, the appellant, a treaty Indian, at his home on an Indian Reserve, in the Province of Alberta, sold a piece of moose meat to a non-Indian. He was charged with a breach of s. 37 of the *Wildlife Act*, R.S.A. 1970, c. 391, which provides:

LE JUGE MARTLAND—Le 8 décembre 1970, l'appelant, un Indien visé par les traités, a vendu chez lui dans une réserve indienne, dans la province d'Alberta, un morceau de viande d'orignal à un non-Indien. Il a été accusé d'avoir violé l'art. 37 de la Loi dite *The Wildlife Act*, R.S.A. 1970. c. 391, qui prévoit:

37. No person shall traffic in any big game or any game bird except as is expressly permitted by this Act or by the regulations.

[TRADUCTION] 37. Personne ne doit faire le commerce du gros gibier ou du gibier à plume sauf suivant que le permettent expressément la présent loi ou les règlements.

The trial judge found that the appellant had trafficked in big game within the meaning of this section. The appellant was acquitted on the ground that the *Wildlife Act* is *ultra vires* of the Alberta Legislature in its application to the appellant as an Indian on an Indian Reserve. A case was stated on this legal issue, which was considered by a judge of the Supreme Court of Alberta, who held that the decision was correct. An appeal was taken to the Appellate Division of the Supreme Court of Alberta, which allowed

Le juge de première instance a conclu que l'appelant avait fait le commerce du gros gibier aux termes de cet article. L'appelant a été acquitté pour le motif que la loi *The Wildlife Act* est *ultra vires* des pouvoirs de la législature de l'Alberta en ce qui concerne son application à l'appelant en tant qu'Indien vivant dans une réserve indienne. Sur cette question de droit, un exposé de cause a été rédigé et soumis à un juge de la Cour suprême de l'Alberta qui a conclu que la décision était juste. Un appel a été inter-

[1] [1972] 1 W.W.R. 536, 5 C.C.C. (2d) 193, 17 C.R.M.S. 110, 22 D.L.R. (3d) 716.

[1] [1972] 1 W.W.R. 536, 5 C.C.C. (2d) 193, 17 C.R.N.S. 110, 22 D.L.R. (3d) 716.

the appeal and overruled the judgment of the Court below. The present appeal is brought, with leave, to this Court.

Section 91(24) of the *British North America Act, 1867*, gives to the Parliament of Canada exclusive authority to legislate in respect of:

24. Indians, and Lands reserved for the Indians.

An agreement was made between the Government of Canada and the Government of Alberta, dated December 14, 1929, hereinafter referred to as "the Agreement", for the transfer by the former to the latter of the interest of the Crown in all Crown lands, mines and minerals within the Province of Alberta, and the provisions of the *Alberta Act* were modified as in the Agreement set out.

Sections 10 to 12 inclusive appear in the Agreement under the heading "Indian Reserves", and it is sections 10 and 12 which are of importance in considering this appeal. They provide as follows:

10. All lands included in Indian Reserves within the Province including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may in agreement with the appropriate Minister of the Province, select, as necessary to enable Canada to fulfil its obligations, under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province

jeté à la Division d'appel de la Cour suprême de l'Alberta, qui a accueilli l'appel et infirmé le jugement de la cour d'instance inférieure. Le présent appel est interjeté, sur autorisation, à cette Cour.

Le par. (24) de l'art. 91 de l'*Acte de l'Amérique du Nord britannique, 1867*, donne au Parlement du Canada l'autorité législative exclusive sur:

24. Les Indiens et les terres réservées pour les Indiens.

Une convention datée du 14 décembre 1929, ci-après appelée «la convention», a été conclue entre le Gouvernement du Canada et le Gouvernement de l'Alberta, en vue du transfert par le Canada à l'Alberta des droits de la Couronne sur toutes les terres fédérales, mines et minéraux dans la province de l'Alberta, et les dispositions de l'*Acte de l'Alberta* ont été modifiées suivant ce qui est établi dans la convention.

Les articles 10 à 12 inclusivement figurent dans la convention sous l'intitulé «Réserves Indiennes», et les articles 10 et 12 sont les dispositions importantes dans le présent appel. Elles prescrivent ce qui suit:

10. Toutes les terres faisant partie des réserves indiennes situées dans la province, y compris celles qui ont été choisies et dont on a mesuré la superficie, mais qui n'ont pas encore fait l'objet d'une ratification, ainsi que celles qui en ont été l'objet, continuent d'appartenir à la Couronne et d'être administrées par le gouvernement du Canada pour les fins du Canada, et, à la demande du surintendant général des Affaires indiennes, la province réservera, au besoin, à même les terres de la Couronne inoccupées et par les présentes transférées à son administration, les autres étendues que ledit surintendant général peut, d'accord avec le ministre approprié de la province, choisir comme étant nécessaires pour permettre au Canada de remplir ses obligations en vertu des traités avec les Indiens de la province, et ces étendues seront dans la suite administrées par le Canada de la même manière à tous égards que si elles n'étaient jamais passées à la province en vertu des dispositions des présentes.

12. Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et

from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

This Agreement was approved by the Parliament of Canada and the Legislature of the Province of Alberta and, thereafter, it and also agreements between the Government of Canada and the Provinces of Manitoba, Saskatchewan and British Columbia were confirmed by the *British North America Act, 1930*. Section 1 of that Act provided:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

Sections 10 and 12 of the Agreement were, therefore, given the force of law, notwithstanding anything in the *British North America Act, 1867*. The question in issue on this appeal is as to whether s. 12 was effective so as to make the provisions of the *Wildlife Act* applicable to the appellant, a treaty Indian, in respect of an act which occurred on an Indian Reserve in the Province of Alberta.

The submission of the appellant is that the Parliament of Canada has exclusive legislative authority to legislate to control the administration of Indian Reserves and that Provincial laws cannot apply on such a Reserve unless referentially introduced through Federal legislation. It is contended that the phrase "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access" does not include Indian Reserve lands and that the only laws to which Indians are subject, while on a Reserve, are the laws of Canada.

qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

La convention a été approuvée par le Parlement du Canada et la législature de la province de l'Alberta et, par la suite, cette convention de même que celles conclues entre le Gouvernement du Canada et les provinces du Manitoba, de la Saskatchewan et de la Colombie-Britannique ont été confirmées par l'*Acte de l'Amérique du Nord britannique, 1930*. L'article 1 de cette dernière loi prévoit ce qui suit:

1. Les conventions comprises dans l'annexe de la présente loi, sont par les présentes confirmées et auront force de loi nonobstant tout ce qui est contenu dans l'*Acte de l'Amérique du Nord britannique, 1867*, ou dans tout Acte le modifiant, ou dans toute loi du Parlement du Canada ou dans tout arrêté du Conseil ou termes ou conditions d'Union faits ou approuvés sous l'empire d'aucune de ces lois.

Les articles 10 et 12 de la convention ont donc reçu force de loi nonobstant tout ce qui est contenu dans l'*Acte de l'Amérique du Nord britannique, 1867*. La question en litige dans le présent appel est de savoir si l'art. 12 a eu pour effet de rendre les dispositions du *The Wildlife Act* applicables à l'appelant, un Indien visé par les traités, relativement à un acte qui a été accompli dans une réserve indienne dans la province de l'Alberta.

L'appelant a allégué que le Parlement du Canada a l'autorité législative exclusive sur l'administration des réserves indiennes et que les lois provinciales ne peuvent s'appliquer dans semblable réserve à moins qu'elles ne soient introduites par renvoi dans la législation fédérale. On prétend que l'expression «sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès» ne comprend pas les terres des réserves indiennes et que les seules lois auxquelles sont assujettis les Indiens,

Section 12, it is said, can only have application to Indians in Alberta outside the Indian Reserves.

In support of this proposition the case of *R. v. Wesley*[2], is cited. This is a judgment of the Alberta Appellate Division. In my opinion it is not of assistance in determining the issue in the present appeal. The accused, an Indian, was charged with breaches of the *Game Act* of Alberta in respect of his hunting activities on unoccupied Crown land. The deer which he had killed was used for food. The issue was as to the scope of the protection provided to him by s. 12 of the Agreement with respect to hunting for food. The Crown contended that the right to hunt "game" did not include animals the killing of which was totally prohibited by the *Game Act*. It was also urged that when the right to hunt was given "at all seasons of the year" this only conferred the right to hunt out of season, but that such hunting was still subject to the limits imposed by the *Game Act*. These submissions were rejected. The Court's conclusions are stated in the judgment of McGillivray J.A. at p. 344:

If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of

[2] [1932] 2 W.W.R. 337, 58 C.C.C. 269, [1932] 4 D.L.R. 774.

lorsqu'ils sont dans une réserve, sont les lois du Canada. L'article 12, prétend-on, ne peut s'appliquer qu'aux Indiens de l'Alberta hors des réserves indiennes.

L'arrêt *R. v. Wesley*[2] a été cité au soutien de cette proposition. Il s'agit d'un arrêt de la Division d'appel de l'Alberta. A mon avis, il ne nous aide pas à décider la question en litige dans le présent appel. L'inculpé, un Indien, avait été accusé de violations à la loi dite *The Game Act* de l'Alberta relativement à ses opérations de chasse sur les terres inoccupées de la Couronne. Le chevreuil qu'il avait tué avait servi de nourriture. La question était de déterminer l'étendue de la protection que lui accordait l'art. 12 de la convention relativement à la chasse pour se nourrir. La Couronne a prétendu que le droit de chasser «le gibier» ne comprenait pas les animaux dont la chasse était totalement interdite par la loi *The Game Act*. On a aussi allégué que quand fut accordé le droit de chasser «en toute saison de l'année», seul le droit de faire la chasse hors saison s'est trouvé à être conféré, mais que cette chasse était toujours sujette aux restrictions imposées par le *Game Act*. Ces prétentions ont été rejetées. Les conclusions de la Cour sont exposées dans le jugement du Juge d'appel McGillivray, page 344:

[TRADUCTION] Si la réserve a simplement pour effet d'accorder aux Indiens le privilège additionnel de chasser pour se nourrir «hors saison» et s'ils sont pour le reste assujettis aux lois provinciales sur la chasse, il s'ensuit que, dans toute année, on peut restreindre le nombre d'animaux d'une espèce donnée qu'ils peuvent tuer même si ce nombre n'est pas suffisant pour leur subsistance et entretien et même si aucune autre espèce de gibier ne leur est accessible. Je ne crois pas que ce soit là, d'après le texte de l'article, l'intention du législateur. Je crois que la loi entendait assujettir l'Indien comme le Blanc aux lois visant la conservation de la faune quand ils pratiquent la chasse sportive ou commerciale sauf que, en chassant des animaux sauvages pour se procurer la nourriture nécessaire à la vie, l'Indien devait être placé dans une position très différente du Blanc qui, d'une manière générale, ne chasse pas pour se nourrir, et

[2] [1932] 2 W.W.R. 337, 58 C.C.C. 269, [1932] 4 D.L.R 774.

the continued enjoyment of a right which he has enjoyed from time immemorial.

This passage was quoted with approval in this Court in *Prince v. R.*[3], in which the issue was as to the meaning of the word "hunt" in s. 72(1) of the *Game and Fisheries Act*, R.S.M. 1954, c. 94, which had been enacted in implementation of s. 13 of the Manitoba Natural Resources Agreement, which is the same as s. 12 of the Agreement. It was admitted that the appellants were Indians, hunting for food, on land to which they had the right of access. It was held that they were not subject to restriction as to the method of hunting. The same principle was applied, recently, by the Manitoba Court of Appeal in *R. v. McPherson*[4].

The Court of Appeal for Saskatchewan, in *R. v. Smith*[5], considered the application of s. 12 of the Saskatchewan Natural Resources Agreement, which is the same as s. 12 of the Agreement. The accused was an Indian charged with carrying fire-arms on a game preserve. It was contended that he was protected by the proviso in the section, in that he was hunting on unoccupied Crown lands or on lands to which he had a right of access. Both arguments were rejected. It was held that "unoccupied" meant "idle" or "not put to use" and that Crown lands appropriated for a special purpose were not unoccupied within the meaning of s. 12. It was also held that the only right of access to the lands in question was merely the privilege accorded to all persons to enter the preserve without carrying fire-arms.

All of the members of the Court, when considering the meaning of the words "right of access", considered that they applied to Indian Reserves as well as to other lands.

[3] [1964] S.C.R. 81 at 84, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1.
[4] [1971] 2 W.W.R. 640.
[5] (1935), 64 C.C.C. 131, [1935] 2 W.W.R. 433, [1935] 3 D.L.R. 703.

devait, de par la réserve de l'article 12, se voir assuré de la jouissance continue d'un droit qu'il avait depuis des temps immémoriaux.

Ce dernier passage a été cité et approuvé par cette Cour dans l'arrêt *Prince c. R.*[3], dans lequel le litige portait sur la signification du terme «chasser» dans le par. 1 de l'art. 72 du *The Game and Fisheries Act*, R.S.M. 1954, c. 94, qui avait été adopté en application de l'art. 13 du Manitoba Natural Resources Agreement, qui est identique à l'art. 12 de la convention. Il était admis que les appelants étaient des Indiens, pratiquant la chasse pour se nourrir sur des terres auxquelles ils avaient droit d'accès. On a statué qu'aucune restriction ne s'appliquait à eux quant à la méthode de chasse. La Cour d'appel du Manitoba a récemment appliqué le même principe dans l'arrêt *R. v. McPherson*[4].

Dans l'arrêt *R. v. Smith*[5], la Cour d'appel de la Saskatchewan a étudié l'application de l'art. 12 du Saskatchewan Natural Resources Agreement, qui est identique à l'art. 12 de la convention. L'inculpé, un Indien, était accusé de port d'armes à feu dans une réserve pour gibier. On a prétendu qu'il était protégé par la réserve de l'article, car il chassait sur des terres inoccupées de la Couronne ou sur des terres auxquelles il avait un droit d'accès. Ces deux arguments ont été rejetés. On a statué que le terme «inoccupé» signifiait «inemployé» ou «non utilisé» et que les terres de la Couronne réservées à une fin spéciale n'étaient pas inoccupées au sens de l'art. 12. On a aussi statué que le seul droit d'accès aux terres en question était simplement le privilège accordé à toutes les personnes d'entrer dans la réserve sans transporter d'armes à feu.

En étudiant la signification de l'expression «droit d'accès», tous les membres de la Cour ont considéré qu'elle s'appliquait aussi bien aux réserves Indiennes qu'aux autres terres.

[3] [1964] R.C.S. 81 à 84, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1.
[4] [1971] 2 W.W.R. 640.
[5] (1935), 64 C.C.C. 131, [1935] 2 W.W.R. 433, [1935] 3 D.L.R. 703.

The only other case cited to us which was concerned with the interpretation of s. 12 is the judgment of this Court in *Daniels v. White and The Queen*[6], which dealt with the equivalent section (s. 13) of the Manitoba Agreement. The issue there, however, was as to whether the guarantee of the Indians' right to hunt, trap and fish game and fish for food was binding upon the Federal Government, so as to exempt the appellant, who was an Indian, from the application of the provisions of the *Migratory Birds Convention Act*. It was held that it was only Provincial game laws which were subject to the proviso contained in that section. That decision has no application to the circumstances of this case.

The present appeal thus raises issues as to the application of s. 12 which have not been considered previously.

As indicated earlier, the appellant starts from the proposition that, prior to the making of the Agreement, Indian Reserves were enclaves which were withdrawn from the application of Provincial legislation, save by way of reference by virtue of Federal legislation. On this premise it is contended that s. 12 should not be construed so as to make Provincial game legislation applicable within Indian Reserves.

I am not prepared to accept this initial premise. Section 91(24) of the *British North America Act, 1867*, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over lands reserved for the Indians. Section 92 gave to each Province, in such Province, exclusive legislative power over the subjects therein defined. It is well established, as illustrated in *Union Colliery Company v. Bryden*[7], that a Province cannot legislate in relation to a subject matter exclusively assigned to the Federal Parliament by s. 91. But it is also well

[6] [1968] S.C.R. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1.

[7] [1899] A.C. 580.

La dernière cause citée concernant l'interprétation de l'art. 12 est le jugement de cette Cour dans l'affaire *Daniels c. White et La Reine*[6], qui a traité de l'article équivalent (l'art. 13) de la convention relative au Manitoba. Cependant, dans cette dernière affaire, il s'agissait de déterminer si la garantie du droit des Indiens de chasser, de prendre le gibier au piège et de pêcher le poisson pour se nourrir, liait le Gouvernement fédéral de façon à exempter l'appelant, qui était un Indien, de l'application des dispositions de la *Loi sur la Convention concernant les oiseaux migrateurs*. On a statué que seules les lois provinciales sur la chasse et la pêche étaient visées par la réserve contenue dans cet article. Cette dernière décision ne s'applique pas aux circonstances de l'espèce.

Le présent appel soulève donc des questions quant à l'application de l'art. 12 qui n'ont pas été étudiées précédemment.

Comme il a été indiqué plus haut, l'appelant part de la proposition que, avant la conclusion de la convention, les réserves indiennes étaient des enclaves qui ont été retirées du champ d'application de la législation provinciale, sauf lorsqu'elle s'applique par renvoi en vertu d'une loi fédérale. A partir de cette prémisse, on prétend que l'art. 12 ne devrait pas être interprété de manière à ce que la législation provinciale en matière de chasse et pêche soit applicable aux réserves indiennes.

Je ne puis accepter cette première prémisse. Le par. (24) de l'article 91 de l'*Acte de l'Amérique du Nord britannique, 1867*, a donné au Parlement canadien l'autorité législative exclusive relativement aux Indiens et aux terres réservées aux Indiens. L'article 92 a donné à chaque province le pouvoir exclusif de légiférer sur les sujets qui y sont énumérés. Il est bien établi, comme le démontre l'arrêt *Union Colliery Company v. Bryden*[7], qu'une province ne peut légiférer relativement à une matière exclusivement assignée au Parlement fédéral en vertu de

[6] [1968] R.C.S. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1.

[7] [1899] A.C. 580.

established that Provincial legislation enacted under a heading of s. 92 does not necessarily become invalid because it affects something which is subject to Federal legislation. A vivid illustration of this is to be found in the Privy Council decision a few years after the *Union Colliery* case in *Cunningham v. Tomey Homma*[8], which sustained Provincial legislation, pursuant to s. 92(1), which prohibited Japanese, whether naturalized or not, from voting in Provincial elections in British Columbia.

A Provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act, 1867*, was to create enclaves within a Province within the boundaries of which Provincial legislation could have no application. In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.

[8] [1903] A.C. 151.

l'article 91. Mais, il est aussi bien établi qu'une loi provinciale adoptée en vertu d'une des catégories de l'art. 92 ne devient pas nécessairement nulle parce qu'elle touche quelque chose qui est assujetti à la législation fédérale. Le Conseil privé l'a clairement illustré dans l'arrêt *Cunningham v. Tomey Homma*[8], qui a été rendu quelques années après l'affaire *Union Colliery* et qui a confirmé la validité d'une loi provinciale, passée en vertu du par. (1) de l'art. 92, qui interdisait aux Japonais, qu'ils soient naturalisés ou non, de voter aux élections provinciales en Colombie-Britannique.

Une législature provinciale ne saurait légiférer relativement aux Indiens ou relativement aux réserves indiennes, ce qui est loin de dire que le par. (24) de l'art. 91 de l'*Acte de l'Amérique du Nord britannique, 1867*, avait pour effet de créer des enclaves dans une province à l'intérieur des limites desquelles la législation provinciale ne pourrait pas s'appliquer. A mon avis, le critère concernant l'application de la législation provinciale dans une réserve est le même que celui qui concerne son application dans la province, c'est-à-dire, que la législation doit s'inscrire dans le cadre des pouvoirs énumérés à l'art. 92 et non porter sur des sujets exclusivement assignés au Parlement du Canada en vertu de l'art. 91. Deux de ces sujets sont les Indiens et les réserves indiennes, mais si une législation provinciale dans les limites de l'art. 92 n'est pas interprétée comme étant une législation relative à ces catégories de sujets (ou tout autre sujet visé par l'art. 91), elle est applicable partout dans la province, y compris les réserves indiennes, même si elle peut toucher les Indiens et les réserves indiennes. Le point que j'avance est que le par. (24) de l'art. 91 énumère des catégories de sujets à l'égard desquelles le Parlement fédéral a le pouvoir exclusif de légiférer, mais il ne vise pas à définir des secteurs d'une province dans lesquels le pouvoir d'une province de légiférer, qui serait autrement de sa compétence, doit être exclu.

[8] [1903] A.C. 151.

There have been a number of cases in Provincial Courts in which s. 12 of the Agreement, or its equivalent in the Manitoba and Saskatchewan Agreements, was not applicable, which have considered the question of the application of Provincial laws to Indians, and their application within Indian Reserves. Counsel for the appellant cites *R. v. Jim*[9]. In this case Hunter C.J.B.C. held that a charge of hunting deer, without a licence issued pursuant to the *British Columbia Game Protection Act*, would not lie against an Indian hunting on an Indian Reserve. The ground of the decision was that the *Indian Act*, enacted pursuant to s. 91(24) of the *British North America Act, 1867*, had provided that all Indian lands should be managed as the Governor-in-Council directs and that management included the regulation of hunting on a Reserve.

R. v. Rodgers[10] is a decision of the Manitoba Court of Appeal, to the like effect, involving the trapping of mink on an Indian Reserve without a Provincial licence.

In *R. v. Morley*[11], the British Columbia Court of Appeal held that a Provincial game law applied to a non-Indian on a charge of killing a pheasant during the closed season on an Indian Reserve.

In *Corporation of Surrey v. Peace Arch Enterprises Ltd.*[12], the situation was different. It involved lands in an Indian Reserve which had been "surrendered" in trust to the Federal Crown for the purpose of leasing. The issue was as to whether the lands were subject, in their use by the lessees, who were non-Indians, to

[9] (1915), 22 C.C.C. 236, 22 B.C.R. 106.

[10] [1923] 2 W.W.R. 353, 40 C.C.C. 51, [1933] 3 D.L.R. 414.

[11] [1932] 4 D.L.R. 483, [1932] 2 W.W.R. 193, 58 C.C.C. 166.

[12] (1970), 74 W.W.R. 380.

De nombreux arrêts des cours provinciales rendus dans des affaires où l'art. 12 de la convention, ou son équivalent dans les conventions du Manitoba et de la Saskatchewan, n'était pas applicable, ont étudié la question de l'application des lois provinciales aux Indiens et leur application à l'intérieur des réserves indiennes. L'avocat de l'appelant cite l'arrêt *R. v. Jim*[9]. Dans cette dernière affaire, le Juge en chef de la Colombie-Britannique, le Juge Hunter, a statué qu'une accusation d'avoir chassé le chevreuil sans détenir un permis émis en vertu de la loi dite *British Columbia Game Protection Act*, ne pourrait être portée contre un Indien qui chasse dans une réserve indienne. La décision a été fondée sur le motif que la *Loi sur les Indiens*, adoptée en vertu du par. (24) de l'art. 91 de l'*Acte de l'Amérique du Nord britannique, 1867*, prévoyait que toutes les terres indiennes devaient être administrées comme le décrète le gouverneur en conseil et que l'administration comprenait la réglementation de la chasse dans une réserve.

L'arrêt *R. v. Rodgers*[10] est une décision dans le même sens de la Cour d'appel du Manitoba concernant le piégeage du vison dans une réserve indienne sans un permis provincial.

Dans l'arrêt *R. v. Morley*[11], la Cour d'appel de la Colombie-Britannique a statué qu'une loi provinciale en matière de chasse et pêche s'appliquait à un non-Indien à l'égard d'une accusation d'avoir tué un faisan en temps prohibé dans une réserve indienne.

Dans l'affaire *Corporation of Surrey v. Peace Arch Enterprises Ltd.*[12], la situation était différente. Il s'agissait de terres situées dans une réserve indienne qui avaient été "cédées" en fidéicommis à la Couronne fédérale à des fins de louage. La question était de savoir si les terres étaient sujettes, dans leur utilisation par

[9] (1915), 22 C.C.C. 236, 22 B.C.R. 106.

[10] [1923] 2 W.W.R. 353, 40 C.C.C. 51, [1933] 3 D.L.R 414.

[11] [1932] 4 D.L.R. 483, [1932] 2 W.W.R. 193, 58 C.C.C 166.

[12] (1970), 74 W.W.R. 380.

certain municipal by-laws and to regulations under the *Provincial Health Act*. The Court found that the lands in question were still "lands reserved for the Indians" and, that being so, only the Federal Parliament could legislate as to the use to which they might be put. The *Morley* case is not mentioned in the judgment and I presume that this was so because the cases were not considered as parallel. Once it was determined that the lands remained lands reserved for the Indians, Provincial legislation relating to their use was not applicable. The game law considered in the *Morley* case governed the conduct of persons hunting game in British Columbia and was held to apply in all parts of the Province.

The Quebec Court of Sessions of the Peace, in *R. v. Groslouis*[13], convicted an Indian merchant, who resided and operated a retail store on an Indian Reserve, of an offence under the *Quebec Retail Sales Tax Act* in respect of a sale of goods on the Reserve to a non-Indian. The Court suggested, however, that, when selling to a non-Indian, he did an action which theoretically caused him to go outside the Reserve.

The Ontario Court of Appeal held in *R. v. Hill*[14] that an unenfranchised treaty Indian, resident on a Reserve, was subject to the provisions of the *Ontario Medical Act* when he practised medicine for hire, but not upon the Reserve. That Court also held, in *R. v. Martin*[15] that an Indian, not on a Reserve, could be convicted of an offence under the *Ontario Temperance Act*.

[13] (1943), 81 C.C.C. 167, [1944] R.L. 12.
[14] (1907), 15 O.L.R. 406.
[15] (1917), 41 O.L.R. 79, 29 C.C.C. 189, 39 D.L.R. 635.

les locataires, qui étaient des non-Indiens, à certains règlements municipaux et aux règlements établis en vertu de la loi dite *Provincial Health Act*. La Cour a conclu que les terres en question étaient toujours «des terres réservées aux Indiens» et, puisqu'il en était ainsi, seul le Parlement fédéral pouvait légiférer quant à l'usage auquel elles pouvaient être destinées. L'arrêt *Morley* n'a pas été mentionné dans le jugement et je présume qu'il en a été ainsi parce que les affaires n'étaient pas considérées comme comparables. Dès lors qu'on avait décidé que les terres restaient des terres réservées aux Indiens, la législation provinciale concernant leur usage n'était pas applicable. La législation en matière de chasse et pêche étudiée dans l'arrêt *Morley* régissait la conduite de personnes qui chassaient le gibier en Colombie-Britannique et il a été décidé qu'elle s'appliquait dans toutes les parties de la province.

Dans l'arrêt *R. v. Groslouis*[13], la Cour des sessions de la paix du Québec a déclaré un marchand indien qui résidait et exploitait un magasin de détail dans une réserve indienne coupable d'une infraction en vertu de la *Loi de l'impôt sur la vente en détail du Québec* relativement à la vente de marchandises à un non-Indien dans une réserve. La Cour a toutefois exprimé l'avis que quand il vendait des marchandises à un non-Indien, il accomplissait une action qui, en théorie, avait pour effet de le faire sortir de la réserve.

Dans l'arrêt *R. v. Hill*[14], la Cour d'appel de l'Ontario a statué qu'un Indien non emancipé visé par les traités, résidant dans une réserve, était assujetti aux dispositions de la loi dite *Ontario Medical Act* lorsqu'il pratiquait la médecine à titre onéreux, mais non dans une réserve. Dans l'arrêt *R. v. Martin*[15], cette dernière Cour a aussi statué qu'un Indien, hors d'une réserve, pouvait être déclaré coupable d'une infraction en vertu de la loi dite *The Ontario Temperance Act*.

[13] (1943), 81 C.C.C. 167, [1944] R.L. 12.
[14] (1907), 15 O.L.R. 406.
[15] (1917), 41 O.L.R. 79, 29 C.C.C. 189, 39 D.L.R. 635.

Riddell J., at p. 83, applied the language of the decision of the Privy Council in *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de Bonsecours*[16] *mutatis mutandis*, in the case before him. The passages in the *Canadian Pacific Railway* case are as follows:

> The British North America Act, whilst it gives the legislative control of the appellants' railway quâ railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures.
>
> * * *
>
> It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec.

Riddell J. then went on to say:

> In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them.

In none of these cases is it decided that a Provincial game law, of general application, would not affect an Indian outside a Reserve. Legislation of this kind does not relate to Indians, *quâ* Indians, and the passage above quoted would, in my opinion, be applicable to such legislation. The *Jim* case and the *Rodgers* case

[16] [1899] A.C. 367 at 372-3.

Le Juge Riddell, à la p. 83, appliqua *mutatis mutandis*, dans l'affaire dont il était saisi, les termes de la décision rendue par le Conseil privé dans l'affaire *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de Bonsecours*[16]. Les passages pertinents de l'arrêt *Canadian Pacific Railway* sont les suivants:

> [TRADUCTION] L'acte de l'Amérique du Nord britannique, bien qu'il donne au Parlement du Canada l'autorité législative sur le chemin de fer de l'appelante en tant que chemin de fer, ne déclare pas que le chemin de fer cessera de faire partie des provinces dans lesquelles il est situé, ou qu'il doit, à d'autres égards, être retiré de la compétence des législatures provinciales.
>
> * * *
>
> Il apparaît donc à leurs Seigneuries que toute tentative par la législature du Québec de régir par législation, décrite ou non comme étant en matière municipale, la structure d'un fossé faisant partie des ouvrages autorisés de la compagnie appelante, serait une législation qui outrepasserait ses pouvoirs. D'autre part, si la loi ne concernait pas la structure du fossé, mais prévoyait qu'advenant une accumulation de détritus et de déchets causant le débordement du fossé et un préjudice à un autre propriétaire dans la paroisse, le fossé devra être complètement nettoyé par la compagnie appelante, alors, d'après leurs Seigneuries, la loi serait une loi en matière municipale du ressort de la législature du Québec.

Le Juge Riddell a poursuivi:

> [TRADUCTION] En d'autres termes, aucune loi de la législature provinciale concernant les Indiens ou leurs terres comme tels serait valide et exécutoire; mais il n'y a aucune raison pour laquelle des lois d'application générale ne pourraient les toucher.

Aucun de ces arrêts n'a décidé qu'une loi provinciale d'application générale en matière de chasse et pêche ne pourrait toucher à un Indien hors d'une réserve. Les lois de cette nature ne visent pas les Indiens en tant qu'Indiens, et le passage précité serait, à mon avis, applicable à pareilles lois. Les arrêts *Jim* et *Rodgers* ont

[16] [1899] A.C. 367 à 372-3.

held that such legislation did not apply to an Indian on an Indian Reserve. The *Morley* case is inconsistent with the idea that no Provincial legislation can apply within an Indian Reserve, save by reference in a Federal statute.

I now turn to a consideration of the effect of s. 12 of the Agreement.

It has been noted that this section, along with ss. 10 and 11, appears under the heading "Indian Reserves". It begins with the words:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, ...

The opening words of the section define its purpose. It is to secure to the Indians of the Province a continuing supply of game and fish for their support and subsistence. It is to achieve that purpose that Indians within the boundaries of the Province are to conform to Provincial game laws, subject, always, to their right to hunt and fish for food. This being the purpose of the section, it could not have been intended that the controls which would apply to Indians in relation to hunting and fishing for purposes other than for their own food, should apply only to Indians not on Reserves.

Furthermore, if the section were to be so restricted in its scope, it would accomplish nothing towards its purpose. Cases decided before the Agreement, such as *R. v. Martin*, *supra*, had held that general legislation by a Province, not relating to Indians, *qua* Indians, would apply to them. On their facts, these cases dealt with Indians outside Reserves. The point is that the provisions of s. 12 were not required to make Provincial game laws apply to Indians off the Reserve.

décidé que pareilles lois ne s'appliquaient pas à un Indien dans une réserve indienne. L'arrêt *Morley* est inconciliable avec la proposition selon laquelle aucune loi provinciale ne peut s'appliquer à l'intérieur d'une réserve indienne, sauf par renvoi dans une loi fédérale.

J'aborde maintenant la question de l'effet de l'art. 12 de la convention.

Nous avons remarqué que cet article, de même que les articles 10 et 11, figure sous l'intitulé «réserves indiennes». Le début se lit comme suit:

> Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province, ...

Les mots du début de l'article en précisent le but. Il vise à assurer aux Indiens de la province la continuation d'un approvisionnement en gibier et poisson pour leur soutien et leur subsistance. C'est afin d'atteindre ce but que les Indiens résidant à l'intérieur des limites de la province doivent respecter les lois provinciales en matière de chasse et pêche, sous réserve toujours de leur droit de chasser et de pêcher pour se nourrir. Cela étant le but de l'article, on ne pouvait entendre que les règles qui s'appliqueraient aux Indiens relativement à la chasse et à la pêche à des fins autres que pour se nourrir, devaient s'appliquer seulement aux Indiens hors des réserves.

De plus, si la portée de l'article était ainsi restreinte, il ne servirait pas à atteindre son but. Les arrêts qui ont précédé la convention, tels que *R. v. Martin*, précité, avaient décidé que les lois provinciales d'application générale qui ne se rapportaient pas aux Indiens en tant qu'Indiens leur seraient applicables. D'après leurs faits, ces espèces concernaient des Indiens hors des réserves. Ce à quoi je veux en venir, c'est que les dispositions de l'art. 12 n'étaient pas essentielles pour que les lois provinciales en matière de chasse et pêche s'appliquent aux Indiens hors des réserves.

In my opinion, the meaning of s. 12 is that Canada, clothed as it was with legislative jurisdiction over "Indians, and Lands reserved for the Indians", in order to achieve the purpose of the section, agreed to the imposition of Provincial controls over hunting and fishing, which, previously, the Province might not have had power to impose. By its express wording, it provides that the game laws of the Province shall apply "to the Indians within the boundaries thereof". To me this must contemplate their application to all Indians within the Province, without restriction as to where, within the Province, they might be.

This view is supported by an examination of the state of the law, in Alberta, at the time the Agreement was made. At that time, s. 69 of the *Indian Act*, R.S.C. 1927, c. 98, provided as follows:

> **69.** The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient.

The Superintendent General was thus empowered to declare that Alberta laws respecting game should apply to "Indians within the said province" or "in such parts thereof as to him seems expedient". Being a provision of the *Indian Act*, the section must have contemplated the possible exercise of the power with respect to Indians on Reserves when it spoke of "Indians within the said province".

When s. 12 was drafted, it stated its general purpose and then went on to provide that the game laws of the Province should apply "to Indians within the boundaries thereof". This is practically the same as the words "Indians within the said province" in s. 69, and, in my opinion, it was intended to have the same meaning and application.

A mon avis, l'art. 12 signifie que le Canada, dont la compétence législative s'étendait aux «Indiens et aux terres réservées aux Indiens», afin d'atteindre le but de l'article, a accepté l'imposition de règles provinciales sur la chasse et la pêche que la province n'aurait pas eu le pouvoir d'imposer antérieurement. En termes exprès, il prévoit que les lois provinciales en matière de chasse et pêche doivent s'appliquer «aux Indiens dans les limites de la province». A mon avis, il faut en déduire qu'elles s'appliquent à tous les Indiens dans la province, où qu'ils se trouvent dans la province.

Ce point de vue s'appuie sur une étude de l'état du droit en Alberta, à l'époque où la convention a été conclue. A ce moment-là, l'art. 69 de la *Loi des Indiens*, c. 98, S.R.C. 1927, prévoyait ce qui suit:

> **69.** Le surintendant général peut, de temps en temps, par voie d'avis public, déclarer qu'à dater d'un jour que l'avis indique, les lois en vigueur dans les provinces du Manitoba, de la Saskatchewan ou de l'Alberta, ou dans les Territoires, concernant la chasse ou concernant telle espèce de gibier qui est désigné dans cet avis, sont applicables, à l'égard des Indiens dans ces provinces ou dans ces Territoires, selon le cas, ou dans celles de leurs régions où l'application lui en semble opportune.

Le surintendant général avait donc le pouvoir de déclarer que les lois de l'Alberta concernant la chasse devaient s'appliquer à l'égard «des Indiens dans cette province» ou «dans celles de ses régions où l'application lui en semble opportune». Puisqu'il s'agit d'une disposition de la *Loi sur les Indiens*, l'article a dû prévoir l'exercice possible de ce pouvoir à l'égard des Indiens dans les réserves quand il a parlé des «Indiens dans ces provinces».

Quand l'art. 12 a été rédigé, il énonçait d'abord son but général et il prévoyait ensuite que les lois de la province en matière de chasse et pêche devaient s'appliquer aux «Indiens dans les limites de la province». Il s'agit pratiquement de la même expression que l'expression «Indiens dans ces provinces» contenue dans

Section 69 ceased to have any effect in Alberta, Saskatchewan and Manitoba after the enactment of the *British North America Act, 1930*, which gave the agreements therein mentioned the force of law, notwithstanding anything in the *British North America Act, 1867*, or any amendments to it, or any Act of the Parliament of Canada. Section 69 disappeared from the *Indian Act* enacted in 1951, c. 29, S.C. 1951, which then introduced s. 87 (now s. 88) to which reference will be made later, and which provided:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The appellant places emphasis on the words in the proviso to s. 12 of the Agreement "on any other lands to which the said Indians may have a right of access". The contention is that s. 10 provided for continuance of the vesting of title in Indian Reserves in the Federal Crown, as well as for the creation of additional Reserves, and that, in these lands, the Indians who reside thereon have an interest considerably greater than a mere "right of access". The use of that phrase, it is submitted, is inconsistent with any reference to Reserve lands, and therefore, as the proviso, by the terms used, does not apply to Indian Reserves, the section, as a whole, must be taken not to have application to them.

I am unable to agree that the broad terms used in the first portion of s. 12 can be limited, inferentially, in this way. In my view, having made all Indians within the boundaries of the Province, in their own interest, subject to Provincial game laws, the proviso, by which the

l'art. 69, et, à mon avis, on avait l'intention de lui donner le même sens et la même application.

L'article 69 a cessé d'être en vigueur en Alberta, en Saskatchewan et au Manitoba après l'adoption de l'*Acte de l'Amérique du Nord britannique, 1930*, qui a donné force de loi aux conventions qui y étaient mentionnées nonobstant toute disposition de l'*Acte de l'Amérique du Nord britannique, 1867*, ou modification s'y rapportant, ou toute loi du Parlement du Canada. L'article 69 a disparu de la *Loi sur les Indiens* adoptée en 1951, c. 29, S.C. 1951, laquelle introduisait l'art. 87 (maintenant l'art. 88) mentionné plus loin qui prévoyait:

> Sous réserve des dispositions de quelque traité et de quelque autre loi du Parlement du Canada, toutes lois d'application générale et en vigueur, à l'occasion, dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où lesdites lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou statut administratif établi sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou y ressortissant.

L'appelant insiste sur les termes suivants qui se trouvent dans la réserve de l'art. 12 de la convention: «sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès». On prétend que l'art. 10 prévoit que les réserves indiennes continuent d'appartenir à la Couronne fédérale et qu'il prévoit aussi la création d'autres réserves, et que, sur ces terres, les Indiens résidants ont un droit de beaucoup supérieur à un simple «droit d'accès». L'emploi de cette expression, prétend-on, est incompatible avec toute mention de terres de réserves, et par conséquent, puisque la réserve, selon les termes employés, ne s'applique pas aux réserves indiennes, il faut en déduire que l'article, dans son ensemble, ne leur est pas applicable.

Je ne puis accepter que la portée des termes larges employés dans la première partie de l'art. 12 puisse, par déduction, être restreinte de cette façon. A mon avis, ayant eu pour effet d'assujettir, dans leur propre intérêt, tous les Indiens dans les limites de la province aux lois provin-

Province assured the defined rights of hunting and fishing for food, was drawn in broad terms. The proviso assures the right to hunt and fish for food on Indian Reserves, because there can be no doubt that, whatever additional rights Indian residents on a Reserve may have, they certainly have the right of access to it. This view was expressed by the Saskatchewan Court of Appeal in the *Smith* case to which reference has already been made.

For these reasons, I am of the opinion that s. 12 of the Agreement made the provisions of the *Wildlife Act* applicable to all Indians, including those on Reserves, and governed their activities throughout the Province, including Reserves. By virtue of s. 1 of the *British North America Act, 1930*, it has the force of law, notwithstanding anything contained in the *British North America Act, 1867*, any amendment thereto, or any Federal statute.

Having reached this conclusion, it is not necessary, in the circumstances of this case, to determine the meaning and effect of s. 88 (formerly s. 87) of the *Indian Act*, R.S.C. 1970, c. I-6.

I would dismiss the appeal.

The judgment of Hall, Spence and Laskin JJ. was delivered by

LASKIN J. (*dissenting*)—This appeal raises, for the first time in this Court, the question whether provincial game laws apply to a Treaty Indian on an Indian Reserve so as to make him liable to their penalties for engaging on the Reserve in activities prohibited by the provincial legislation. Although the issue in this case involves Alberta legislation, and hence requires a consideration of the Natural Resources Agreement between Canada and Alberta, as approved respectively by 1930 (Can.), c. 3 and 1930 (Alta.), c. 21 and confirmed by the *British North America Act*, 1930 (U.K.), c. 26, it eddies out to sister western Provinces which have like agree-

ciales en matière de chasse et pêche, la réserve par laquelle la province a assuré les droits précis de chasser et de pêcher pour se nourrir, a été rédigée en termes larges. La réserve de l'article assure le droit de chasser et de pêcher pour se nourrir dans les réserves indiennes, car il ne fait aucun doute que, quels que soient les droits additionnels que les Indiens résidant dans une réserve puissent avoir, ils y ont certainement droit d'accès. Ce point de vue a été exprimé par la Cour d'appel de la Saskatchewan dans l'arrêt *Smith* déjà mentionné.

Pour ces motifs, je suis d'avis que l'art. 12 de la convention a eu pour effet de rendre les dispositions de la loi dite *The Wildlife Act* applicables à tous les Indiens, y compris ceux qui se trouvent dans les réserves, et de régir leurs activités dans toute la province, y compris dans les réserves. En vertu de l'art. 1 de l'*Acte de l'Amérique du Nord britannique, 1930*, il a force de loi, nonobstant toute disposition de l'*Acte de l'Amérique du Nord britannique, 1867*, modification s'y rapportant, ou toute loi fédérale.

Vu la conclusion que j'ai tirée, il n'est pas nécessaire, dans les circonstances de l'espèce, de déterminer le sens et l'effet de l'art. 88 (anciennement l'art. 87) de la *Loi sur les Indiens*, c. I-6, S.R.C. 1970.

Je suis d'avis de rejeter l'appel.

Le jugement des Juges Hall, Spence et Laskin a été rendu par

LE JUGE LASKIN (*dissident*)—Cet appel soulève pour la première fois devant cette Cour la question de savoir si les lois provinciales sur la conservation de la faune s'appliquent à un Indien visé par les traités dans une réserve indienne, de telle sorte que celui-ci devient passible des sanctions pénales prévues par ces lois lorsqu'il se livre dans la réserve à des activités interdites par la législation provinciale. Bien que dans la présente affaire la question en litige intéresse directement les lois de l'Alberta, et exige par conséquent que l'on considère la convention sur les ressources naturelles passée entre le gouvernement du Canada et le gouver-

ments with Canada and, in my opinion, is of equal import to Treaty Indians living on Reserves in Provinces east of Manitoba.

The Alberta Natural Resources Agreement is part of the constitutional order under which Canada and its respective Provinces exist, and the question arises whether and to what extent it affects and is affected by the distribution of legislative power under ss. 91 and 92 of the *British North America Act*. The issue in the present case engages, therefore, not only the relevant terms of the Alberta Natural Resources Agreement but also the exclusive federal power under s. 91(24) in relation to "Indians, and lands reserved for the Indians". In my opinion, there are parallel questions here of the extent, if any, to which provincial game laws may apply to Indians on a Reserve either in the face of the Alberta Natural Resources Agreement (or the Manitoba Natural Resources Agreement or the Saskatchewan Natural Resources Agreement, which have like provisions on the matter in issue) or in the face of unexercised federal legislative power under s. 91(24). In this latter respect, I repeat time-tested words from *Union Colliery Co. v. Bryden*[17], which express what is now a constitutional axiom:

[17] [1899] A.C. 580 at 588.

nement de la province de l'Alberta, telle qu'elle a été approuvée par, respectivement, 1930 (Canada), c. 3, et 1930 (Alberta), c. 21, et confirmée par l'*Acte de l'Amérique du Nord britannique*, 1930 (Royaume-Uni), chapitre 26, cette question intéresse indirectement les provinces soeurs de l'Ouest qui ont passé des conventions analogues avec le gouvernement du Canada et, à mon avis, elle est tout aussi importante pour les Indiens visés par les traités vivant dans des réserves situées dans les provinces à l'est du Manitoba.

La convention sur les ressources naturelles de l'Alberta fait partie intégrante de l'ordre constitutionnel sur lequel repose l'existence du Canada et de ses provinces, et il s'agit de savoir si cette convention touche à la répartition du pouvoir législatif prévue par les articles 91 et 92 de l'*Acte de l'Amérique du Nord britannique* et est touchée par elle, et dans quelle mesure. Ce que met en jeu, par conséquent, la question en litige dans la présente affaire, c'est non seulement les dispositions pertinentes de la convention sur les ressources naturelles de l'Alberta, mais également le pouvoir exclusif du parlement fédéral de légiférer en vertu du par. (24) de l'art. 91 à l'égard des «Indiens et des terres réservées pour les Indiens». A mon avis, il y a des questions parallèles ici qui sont de savoir dans quelle mesure, le cas échéant, les lois provinciales sur la conservation de la faune peuvent s'appliquer aux Indiens d'une réserve soit en regard de la convention sur les ressources naturelles de l'Alberta (ou de la convention sur les ressources naturelles du Manitoba, ou encore de la convention sur les ressources naturelles de la Saskatchewan, qui contiennent des dispositions semblables sur la matière du présent litige) soit en regard du pouvoir législatif non exercé du fédéral sous le régime de l'art. 91, par. (24). Sous ce dernier rapport, j'emprunte à l'arrêt *Union Colliery Co. v. Bryden*[17] ces termes consacrés qui expriment ce qui est devenu un axiome du droit constitutionnel:

[17] [1899] A.C. 580 à 588.

The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

There is a subsidiary question that arises here if it be held that the relevant provincial statute, the *Wildlife Act*, 1970 (Alta.), c. 113 (now R.S.A. 1970, c. 391), applies to Indians on a Reserve under the Alberta Natural Resources Agreement. That question is whether, in that event, it is excluded or overborne by the provisions of the *Indian Act*, R.S.C. 1970, c. I-6, and especially ss. 73, 81 and 88 thereof.

One of the preambles to the Alberta Natural Resources Agreement (and similarly in the Saskatchewan Natural Resources Agreement and as well, albeit in a somewhat different context, in the Manitoba Natural Resources Agreement) provides that "it is desirable that the Province should be placed in a position of equality with the other Provinces of Confederation with respect to the administration and control of its natural resources as from its entrance into Confederation in 1905".

The provisions of the Agreement which directly raise the question for decision in this case are ss. 10 and 12 which read, respectively, as follows:

10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

[TRADUCTION] Le fait que le parlement fédéral s'abstient de légiférer dans la plénitude de ses pouvoirs ne saurait avoir pour effet de transférer à une législature provinciale le pouvoir législatif conféré au Dominion par l'article 91 de l'acte de 1867.

Une question complémentaire se pose ici si on décide que la loi provinciale pertinente, le *Wildlife Act*, 1970 (Alberta), c. 113 (maintenant R.S.A. 1970, c. 391), s'applique à des Indiens dans une réserve sous le régime de la convention sur les ressources naturelles de l'Alberta. Cette question consiste à savoir si, dans ce cas, cette loi provinciale est exclue ou écartée par les dispositions de la *Loi sur les Indiens*, S.R.C. 1970, c. I-6, en particulier ses articles 73, 81 et 88.

L'un des attendus de la convention sur les ressources naturelles de l'Alberta (de même que de la convention sur les ressources naturelles de la Saskatchewan et également, quoique dans un contexte différent, de la convention sur les ressources naturelles du Manitoba) prévoit qu'«il est avantageux que la province soit traitée à l'égal des autres provinces de la Confédération quant à l'administration et au contrôle de ses ressources naturelles, à dater de son entrée dans la Confédération en 1905».

Les clauses de la convention qui soulèvent directement la question à décider dans la présente affaire sont les articles 10 et 12 qui s'énoncent, respectivement, comme suit:

10. Toutes les terres faisant partie des réserves indiennes situées dans la province, y compris celles qui ont été choisies et dont on a mesuré la superficie, mais qui n'ont pas encore fait l'objet d'une ratification, ainsi que celles qui en ont été l'objet, continuent d'appartenir à la Couronne et d'être administrées par le gouvernement du Canada pour les fins du Canada, et, à la demande du surintendant général des Affaires Indiennes, la province réservera, au besoin, à même les terres de la Couronne inoccupées et par les présentes transférées à son administration, les autres étendues que ledit surintendant général peut, d'accord avec le ministre approprié de la province, choisir comme étant nécessaires pour permettre au Canada de remplir ses obligations en vertu des traités avec les Indiens de la province, et ces étendues seront dans la suite administrées par le Canada de la même manière

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

There are several other sections of the Alberta Natural Resources Agreement which are worth reproducing as indicators of its purpose to put Alberta in a position of equality with other Provinces respecting administration and control of its natural resources. They are ss. 14, 15 and 18 which are, in their material terms, in these words:

14. The parks mentioned in the schedule hereto shall continue as national parks and the lands included therein, as the same are described in the orders in council in the said schedule referred to (except such of the said lands as may be hereafter excluded therefrom), together with the mines and minerals (precious and base) in each of the said parks and the royalties incident thereto, shall continue to be vested in and administered by the Government of Canada as national parks, but in the event of the Parliament of Canada at any time declaring that the said lands or any part thereof are no longer required for park purposes, the lands, mines, minerals (precious and base) and the royalties incident thereto, specified in any such declaration, shall forthwith upon the making thereof belong to the Province, and the provisions of paragraph three of this agreement shall apply thereto as from the date of such declaration.

15. The Parliament of Canada shall have exclusive legislative jurisdiction within the whole area included within the outer boundaries of each of the said parks notwithstanding that portions of such area may not form part of the park proper; the laws now in force within the said area shall continue in force only until changed by the Parliament of Canada or under its authority, provided, however, that all laws of the

à tous égards que si elles n'étaient jamais passées à la province en vertu des dispositions des présentes.

12. Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

Plusieurs autres articles de la convention sur les ressources naturelles de l'Alberta méritent d'être reproduits car ils témoignent de l'intention, dans cette convention-là, de placer l'Alberta dans une situation d'égalité avec les autres provinces en ce qui touche l'administration et le contrôle de ses ressources naturelles. Il s'agit des articles 14, 15 et 18 qui, en leurs termes matériels, sont ainsi libellés:

14. Les parcs nationaux à l'annexe des présentes demeureront parcs nationaux, et les terres y comprises, ainsi qu'elles sont décrites dans les arrêtés en conseil énoncés dans ladite annexe (sauf celles desdites terres qui peuvent ensuite en être exclues), ainsi que les mines et minéraux (précieux et vils) qui se trouvent dans chacun desdits parcs, de même que les redevances y afférentes, continueront d'appartenir au gouvernement du Canada et d'être administrées par lui à titre de parcs nationaux; mais, advenant le cas où le Parlement du Canada déclarerait, à quelque époque que ce soit, que lesdites terres ou une de leurs parties ne sont plus requises comme parcs, les terres, mines, minéraux (précieux et vils) et les redevances y afférentes, mentionnés dans cette déclaration, appartiendront immédiatement de ce chef à la province, et les dispositions du troisième paragraphe de la présente convention s'y appliqueront à compter de la date de cette déclaration.

15. Le Parlement du Canada possédera une juridiction législative exclusive dans toute la zone comprise dans les limites extérieures de chacun desdits parcs, nonobstant le fait que des portions de cette zone puissent ne pas faire partie du parc lui-même; les lois actuellement en vigueur dans ladite zone continueront de l'être à moins qu'elles ne soient changées par le Parlement du Canada ou sous son autorité; cepen-

Province now or hereafter in force, which are not repugnant to any law or regulation made applicable within the said area by or under the authority of the Parliament of Canada, shall extend to and be enforceable within the same, and that all general taxing acts passed by the Province shall apply within the same unless expressly excluded from application therein by or under the authority of the Parliament of Canada.

18. Except as herein otherwise expressly provided, nothing in this agreement shall be interpreted as applying so as to affect or transfer to the administration of the Province (a) any lands for which Crown grants have been made and registered under the *Land Titles Act* of the Province and of which His Majesty the King in the right of His Dominion of Canada is, or is entitled to become the registered owner at the date upon which the agreement comes into force, or (b) any ungranted lands of the Crown upon which public money of Canada has been expended or which are, at the date upon which this agreement comes into force, in use or reserved by Canada for the purpose of the federal administration.

dant, toutes les lois de la province actuellement en vigueur ou qui le deviendront et qui ne répugnent à aucune loi ou à aucun règlement dont l'application dans ladite zone a été décrétée par ou sous l'autorité du Parlement du Canada s'étendront à ladite zone et y seront exécutoires, et toutes les lois générales d'impôt adoptées par la province s'y appliqueront à moins que leur application n'en soit expressément exclue par ou sous l'autorité du Parlement du Canada.

18. Sauf dispositions expressément contraires des présentes, rien dans la présente convention ne doit s'interpréter comme s'appliquant de manière à affecter ou à transférer à l'administration de la province *a*) des terres pour lesquelles des concessions de la Couronne ont été faites et enregistrées en vertu du *Land Titles Act* de la province et dont Sa Majesté le Roi pour le compte de son Dominion du Canada est le propriétaire enregistré ou a le droit de le devenir à la date de l'entrée en vigueur de la présente convention, ou *b*) des terres non concédées de la Couronne pour lesquelles des deniers publics du Canada ont été dépensés ou qui sont, à la date de l'entrée en vigueur de la présente convention, en usage ou réservées par le Canada pour les fins de l'administration fédérale.

The accused in this case, who is a Treaty Indian, was charged with unlawful trafficking on his Reserve in big game (he sold a piece of moose meat to a provincial game law officer) contrary to s. 37 of the *Wildlife Act*. It is uncontested that what he did was, in fact and in law, within the prohibitions of that Act. The Act establishes a system of control over wildlife in Alberta by regulatory licensing and prohibitions to which all persons in Alberta are *ex facie* subject. Neither Indians nor Indian Reserves are mentioned in the Act. In its generality, it extends to them but, as in other situations where generally expressed provincial legislation must be construed to meet the limitations on provincial authority because of exclusive federal competence or because of precluding or supervening federal legislation, the inquiry is whether the *ex facie* scope of the Act must be restricted in recognition of federal power, whether unexercised or exercised.

L'accusé dans la présente affaire, qui est un Indien visé par les traités, a été accusé de commerce illégal du gros gibier sur sa réserve (il a vendu une pièce de viande d'orignal à un garde-chasse provincial) en violation de l'art. 37 de la loi dite *Wildlife Act*. Il n'est pas contesté qu'il ait commis, en fait et en droit, un acte visé par les interdictions de cette loi. Celle-ci établit un mode de contrôle de la faune de l'Alberta au moyen de règlements prévoyant des permis et interdictions de chasse auxquelles sont soumises *ex facie* toutes les personnes en Alberta. Cette loi ne parle ni d'Indiens ni de réserves indiennes. Dans sa généralité, elle s'étend à eux mais, comme dans d'autres cas où une loi provinciale énoncée de manière générale doit être interprétée de façon à tenir compte des limitations imposées à l'autorité provinciale en raison d'une compétence fédérale exclusive ou en raison d'une loi fédérale exclusive ou interposée, la question qui se pose est de savoir si le domaine d'application *ex facie* de la loi doit être limité de façon à tenir compte du pouvoir fédéral, que celui-ci ait été exercé ou non.

I propose to deal first with the effect of s. 91(24) upon the reach of provincial game laws. Apart entirely from the exclusive power vested in the Parliament of Canada to legislate in relation to Indians, its exclusive power in relation also to Indian Reserves puts such tracts of land, albeit they are physically in a Province, beyond provincial competence to regulate their use or to control resources thereon. This is not because of any title vested in the Parliament of Canada or in the Crown in right of Canada, but because regardless of ultimate title, it is only Parliament that may legislate in relation to Reserves once they have been recognized or set aside as such. The issue of title to Indian lands, whether the loosely defined lands referred to in the Royal Proclamation of 1763 or the more precisely defined tracts known as Indian Reserves, was considered by the Privy Council in *St. Catherines Milling and Lumber Co. v. The Queen*[18]. The present case involves a Reserve in the special sense of lands expressly set aside as such, and it was the result of the *St. Catherines Milling* case that where such lands are within the limits of a Province, it is only when they are surrendered to the Crown that the full proprietary interest of the Province may be asserted, and that they then become subject to its control and disposition: see also *Ontario Mining Co. v. Seybold*[19].

However, as was noted in *Attorney-General of Canada v. Giroux*[20], in the reasons of Duff J., with whom Anglin J. concurred, there may be Indian title in a Reserve beyond the mere personal and usufructuary interest found to exist in the *St. Catherines Milling* case. Indians may have the beneficial ownership which is held for

[18] (1889), 14 App. Cas. 46.
[19] [1903] A.C. 73.
[20] (1916), 53 S.C.R. 172, 30 D.L.R. 123.

Je me propose d'examiner d'abord l'effet de l'article 91, par. (24), quant à la portée des lois provinciales sur la conservation de la faune. Indépendamment du pouvoir exclusif dont le Parlement du Canada est investi pour faire des lois relatives aux Indiens, le pouvoir exclusif qu'il possède également en ce qui concerne les réserves indiennes place de telles étendues de terre, bien qu'elles soient physiquement comprises dans les limites intérieures d'une province, en dehors de la compétence provinciale lorsqu'il s'agit de réglementer leur usage ou de contrôler les ressources qui s'y trouvent. Cela n'est pas dû à un droit de propriété quelconque dont le Parlement du Canada ou la Couronne du chef du Canada se trouvent investis, mais au fait que, quel que soit le droit en cause, c'est seulement le Parlement qui peut faire des lois concernant les réserves une fois que celles-ci ont été reconnues ou réservées comme telles. La question du droit de propriété concernant les terres indiennes, qu'il s'agisse des terres mal définies dont la Proclamation royale de 1763 fait état, ou des étendues plus précisément définies que l'on appelle réserves indiennes, a été examiné par le Conseil privé dans l'affaire *St. Catherines Milling and Lumber Co. v. The Queen*[18]. Dans la présente affaire, il s'agit d'une réserve dans le sens spécial de terres expressément réservées comme telles, et dans l'affaire *St. Catherines Milling* on a conclu que lorsque de telles terres sont dans les limites d'une province, ce n'est que lorsqu'elles sont cédées à la Couronne que la province peut revendiquer son plein droit de propriété et y exercer alors son autorité et en avoir la disposition: voir également *Ontario Mining Co. v. Seybold*[19].

Cependant, ainsi qu'on l'a souligné dans l'affaire *Procureur Général du Canada c. Giroux*[20], motifs du juge Duff, auxquels le Juge Anglin a souscrit, peut exister dans une réserve un titre indien qui soit davantage que le simple droit personnel et d'usufruit dont l'existence a été reconnue dans l'affaire *St. Catherines Milling*.

[18] (1889), 14 App. Cas. 46.
[19] [1903] A.C. 73.
[20] (1916), 53 R.C.S. 172, 30 D.L.R. 123.

them in trust, and if that be so the legislative authority of Parliament under s. 91(24) would remain upon the surrender of the Reserve land to the Crown to permit it to effectuate the trust. Surrender would not, in such a case, be to the Crown in right of the Province, as it was in the *St. Catherines Milling* case where the land in question was unaffected by any trust in favour of the Indians. In any event, as was pointed out by this Court in *Reference re Saskatchewan Natural Resources*[21], "a distinction [is] recognized between legislative powers and proprietary rights, and the Crown may, for one purpose, be represented by the Dominion and, for the other purpose, by a Province, as in the case of Inland Fisheries or Indian lands".

Where land in a Province is, as in the present case, an admitted Indian Reserve, its administration and the law applicable thereto, so far at least as Indians thereon are concerned, depend on federal legislation. Indian Reserves are enclaves which, so long as they exist as Reserves, are withdrawn from provincial regulatory power. If provincial legislation is applicable at all, it is only by referential incorporation through adoption by the Parliament of Canada. This is seen in the *Indian Act*, with which I will deal later in these reasons.

The significance of the allocation of exclusive legislative power to Parliament in relation to Indian Reserves merits emphasis in terms of the kind of enclave that a Reserve is. It is a social and economic community unit, with its own political structure as well according to the prescriptions of the *Indian Act*. The underlying title (that is, upon surrender) may well be in the Province, but during its existence as such a Reserve, in my opinion, is no more subject to provincial legislation than is federal Crown

[21] [1931] S.C.R. 263 at 275, [1931] 1 D.L.R. 865.

Les Indiens peuvent avoir la propriété réelle qui est détenue pour eux en fiducie, et s'il en est ainsi l'autorité législative du Parlement prévue à l'art. 91, par. (24) demeure après la cession de la terre de réserve à la Couronne pour lui permettre de donner suite à la fiducie. La cession ne serait pas, dans un tel cas, à la Couronne du chef de la province, comme elle l'avait été dans l'affaire *St. Catherines Milling* où la terre en cause n'avait fait l'objet d'aucune fiducie en faveur des Indiens. En tout état de cause, comme cette Cour l'a souligné dans *Reference re Saskatchewan Natural Resources*[21], (traduction) «une distinction [est] reconnue entre les pouvoirs législatifs et les droits de propriété, et la Couronne peut, à une fin, être représentée par le Dominion et, à l'autre fin, par la province, comme dans le cas des pêcheries dans les eaux intérieures ou dans celui des terres indiennes».

Lorsque dans une province il existe une terre qui, comme dans la présente affaire, constitue une réserve indienne reconnue, son administration et la loi qui y est applicable, du moins en ce qui concerne les Indiens vivant sur cette terre, sont du domaine fédéral. Les réserves indiennes constituent des enclaves qui, aussi longtemps qu'elles existent en tant que réserves, sont soustraites au pouvoir de réglementation provincial. Si tant est que les lois provinciales sont applicables, elles ne le sont que par une incorporation par renvoi adoptée par le Parlement du Canada. C'est ce que l'on peut constater dans la *Loi sur les Indiens*, que j'examinerai plus tard dans les présents motifs.

Il importe de souligner l'importance de l'attribution au Parlement d'un pouvoir législatif exclusif en ce qui concerne les réserves indiennes, si l'on tient compte du genre d'enclave que constitue une réserve. Elle constitue une collectivité sociale et économique, qui possède également sa propre structure politique suivant les dispositions de la *Loi sur les Indiens*. Le droit de propriété sous-jacent (c'est-à-dire, lors d'une cession) peut bien appartenir à la province, mais une réserve, tant qu'elle existe en tant que telle

[21] [1931] R.C.S. 263 à 275, [1931] 1 D.L.R. 865.

property; and it is no more subject to provincial regulatory authority than is any other enterprise falling within exclusive federal competence.

I do not wish to overdraw analogies. It would strike me as quite strange, however, that when provincial competence is denied in relation to land held by the Crown in right of Canada (see *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*[22]), or in relation to land upon which a federal service is operated (see *Reference re Saskatchewan Minimum Wage Act*[23]), or in relation to land integral to the operation of a private enterprise that is within exclusive federal competence (see *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*[24]), there should be any doubt about the want of provincial competence in relation to lands that are within s. 91(24). There is, in my opinion, nothing in such cases as *C.P.R. v. Notre Dame de Bonsecours*[25] that shake this view since that case dealt with the application of provincial legislation to a railway within federal jurisdiction in a matter not integral to its operation.

Nor need I in this case consider whether, in the absence of federal legislation, provincial legislation touching the personal status and relationships of persons on a Reserve, as for example, respecting marriage or custody or adoption of children, is validly applicable; or, similarly, whether provincial commercial law would apply, absent federal legislation. The present case concerns the regulation and administration of the resources of land comprised in a Reserve, and I can conceive of nothing more integral to that land as such. If the federal power given by s. 91(24) does not preclude the application of

[22] [1933] S.C.R. 629 at 643, [1933] 4 D.L.R. 545.
[23] [1948] S.C.R. 248 at 253, 91 C.C.C. 366, [1948] 3 D.L.R. 801.
[24] [1954] S.C.R. 207, [1954] 3 D.L.R. 481.
[25] [1899] A.C. 367.

n'est, à mon avis, pas plus soumise à la législation provinciale que l'est un bien de la Couronne fédérale; et elle n'est pas plus soumise à l'autorité réglementaire provinciale que l'est toute autre entreprise relevant d'une compétence fédérale exclusive.

Je ne veux pas aller trop loin dans les comparaisons. Cependant, je trouverais vraiment étrange qu'alors que la compétence provinciale est niée relativement à une terre détenue par la Couronne du chef du Canada (voir *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board*[22]), ou relativement à une terre sur laquelle fonctionne un service fédéral (voir *Reference re Saskatchewan Minimum Wage Act*[23]), ou relativement à une terre faisant partie intégrante de l'exploitation d'une entreprise privée qui relève d'une compétence fédérale exclusive (voir *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*[24]), on puisse avoir un doute quelconque sur le manque de compétence provinciale concernant des terres qui relèvent de l'article 91, par. (24). A mon avis, on ne trouve rien dans des affaires telles que *C.P.R. v. Notre Dame de Bonsecours*[25] qui ébranle cette opinion étant donné que dans cette affaire-là il s'agissait de l'application d'une loi provinciale à un chemin de fer de juridiction fédérale quant à un objet qui ne faisait pas partie intégrante de son exploitation.

Il n'est pas nécessaire, non plus, que j'examine dans la présente affaire si, en l'absence d'une législation fédérale, la législation provinciale concernant le statut personnel et les liens de parenté de personnes vivant dans une réserve, notamment en ce qui a trait au mariage ou à la garde ou à l'adoption d'enfants, s'appliquerait valablement; ou, de même, si le droit commercial provincial s'appliquerait en l'absence d'une législation fédérale. La présente affaire porte sur la réglementation et l'administration des ressources de terres comprises dans une réserve, et je ne puis imaginer rien qui fasse

[22] [1933] R.C.S. 629 à 643, [1933] 4 D.L.R. 545.
[23] [1948] R.C.S. 248 à 253, 91 C.C.C. 366, [1948] 3 D.L.R. 801.
[24] [1954] R.C.S. 207, [1954] 3 D.L.R. 481.
[25] [1899] A.C. 367.

such provincial legislation to Indian Reserves, the power will have lost the exclusiveness which is ordained by the Constitution.

I think it is important here, no less than in relation to other heads of federal power, to scotch any notion that s. 91(24) exists by subtraction from some larger head of provincial authority, e.g. property and civil rights in the Province, and hence is of limited scope, leaving an area of competence to the Province where there has been no federal legislation. My brother Judson dealt with this very point in another context in *Nykorak v. Attorney-General of Canada*[26].

Since federal power in relation to "lands reserved for the Indians" is independent and exclusive, its content must embrace administrative control and regulatory authority over Indian Reserves. Hence, not only provincial game laws but other provincial regulatory legislation can have no application, of its own force, to such Reserves, at least where it is sought to subject Indians thereon to such legislation. The Manitoba Court of Appeal held in *Rex v. Rogers*[27] that the provincial *Game Protection Act* could not apply on an Indian Reserve. The context of this holding is important because the accused was a non-Indian who took in payment of goods, bought from him off the Reserve by a Treaty Indian, the skin of a mink which had been trapped by the Indian on his Reserve. The pertinent question in that case, whether the Indian was a trapper within the provincial Act, was answered in the negative on the principle that provincial legislation could not apply to land over which the Province has no jurisdiction. In a more recent decision the British Columbia Court of Appeal held that municipal by-laws enacted under the provincial *Health Act* did not apply to an Indian Reserve, even in relation to a

[26] [1962] S.C.R. 331 at 335, 37 W.W.R. 660, 33 D.L.R. (2d) 373.

[27] [1923] 3 D.L.R. 414, [1923] 2 W.W.R. 353, 40 C.C.C. 51.

davantage partie intégrante de ces terres en tant que telles. Si le pouvoir fédéral prévu par l'article 91, par. (24) n'écarte pas l'application aux réserves indiennes d'une telle législation provinciale, ce pouvoir a perdu le caractère exclusif que prescrit la constitution.

Je pense qu'il est important ici, non moins que lorsqu'il s'agit d'autres catégories énumérées de pouvoirs fédéraux, d'écarter toute notion selon laquelle l'art. 91, par. (24) existe en vertu d'un retranchement opéré sur une catégorie énumérée plus vaste de pouvoirs provinciaux, par exemple, la propriété et les droits civils dans la province, et est donc de portée limitée, laissant un champ de compétence à la province là où il n'existe pas de législation fédérale. Mon collègue Judson a traité de ce même sujet, dans un autre contexte, dans *Nykorak c. Le procureur général du Canada*[26].

Étant donné que le pouvoir fédéral relatif aux «terres réservées pour les Indiens» est un pouvoir indépendant et exclusif, il doit englober le contrôle administratif et le pouvoir de réglementation sur les réserves indiennes. Par conséquent, non seulement les lois provinciales sur la conservation de la faune mais les autres lois provinciales de caractère réglementaire ne peuvent s'appliquer à de telles réserves du seul fait de leur mise en vigueur, du moins si l'on cherche à y assujettir les Indiens vivant dans ces réserves. La Cour d'appel du Manitoba a jugé dans *Rex v. Rodgers*[27], que la loi provinciale dite *Game Protection Act* ne pouvait pas s'appliquer sur une réserve indienne. Le contexte de cette décision est important parce que l'accusé était un non-Indien qui avait reçu en guise de paiement pour des marchandises qu'un Indien visé par des traités lui avaient achetées en dehors de la réserve, la peau d'un vison que l'Indien avait piégé dans sa réserve. La question pertinente dans cette affaire-là, qui était de savoir si l'Indien était un trappeur aux termes de la loi provinciale, a reçu une réponse négative, le principe étant que la législation provinciale ne pouvait pas s'appliquer à une terre sur laquelle

[26] [1962] R.C.S. 331 à 335, 37 W.W.R. 660, 33 D.L.R. (2d) 373.

[27] [1923] 3 D.L.R. 414, [1923] 2 W.W.R. 353, 40 C.C.C. 51.

non-Indian lessee: see *Surrey v. Peace Arch Enterprises*[28]. Although I need come to no conclusion in this case on the application of provincial legislation to non-Indians for actions or conduct on a Reserve, it appears to me that the decision in *Surrey v. Peace Arch Enterprises* undermines the majority judgment of the British Columbia Court of Appeal in *Rex v. Morley*[29], which held that provincial game laws applied to a non-Indian who shot game on a Reserve in a closed season.

A number of other cases may be mentioned on the question of the application of provincial laws to Indians on a Reserve. *Rex v. Hill*[30], an Ontario County Court judgment held that the provincial game and fisheries statute could not apply to an Indian, found on his Reserve in possession of two seine nets, so as to make him liable to a penalty for unlicensed possession. The Court followed *Rex v. Jim*[31], where Chief Justice Hunter of British Columbia held that the provincial game law did not apply to an Indian on a Reserve and hence the accused was not liable for killing a buck out of season in violation of the provincial statute. A different result on principle was reached by a Quebec Sessions Court judge in *Rex v. Groslouis*[32] when he convicted an Indian under a provincial tax statute for failing to have a provincial permit when selling goods to a non-Indian on the Reserve. I note, however, that the Court viewed the situation as one where the Indian accused, because

[28] (1970), 74 W.W.R. 380.

[29] [1932] 4 D.L.R. 483, 46 B.C.R. 28, [1932] 2 W.W.R. 193, 58 C.C.C. 166.

[30] (1951), 101 C.C.C. 343, 14 C.R. 266, [1951] O.W.N. 824.

[31] (1915), 26 C.C.C. 236, 22 B.C.R. 106.

[32] (1944), 81 C.C.C. 167, [1944] R.L. 12.

la province n'avait pas compétence. Dans une décision plus récente, la Cour d'appel de la Colombie-Britannique a jugé que les règlements municipaux édictés en vertu de la loi provinciale dite *Health Act* ne s'appliquaient pas à une réserve indienne, même dans le cas d'un locataire non-Indien: voir *Surrey v. Peace Arch Enterprises*[28]. Bien que dans la présente affaire je n'aie pas à conclure sur l'application d'une législation provinciale à des non-Indiens en raison d'actes ou de comportements dans une réserve, il me semble que la décision rendue dans *Surrey v. Peace Arch Enterprises* sape le jugement majoritaire prononcé par la Cour d'appel de la Colombie-Britannique dans *Rex v. Morley*[29] qui a conclu que les lois provinciales sur la conservation de la faune s'appliquaient à un non-Indien qui avait chassé du gibier sur une réserve pendant la période de prohibition.

On pourrait mentionner un certain nombre d'autres affaires sur la question de l'application de lois provinciales à des Indiens dans une réserve. Dans *Rex v. Hill*[30], jugement prononcé par une cour de comté de l'Ontario, on a conclu que la loi provinciale sur la chasse et la pêche ne pouvait pas s'appliquer à un Indien trouvé, dans sa réserve, en possession de deux filets de seine, de telle sorte qu'on puisse le rendre passible d'une pénalité pour possession non autorisée. La cour a adopté la décision rendue dans *Rex v. Jim*[31], dans laquelle le Juge en chef Hunter de la Colombie-Britannique avait conclu que la loi provinciale sur la conservation de la faune ne s'appliquait pas à un Indien vivant dans une réserve et que, de ce fait, l'accusé ne pouvait pas être trouvé coupable d'une infraction pour avoir tué un chevreuil pendant la période de prohibition, en violation de la loi provinciale. Dans *Rex v. Groslouis*[32], un juge de la Cour des Sessions du Québec a abouti à

[28] (1970), 74 W.W.R. 380.

[29] [1932] 4 D.L.R. 483, 46 B.C.R. 28, [1932] 2 W.W.R. 193, 58 C.C.C. 166.

[30] (1951), 101 C.C.C. 343, 14 C.R. 266, [1951] O.W.N. 824.

[31] (1915), 26 C.C.C. 236, 22 B.C.R. 106.

[32] (1944), 81 C.C.C. 167, [1944] R.L. 12.

he was a retail merchant who sold to a non-inhabitant of the Reserve, had, so to speak, gone outside the Reserve to effect the transaction. Another point made in that case, which goes to the issue of the exclusiveness of the federal power to which I have already alluded, was that the federal *Indian Act* did not cover the situation and hence provincial general law applied. In this aspect of the matter, the Quebec Court relied on the dissenting judge in *Rex v. Rodgers, supra*. This approach ignores the preclusive effect of s. 91(24).

une conclusion de principe différente en condamnant un Indien en vertu d'une loi fiscale provinciale pour vente de marchandises sans permis à un non-Indien dans la réserve. Je note, cependant, que la Cour a considéré qu'il s'agissait là d'une situation dans laquelle l'Indien accusé, étant un marchand au détail qui avait vendu à une personne n'habitant pas dans la réserve, se trouvait, pour ainsi dire, à être sorti de la réserve aux fins de l'opération commerciale. Dans cette affaire-là, un autre argument, qui touchait à la question, dont j'ai déjà parlé, du caractère exclusif du pouvoir fédéral, était que la *Loi sur les Indiens* fédérale ne visait pas la situation et que, par conséquent, la loi générale provinciale s'appliquait. Sur cet aspect de la question la cour québecoise s'est référée à l'opinion du juge dissident dans *Rex v. Rodgers*, précité. Cette façon de voir ne tient pas compte de l'effet d'exclusion de l'art. 91, par. (24).

I turn now to the Alberta Natural Resources Agreement which deals separately in its ss. 10 and 12 with Reserves and with unoccupied Crown lands and other lands to which Indians may have a right of access. The Alberta Appellate Division simply mentioned and then completely ignored s. 10 in its reasons in this case, dealing with it as if the only question was whether lands to which Indians had a right of access included Indian Reserves as not being dealt with elsewhere in the Agreement. Even in such a frame of reference, I would find it a hardy conclusion to subsume Indian Reserves within the phrase "any other lands to which the . . . Indians may have a right of access". It would mean federal adoption of provincial laws for Reserves without express mention and in a situation where there was already in existence a federal *Indian Act* which itself provided for a limited incorporation of provincial law to operate upon and in the Reserves.

Je passe maintenant à la convention sur les ressources naturelles de l'Alberta, qui traite séparément dans ses articles 10 et 12 des réserves et des terres inoccupées de la Couronne et autres terres auxquelles les Indiens peuvent avoir un droit d'accès. La Division d'appel de l'Alberta a simplement mentionné puis laissé de côté l'art. 10 dans ses motifs dans le présent litige, le traitant comme si la seule question était de savoir si des terres auxquelles les Indiens ont un droit d'accès comprenaient les réserves indiennes dans une convention muette quant à ces réserves. Même selon cette optique, je pense que subsumer réserves indiennes dans les mots «toutes les autres terres auxquelles les . . . Indiens peuvent avoir un droit d'accès» constituerait une conclusion audacieuse. Cela impliquerait une adoption dans les réserves par le pouvoir fédéral de lois provinciales, sans mention expresse et malgré l'existence d'une *Loi sur les Indiens* fédérale qui prévoit de son côté l'introduction limitée de certaines lois provinciales à appliquer sur et dans les réserves.

But the fact is that Indian Reserves were specifically dealt with in the Alberta Natural Resources Agreement as they were expressly dealt with in that of Manitoba and in that of

Mais le fait est que les réserves indiennes étaient expressément traitées dans la convention sur les ressources naturelles de l'Alberta, comme elles l'étaient également dans la conven-

Saskatchewan. The words used in the two sections which are directly of concern here are the same in respect of all three Provinces.

History, which is highly relevant here, denies the equation of Indian Reserves with lands to which Indians may have a right of access. Legal logic also denies the equation in a situation where they are separately dealt with as they are here and in the same document. To treat Indian Reserves as coming within the description of "lands to which Indians have a right of access", as did the Alberta Appellate Division, is to describe them in terms of their lowest rather than of their highest legal signification. Indians have at least a right of occupancy of Reserves, and this is a larger interest than a mere right of access which, as this Court held in *Prince and Myron v. The Queen*[33], may exist in privately-owned lands. I see no justification for enlarging the category of what I may call, for short, access lands beyond lands which strictly fall within that description and have no higher legal quality. It would be odd, for example, to find the kind of land considered in the *Giroux* case, referred to earlier in these reasons, as being aptly described as access lands; they would be that, of course, but much more besides.

Section 10 of the Alberta Natural Resources Agreement itself negates the view taken by the Court below. All Indian Reserves are to continue to be administered by the Government of Canada for the purposes of Canada; there is here no qualification to admit any provincial purpose. Moreover, any further Reserves that may be established from unoccupied Crown land transferred to the Province are to be administered by Canada in the same way in all respects as if they had never passed to the

[33] [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1.

tion relative au Manitoba et dans la convention relative à la Saskatchewan. Les termes utilisés dans les deux articles qui nous intéressent directement ici sont les mêmes pour les trois provinces.

L'histoire, qui est très pertinente ici, nie toute assimilation des réserves indiennes à des terres auxquelles les Indiens peuvent avoir un droit d'accès. La logique juridique également nie une telle assimilation dans une situation où elles sont traitées séparément, comme elles le sont ici, et dans le même document. Traiter les réserves indiennes comme tombant dans la description de «terres auxquelles les Indiens peuvent avoir un droit d'accès» ainsi que l'a fait la Cour d'appel de l'Alberta, revient à les décrire suivant leur sens juridique le plus faible plutôt que suivant leur sens juridique le plus fort. Les Indiens ont au moins un droit d'occupation des réserves, et ce droit constitue un intérêt plus grand qu'un simple droit d'accès qui, ainsi que cette Cour l'a conclu dans *Prince et Myron c. La Reine*[33], peut exister dans des terres appartenant à des particuliers. Je ne vois aucun motif de donner à la catégorie de terres que, en bref, j'appellerai terres d'accès une extension qui engloberait davantage que des terres qui répondent strictement à cette description et qui n'ont pas une qualité juridique plus élevée. Il serait singulier, par exemple, de conclure que le genre de terres dont il a été question dans l'affaire *Giroux*, mentionnée plus haut dans les présents motifs, puissent être justement définies comme étant des terres d'accès; elles le seraient certainement, bien entendu, mais elles seraient en outre bien davantage.

L'article 10 de la convention sur les ressources naturelles de l'Alberta contredit lui-même l'opinion exprimée par la Division d'appel. Toutes les réserves indiennes doivent continuer à être administrées par le gouvernement du Canada pour les fins du Canada; aucune restriction n'est apportée ici pour admettre une fin provinciale quelconque. Par ailleurs, toutes les autres réserves qui peuvent être créées sur des terres inoccupées de la Couronne qui ont été transférées à la province doivent être adminis-

[33] [1964] R.C.S. 81, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1.

Province. That points clearly to the exclusion of Reserves from provincial control.

They do not return to that control under s. 12 in respect of the application of provincial game laws. That section deals with a situation unrelated to Indian Reserves. It is concerned rather with Indians as such, and with guaranteeing to them a continuing right to hunt, trap and fish for food regardless of provincial game laws which would otherwise confine Indians in parts of the Province that are under provincial administration. Although inelegantly expressed, s. 12 does not expand provincial legislative power but contracts it. Indians are to have the right to take game and fish for food from all unoccupied Crown lands (these would certainly not include Reserves) and from all other lands to which they may have a right of access. There is hence, by virtue of the sanction of the *British North America Act*, 1930, a limitation upon provincial authority regardless of whether or not Parliament legislates.

It is worth looking at ss. 14 and 15 of the Alberta Natural Resources Agreement, previously quoted and dealing with national parks, as having an operation analogous to s. 10. Existing national parks mentioned in a schedule were to continue under federal administration; only if any of the lands comprised in the parks was surrendered as no longer required by the Government of Canada for park purposes would provincial administration come into play. (The same holds true, of course, for Indian Reserves.) Moreover, federal legislative jurisdiction existing in relation to such park land was to extend beyond the parks proper and apply to their outer boundaries.

trées par le Canada de la même manière, à tous égards, que si elles n'étaient jamais passées à la province. Ce qui indique clairement que les réserves échappent au contrôle provincial.

Elles ne retournent pas sous ce contrôle en vertu de l'art. 12 en ce qui concerne l'application des lois provinciales sur la conservation de la faune. Cet article traite d'une situation qui est sans rapport avec les réserves indiennes. Il s'intéresse plutôt aux Indiens en tant que tels, et a pour objet de leur garantir un droit continu de chasse, de piégeage et de pêche pour leur nourriture, indépendamment des lois provinciales sur la conservation de la faune qui restreindraient autrement les Indiens dans les parties de la province qui sont soumises à l'administration provinciale. Bien que l'article 12 ne soit pas très élégant dans son libellé, il n'élargit pas le pouvoir législatif de la province, mais le contracte. Les Indiens doivent avoir le droit de chasser et de pêcher pour se nourrir sur toutes les terres inoccupées de la Couronne (celles-ci ne comprennent certainement pas les réserves), ainsi que sur toutes les autres terres auxquelles ils peuvent avoir un droit d'accès. Il existe donc, de par l'autorité de l'*Acte de l'Amérique du Nord britannique*, 1930, une limitation du pouvoir provincial, que le Parlement légifère ou non.

Il est intéressant d'étudier les art. 14 et 15 de la convention sur les ressources naturelles de l'Alberta, qui ont été cités plus haut et qui traitent des parcs nationaux, car ils ont une application analogue à l'art. 10. Aux termes de ces deux articles, les parcs nationaux existants mentionnés dans une annexe devaient demeurer sous l'administration fédérale; et ce n'était que dans le cas où une terre quelconque comprise dans les parcs était cédée par le gouvernement du Canada du fait qu'elle n'était plus requise à des fins de parc, que son administration allait à la province. (Il en va de même, naturellement pour les réserves indiennes). Par ailleurs, la compétence législative fédérale sur ces terrains de parcs devait s'étendre au-delà des parcs eux-mêmes et s'appliquer à leurs limites extérieures.

On the facts of this case we are not concerned with the proviso to s. 12 because the accused was not hunting for food, and hence the overriding question is whether provincial game laws apply simply because the Reserve where the accused trafficked in big game is in the Province. In my opinion, s. 12 does not, either in its generality or in its proviso, cover "lands reserved for the Indians", which are separately brought under exclusive federal authority under s. 91(24) of the *British North America Act*; and it does not modify federal power in relation thereto. Even if the words in s. 12, "any other lands to which the said Indians may have a right of access", are taken in a broad general sense as capable, if s. 12 stood alone, of embracing Indian Reserves, they must be read to exclude such Reserves which are specially dealt with in s. 10. The canon of construction enshrined in the maxim *generalia specialibus non derogant* is particularly apt here.

History, however, is even more telling, and I refer, first, to the canvass by McGillivray J.A. in *Rex v. Wesley*[34]. This was a unanimous decision of the Alberta Appellate Division, holding that the *Alberta Game Act* in force at the time did not apply to a Treaty Indian hunting for food on unoccupied Crown land. After referring to the Royal Proclamation of 1763 which reserved various lands to Indians and enjoined any private purchase thereof from the Indians, McGillivray J.A. noted that there was excluded from such lands the territory granted to the Hudson's Bay Company in 1670. This territory, later ceded to Canada, included the unoccupied Crown land upon which the accused in *Rex v. Wesley* hunted. This land was included in a Treaty of September 22, 1877 between certain Indian tribes and the Queen under which hunting rights were assured to them in the lands which were the subject of the Treaty upon the surrender of such rights therein as the Indians had.

[34] [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337, 58 C.C.C. 269.

D'après les faits en cause la réserve de l'art. 12 ne nous concerne pas, étant donné que l'accusé ne chassait pas pour se nourrir; la question essentielle est donc de savoir si les lois provinciales sur la conservation de la faune s'appliquent du seul fait que la réserve où l'accusé exerçait son commerce du gros gibier est située dans la province. A mon avis, l'art. 12, aussi bien dans sa généralité que dans sa réserve, ne vise pas «les terres réservées pour les Indiens», lesquelles relèvent séparément de l'autorité fédérale exclusive suivant l'art. 91, par. (24) de l'*Acte de l'Amérique du Nord britannique*; et il ne modifie pas le pouvoir fédéral relativement à ces terres. Même si les termes suivants de l'art. 12, «toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès», sont pris suivant une acceptation large comme étant capables, l'art. 12 considéré isolément, d'englober les réserves indiennes, on doit néanmoins les interpréter comme excluant les réserves dont traite spécialement l'art. 10. La règle d'interprétation consacrée par la maxime *generalia specialibus non derogant* est particulièrement appropriée ici.

L'histoire, cependant, est encore plus convaincante, et je me reporte d'abord à la revue qu'a faite le Juge d'appel McGillivray dans *Rex v. Wesley*[34]. Il s'agit d'une décision unanime de la Cour d'appel de l'Alberta, selon laquelle l'*Alberta Game Act* en vigueur à l'époque ne s'appliquait pas à un Indien visé par les traités qui chassait pour sa nourriture sur une terre de la Couronne inoccupée. Après s'être reporté à la Proclamation royale de 1763 qui réservait aux Indiens diverses terres et interdisait à un particulier de les leur acheter, le Juge d'appel McGillivray a fait remarquer qu'était exclu de ces terres le territoire concédé à la Compagnie de la Baie d'Hudson en 1670. Ce territoire, cédé plus tard au Canada, comprenait la terre de la Couronne inoccupée sur laquelle chassait l'accusé dans *Rex v. Wesley*. Cette terre avait été incluse dans un traité passé le 22 septembre 1877 entre certaines tribus indiennes et la Reine aux termes duquel des droits de chasse leur étaient assurés sur les terres qui faisaient l'objet du traité à

[34] [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337, 58 C.C.C. 269.

The Treaty qualified the hunting rights according to such regulations as might be made by the Government of the country, and saved and excepted such tracts as might be required or taken up for settlement, mining, trading or any other purposes by the Government of Canada. What is particularly significant about this Treaty is a provision therein "that reserves shall be assigned" to the Indians. McGillivray J.A. adverted in that connection to the fact that the Governor who negotiated the Treaty said at the time to the Indian Chiefs that "it is your privilege to hunt all over the prairies and that should you desire to sell any portion of your land or any coal or timber from off your reserves the Government will see that you receive just and fair prices"; and again, "the reserve will be given to you without depriving you of the privilege to hunt over the plains until the land be taken up". The history recounted in *Rex v. Wesley* prompted Lunney J.A., who also wrote reasons in that case, to say that "the [Alberta Natural Resources] Agreement did not nor was there any intention that it should alter the law applicable to Indians".

I would refer in this connection also to the majority judgment of this Court in *Daniels v. White and The Queen*[35], which involved the relationship between s. 13 of the Manitoba Natural Resources Agreement (which is similar to s. 12 of the Alberta Agreement) and the federal *Migratory Birds Convention Act*. The question there was whether a Treaty Indian who had shot and killed birds on his Reserve for food was protected against culpability under the federal Act by virtue of s. 13 of the Manitoba Agreement. In holding that he was not so protected, Judson J., who spoke for the majority, referred to the Agreement and to the legislation of 1930 confirming it and stated that "it did no

[35] [1968] S.C.R. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1.

condition qu'elles cèdent les droits que les Indiens possédaient sur ces terres.

Le traité mitigeait les droits de chasse en fonction des règlements que le gouvernement du pays pouvait éventuellement établir, et il sauvegardait et exceptait les parcelles de terrain que le gouvernement du Canada pouvait revendiquer ou administrer à des fins de colonisation, d'exploitation minière, de commerce ou pour toutes autres fins. Ce qui est particulièrement important dans ce traité, c'est une disposition prévoyant «que des réserves doivent être attribuées» aux Indiens. Le Juge d'appel McGillivray a signalé à cet égard que le gouverneur qui avait négocié le traité avait à l'époque déclaré aux chefs indiens [TRADUCTION] «vous avez le privilège de chasser partout dans les prairies et quand vous désirerez vendre une partie quelconque de votre terre ou une certaine quantité de charbon ou de bois extrait de vos réserves, le gouvernement verra à ce que l'on vous donne un prix juste et équitable»; et plus loin, «la réserve vous sera concédée sans que vous perdiez le privilège de chasser sur les plaines jusqu'à ce que la terre soit prise». Les faits historiques relatés dans *Rex v. Wesley* ont amené le Juge d'appel Lunney, qui a également rédigé des motifs dans cette affaire-là, à déclarer: [TRADUCTION] «la convention (sur les ressources naturelles de l'Alberta) n'a pas modifié le droit applicable aux Indiens et n'était pas destinée du tout à le modifier».

A cet égard, je cite aussi le jugement majoritaire que cette Cour a prononcé dans l'affaire *Daniels c. White et la Reine*[35], dans laquelle il était question du rapport entre l'art. 13 de la convention sur les ressources naturelles du Manitoba (qui est semblable à l'art. 12 de la convention relative à l'Alberta) et la *Loi sur la convention concernant les oiseaux migrateurs* fédérale. Dans cette affaire-là, il s'agissait de savoir si un Indien visé par les traités qui avait abattu des oiseaux sur sa réserve en vue de se nourrir était dispensé d'obéir à la loi fédérale par l'art. 13 de la convention relative au Manitoba. En décidant qu'il n'en était pas dispensé, le Juge Judson, qui a exposé l'avis de la majo

[35] [1968] R.C.S. 517, 64 W.W.R. 385, 4 C.R.N.S. 17 [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1.

more than impose specified obligations and restrictions upon the transferee province". This accords with the view I take here that nothing in the Alberta Agreement increases the legislative power of the Province in diminution of that of the Parliament of Canada in relation to "Indians and lands reserved for the Indians".

rité, a cité la convention ainsi que la législation confirmative adoptée en 1930, et a déclaré: [TRADUCTION] «elle n'a rien fait de plus qu'imposer des obligations et restrictions spécifiques à la province cessionnaire». Ce point de vue concorde avec mon opinion en la présente affaire suivant laquelle rien dans la convention relative à l'Alberta n'accroît le pouvoir législatif de la province au détriment de celui que possède le Parlement du Canada sur «les Indiens et les terres réservées pour les Indiens».

Nor is my view inconsistent with the position of the minority of the Court in the *Daniels* case, which held that s. 13 of the Manitoba Agreement expressed a federal assurance to Indians as well as a provincial one, and that by virtue of s. 1 of the *British North America Act*, 1930, confirming the Agreement, the right of Indians to hunt for food, as expressed in s. 13, prevailed against the *Migratory Birds Convention Act* and regulations thereunder. That minority view does not touch the additional limitations upon provincial legislative authority residing in s. 91(24) of the *British North America Act*:

Mon opinion n'est pas non plus incompatible avec le point de vue exprimé par les juges minoritaires dans l'affaire *Daniels*, qui ont jugé que l'art. 13 de la convention relative au Manitoba donnait aux Indiens une garantie fédérale aussi bien que provinciale, et qu'en vertu de l'art. 1 de l'*Acte de l'Amérique du Nord britannique*, 1930, confirmant la convention, le droit des Indiens de chasser pour se nourrir, tel qu'exprimé par l'art. 13, prévalait contre la *Loi sur la convention concernant les oiseaux migrateurs* et ses règlements d'application. Cette opinion minoritaire ne touche pas aux restrictions supplémentaires imposées à l'autorité législative provinciale par les dispositions de l'art. 91, par. (24) de l'*Acte de l'Amérique du Nord britannique*.

The *Daniels* case deserves notice on another point which I touched upon early in these reasons, that is the purpose of the various Natural Resources Agreements to give equality of position to the Western Provinces with the other Provinces in respect of control and administration of their natural resources. A consideration in the majority judgment in *Daniels* was the desirability of uniformity in the operation of the federal *Migratory Birds Convention Act* in the various parts of Canada as against any special position of advantage sought under the Manitoba Natural Resources Agreement involved in the case. I do not think, therefore, that a construction of the Alberta Agreement should be strained for here that would unbalance the exclusive authority of Parliament in relation to Indian Reserves.

L'arrêt *Daniels* mérite d'être noté relativement à un autre point que j'ai signalé plus tôt dans les présents motifs, c'est-à-dire l'intention dans les diverses conventions sur les ressources naturelles d'accorder aux provinces de l'Ouest une situation égale à celle des autres provinces en ce qui concerne le contrôle et l'administration de leurs ressources naturelles. La désirabilité d'une application uniforme de la *Loi sur la convention concernant les oiseaux migrateurs* fédérale dans les diverses régions du Canada à l'encontre de toute situation privilégiée recherchée sous le régime de la convention sur les ressources naturelles du Manitoba, a été une considération du jugement majoritaire. Par conséquent, je ne crois pas qu'il faille ici donner à la convention relative à l'Alberta une interprétation tirée qui dérangerait l'autorité exclusive que

It is clear from cases like *Rex v. Wesley*, *supra*, and from the *Daniels* case and from others like *Rex v. Smith*[36], in which the history of Indian cession Treaties is narrated, that Indians who ceded their lands were assured of hunting privileges over them. I need not consider whether such privileges are themselves property interests of a kind which bring them exclusively within federal jurisdiction under s. 91(24) as coming within the phrase "lands reserved for the Indians", or whether the jurisdiction attaches because the rights involved are those of Indians: see *Regina v. White and Bob*[37]. What is evident is that the existence of such privileges in such surrendered lands gives subject matter to s. 12 of the Alberta Natural Resources Agreement without compelling the inclusion therein of Reserves which are of a different order than lands in respect of which there are only hunting rights or in respect of which hunting rights are assertable by the force of s. 12 alone.

In *Rex v. Wesley*, McGillivray J.A. declined the invitation to deal as well with the rights of Indians on their Reserves. That was not before the Court, and in my view was a question unrelated to the application of s. 12 of the Natural Resources Agreement. Rather, it invited the application of s. 10 and hence of exclusive federal authority of which there has been an exercise under the *Indian Act*.

The *Indian Act*, now R.S.C. 1970, c. I-6, defines "reserve" in s. 2(1) to mean a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of an Indian band. Sections 18 and 36 of the Act are as follows:

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to

[36] [1935] 2 W.W.R. 433, 64 C.C.C. 131, [1935] 3 D.L.R. 703.

[37] (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193; aff'd. (1965), 52 D.L.R. (2d) 481.

le Parlement possède relativement aux réserves indiennes.

Il ressort clairement d'arrêts comme *Rex v. Wesley*, précité, et de l'arrêt *Daniels* ainsi que d'autres comme *Rex v. Smith*[36], qui relatent l'histoire des traités de cession indiens, que les Indiens qui ont cédé leurs terres étaient assurés de privilèges de chasse sur ces terres. Je n'ai pas besoin d'examiner si de tels privilèges constituent eux-mêmes des droits de propriété dont la nature les faits relever exclusivement de la juridiction fédérale suivant l'art. 91, par. (24), comme étant visés par les mots «terres réservées pour les Indiens», ou si la compétence est due au fait que les droits en cause appartiennent à des Indiens: voir *Regina v. White and Bob*[37]. Ce qui est évident, c'est que l'existence de tels privilèges dans de telles terres cédées donne un objet à l'art. 12 de la convention sur les ressources naturelles de l'Alberta sans que l'on soit forcé d'y inclure des réserves qui sont d'un ordre différent des terres sur lesquelles existent seulement des droits de chasse ou sur lesquelles des droits de chasse peuvent être revendiqués de par la force de l'art. 12 seulement.

Dans *Rex v. Wesley*, le Juge d'appel McGillivray a décliné l'invitation à traiter également des droits des Indiens dans leurs réserves. Ce n'était pas une question dont était saisie la Cour et, à mon avis, c'était une question sans rapport avec l'application de l'art. 12 de la convention sur les ressources naturelles. Plutôt, c'était une question qui donnait lieu à l'application de l'art. 10, et donc à l'application d'une autorité fédérale exclusive qui a déjà été exerçée sous l'empire de la *Loi sur les Indiens*.

La *Loi sur les Indiens*, maintenant S.R.C. 1970, c. I-6, définit le terme «réserve» à l'art. 2 par. (1), comme désignant une parcelle de terrain dont le titre juridique est attribué à Sa Majesté et que Sa Majesté a mise de côté l'usage et au profit d'une bande indienne. Les articles 18 et 36 de la loi sont libellés comme suit:

18. (1) Sauf les dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises

[36] [1935] 2 W.W.R. 433, 64 C.C.C. 131, [1935] 3 D.L.R. 703.

[37] (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193; confirmé (1965), 52 D.L.R. (2d) 481.

this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for such purposes, but where an individual Indian, immediately prior to such taking, was entitled to the possession of such lands, compensation for such use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

36. Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in Her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.

These, and related provisions which deal with possession by Indians of land within a Reserve, reinforce my opinion that provincial regulatory legislation cannot, *ex proprio vigore*, apply to a Reserve.

This opinion is unaffected by s. 88 of the *Indian Act* which reads:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The section deals only with Indians, not with Reserves, and is, in any event, a referential incorporation of provincial legislation which takes effect under the section as federal legislation. I do not read s. 88 as creating any exception to the operation of federal legislation by making way for otherwise competent provincial

de côté; et, sauf la présente loi et les stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

(2) Le Ministre peut autoriser l'utilisation de terres dans une réserve aux fins des écoles indiennes, de l'administration d'affaires indiennes, de cimetières indiens, de projets relatifs à la santé des Indiens, ou, avec le consentement du conseil de la bande, pour tout autre objet concernant le bien-être général de la bande, et il peut prendre toutes terres dans une réserve, nécessaires à ces fins, mais lorsque, immédiatement avant cette prise, un Indien particulier avait droit à la possession de ces terres, il doit être versé à cet Indien, pour un semblable usage, une indemnité d'un montant dont peuvent convenir l'Indien et le Ministre, ou, à défaut d'accord, qui peut être fixé de la manière que détermine ce dernier.

36. Lorsque des terres ont été mises de côté à l'usage et au profit d'une bande et que le titre juridique y relatif n'est pas dévolu à Sa Majesté, la présente loi s'applique comme si les terres étaient une réserve, selon la définition qu'en donne cette Loi.

Ces articles, ainsi que les dispositions connexes qui ont trait à la possession par les Indiens de terres situées dans une réserve, renforcent mon opinion suivant laquelle la législation réglementaire provinciale ne peut pas, *ex proprio vigore*, s'appliquer à une réserve.

Cette opinion n'est pas modifiée par l'art. 88 de la *Loi sur les Indiens* qui est ainsi libellé:

Sous réserve des dispositions de quelque traité et de quelque autre loi du Parlement du Canada, toutes lois d'application générale et en vigueur, à l'occasion, dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où lesdites lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou statut administratif établi sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou y ressortissant.

Cet article ne traite que des Indiens, et non des réserves, et il constitue, dans tous les cas, une incorporation par renvoi d'une législation provinciale qui, en vertu de cet article, prend effet en tant que législation fédérale. Je n'interprète pas l'art. 88 comme créant une exception à l'application de la législation fédérale en permet-

legislation, as is the case under the *Lord's Day Act*, now R.S.C. 1970, c. L-13. If the *Wildlife Act* of Alberta is such an enactment as is envisaged by s. 88, an Indian who violated its terms would be guilty of an offence under federal law and not of an offence under provincial law.

It was contended by the respondent Attorney-General of Alberta that federal power in relation to "Indians" was akin to its power in relation to aliens (s. 91(25)) and that Indians like aliens were subject to provincial laws of general application. I do not pursue the analogy because it breaks down completely when regard is had to the fact that we are dealing here not only with Indians but with "lands reserved for the Indians". The fact that s. 88 of the *Indian Act* makes provincial laws of general application "applicable to and in respect of Indians in the Province", and hence could be construed as applicable to them on their Reserves as well, does not add anything to the case for the application of provincial game laws to Indians on a Reserve. Parliament's exercise of its legislative power under s. 91(24) does not enlarge the constitutional scope of provincial legislation that has been adopted by Parliament where the Province seeks to rely on it for its own purposes.

I do not find it necessary to come to a conclusion on the appellant's submission that the power to make regulations for the protection and preservation of fur-bearing animals, fish and other game on reserves, vested in the Governor in Council under s. 73(1)(*a*) of the *Indian Act*, and the like power to make by-laws vested in an Indian band by s. 81(*o*) of the Act have, although unexercised, a preclusive effect upon otherwise valid and applicable provincial legislation. The conclusion to which I have come does not compel me to rely on the *Indian Act* in

tant l'introduction d'une législation provinciale *intra vires* à tous autres égards, comme c'est le cas sous le régime de la *Loi sur le Dimanche*, maintenant S.R.C. 1970, c. L-13. Si le *Wildlife Act* de l'Alberta constitue un texte législatif envisagé par l'art. 88, un Indien qui agirait en violation de ses dispositions se rendrait coupable d'une infraction en vertu des lois fédérales et non d'une infraction en vertu des lois provinciales.

L'intimé, le procureur général de l'Alberta, a soutenu que le pouvoir fédéral relatif aux «Indiens» est apparenté à celui que le fédéral exerce relativement aux aubains (art. 91, par. (25)), et que les Indiens comme les aubains sont soumis aux lois provinciales d'application générale. Je ne poursuis pas la comparaison car celle-ci s'effondre complètement lorsqu'on tient compte du fait que nous avons affaire ici non seulement à des Indiens mais également à «des terres réservées pour les Indiens». Le fait que l'art. 88 de la *Loi sur les Indiens* rend les lois d'application générale des provinces «applicables aux Indiens qui s'y trouvent et à leur égard», et que l'on puisse donc l'interpréter comme voulant dire applicables dans leurs réserves également, n'apporte rien à la prétention que les lois provinciales sur la conservation de la faune s'appliquent aux Indiens dans une réserve. L'exercice par le Parlement de son pouvoir législatif en vertu de l'art. 91, par. (24) n'élargit pas la portée constitutionnelle de lois provinciales adoptées par le Parlement lorsque la province cherche à s'y appuyer pour ses propres fins.

Je ne pense pas qu'il soit nécessaire de se prononcer sur la prétention de l'appelant suivant laquelle le pouvoir d'établir des règlements concernant la protection et la conservation des animaux à fourrure, du poisson et du gibier de toute sorte dans les réserves, dévolu aux termes de l'al. *a*) du par. (1) de l'art. 73 de la *Loi sur les Indiens* au gouverneur en conseil, ainsi que le pouvoir semblable d'établir des statuts administratifs dévolu, aux termes de l'al. *o*) de l'art. 81 de la Loi, au conseil d'une bande, ont, bien que non exerçés, pour effet d'empêcher l'applicatio

order to set aside the conviction of the appellant. I have made it abundantly plain that s. 12 of the Alberta Agreement cannot, in view of s. 10 thereof and in view of s. 91(24) of the *British North America Act*, have the effect of subjecting Indians on a Reserve to the Alberta *Wildlife Act*.

Accordingly, I would allow the appeal and restore the order of Sinclair J. who answered favourably to the accused the point of law which was the subject of a stated case.

Appeal dismissed, HALL, SPENCE *and* LASKIN JJ. *dissenting*.

Solicitors for the appellant: Lefsrud, Cunningham, Patrick & Roddick, Edmonton.

Solicitor for the respondent: The Attorney General of Alberta, Edmonton.

d'une législation provinciale qui, autrement, serait valide et applicable. La conclusion à laquelle je suis parvenu ne m'oblige pas à m'appuyer sur la *Loi sur les Indiens* aux fins d'écarter la déclaration de culpabilité qui frappe l'appelant. J'ai déjà indiqué très clairement que l'art. 12 de la convention relative à l'Alberta ne peut pas, étant donné l'art. 10 de cette convention et étant donné l'art. 91, par. (24) de l'*Acte de l'Amérique du Nord britannique*, avoir pour effet de soumettre les Indiens d'une réserve à l'Alberta *Wildlife Act*.

En conséquence, je suis d'avis d'accueillir l'appel et de rétablir l'ordonnance du Juge Sinclair qui a tranché d'une manière favorable à l'accusé le point de droit qui faisait l'objet de l'exposé de cause.

Appel rejeté, les JUGES HALL, SPENCE *et* LASKIN *étant dissidents.*

Procureurs de l'appelant: Lefsrud, Cunningham, Patrick & Roddick, Edmonton.

Procureur de l'intimé: Le Procureur général de l'Alberta, Edmonton.

REGINA v. CARDINAL

Alberta Supreme Court, Appellate Division, Cairns, Allen and Clement, JJ.A. November 4, 1971.

Indians — Application to Indian on a reserve of provincial game laws prohibiting trafficking in big game — Provision in federal-provincial agreement confirmed by B.N.A. Act, 1930, assuring Indians of hunting rights — Whether respondent exempt from provincial game law — Whether game law inconsistent with Indian Act (Can.) — Wildlife Act (Alta.), s. 37.

Constitutional law — Legislative powers — Application to Indian on a reserve of provincial game laws prohibiting trafficking in big game — Provision in federal-provincial agreement, confirmed by B.N.A. Act, 1930, assuring Indians of hunting rights — Whether respondent exempt from provincial game law — Whether game law inconsistent with Indian Act (Can.) — Wildlife Act (Alta.), s. 37.

Paragraph 12 of an agreement entered into between Canada and Alberta ratified by Alberta in the *Alberta Natural Resources Act*, 1930 (Alta.), c. 21, and by Canada in the *Alberta Natural Resources Act*, 1930 (Can.), c. 3, and incorporated into the *B.N.A. Act*, 1930 (U.K.), c. 26, which declares that Indians in the Province are subject to provincial game laws of general application, treats the Indian the same as a non-Indian with respect to hunting for sport or for commerce, but, in respect to hunting for food or sustenance, the proviso to para. 12 assuring the Indian of the right to hunt for food at all seasons of the year on unoccupied Crown lands and reserve lands exempts him from the application of provincial game laws. Accordingly, where the respondent accused was charged with trafficking in big game contrary to the *Wildlife Act*, R.S.A. 1970, c. 391, s. 37, *held*, on appeal from a judgment given on an appeal by way of stated case declaring s. 37 to be *ultra vires*, in so far as s. 37 is not inconsistent with any provision made by or under the *Indian Act*, R.S.C. 1970, c. I-6, and by virtue of s. 88 of that Act, rendered subject thereto, and in so far as s. 37 was here being applied in respect of a sale by an Indian at his home on a reserve of a piece of moose meat to a provincial officer and did not involve hunting for food by an Indian, the appeal should be allowed and a conviction entered against the respondent accused.

[*Daniels v. The Queen*, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1, [1968] S.C.R. 517; *R. v. Wesley*, 58 C.C.C. 269, [1932] 4 D.L.R. 774, 26 Alta. L.R. 433, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403, 46 W.W.R. 1213; revg [1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234; *R. ex rel. Clinton v. Strongquill*, 105 C.C.C. 262, [1953] 2 D.L.R. 264, 16 C.R. 194, 8 W.W.R. (N.S.) 247, apld; *Francis v. The Queen*, 3 D.L.R. (2d) 641, [1956] S.C.R. 618; *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267, refd to]

APPEAL from a judgment of Sinclair, J., dismissing an appeal by way of stated case from a dismissal of a charge on the ground that the *Wildlife Act* (Alta.), s. 37 was *ultra vires* in its application to an Indian or an Indian reserve.

W. Henkel, Q.C., for the Crown, appellant.
R. F. Roddick, for accused, respondent.

The judgment of the Court was delivered by

CLEMENT, J.A.:—Cardinal was charged that he

> . . . within the Province of Alberta, did unlawfully traffic in big game, other than as is expressly permitted by *The Wildlife Act* or by the regulations made thereunder, contrary to the provisions of Section 37 of *The Wildlife Act* of Alberta and amendments thereto.

Section 37 of the *Wildlife Act*, now R.S.A. 1970, c. 391, provides:

> 37. No person shall traffic in any big game or any game bird except as is expressly permitted by this Act or by the regulations.

This Act is one of general application in Alberta. There are no provisions in it nor in the Regulations that bear on the issue in appeal.

On the trial of the charge, the Provincial Judge found that Cardinal had trafficked in big game within the meaning of this section. He also found that Cardinal is a Treaty Indian living on an Indian reserve in Northern Alberta, and that the trafficking consisted in a sale made at Cardinal's home on the reserve of a piece of moose meat to a provincial officer, who was not an Indian. No evidence was given as to where or by what means, whether by hunting for food or otherwise by Cardinal or another, the moose meat came into his possession; we are concerned only with the fact that he made a sale of a piece of moose meat, which of itself constitutes trafficking within the meaning of the *Wildlife Act*, that Cardinal is a Treaty Indian, and that the trafficking occurred in his home on the Indian reserve of the Band of which he is a member. In delivering judgment, the Provincial Judge referred to the provisions of the *Indian Act*, R.S.C. 1952, c. 149 [now R.S.C. 1970, c. I-6], the *Alberta Natural Resources Act*, 1930 (Alta.), c. 21, and 1930 (Can.), c. 3, and a number of reported decisions, and concluded:

> On the reservation it would appear that an Indian cannot be charged with any offence under the Provincial *Wildlife Act*, as it infringes on the Dominion statutes.

He dismissed the charge, and on application of the Crown stated a case for the opinion of the Court on the question:

> Was I right in ruling that *The Wildlife Act*, Statutes of Alberta 1970 Chapter 113 is *ultra vires* of the Province of Alberta in its application to the respondent, as an Indian on an Indian reserve, since the Parliament of Canada has by section 72 and section 80 of

48

The Indian Act, R.S.C. 1952 Chapter 149 reserved unto itself the regulation of game on Indian reserves?

The case was heard by Sinclair, J., who answered the question by declaring that the Provincial Judge came to a correct decision in point of law upon the facts stated by him, and the Crown has appealed. It is necessary to examine the relevant statutory provisions and determine their proper interpretation and application to this case.

By s. 91 of the *B.N.A. Act, 1867*, exclusive legislative authority of the Parliament of Canada is extended to all matters coming within the classes of subjects enumerated, including "(24) Indians and lands reserved for Indians."

On December 14, 1929, Canada and Alberta entered into an agreement respecting Alberta natural resources of which the following paragraphs require consideration [*Alberta Natural Resources Act*, schedule]:

> 10. All lands included in Indian reserves within the province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.
>
> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.
>
> 24. The foregoing provisions of this agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Province.

This agreement was confirmed and given effect by the *B.N.A. Act*, 1930 (U.K.), c. 26, which provided:

> 1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in

38

> Council or terms or conditions of union made or approved under any such Act as aforesaid.

It was ratified and confirmed by Alberta in the *Alberta Natural Resources Act*, enacted as 1930 (Alta.), c. 21, and by Canada in the *Alberta Natural Resources Act*, enacted as 1930 (Can.), c. 3. Similar agreements were made between Canada and Manitoba, and Canada and Saskatchewan, and similarly confirmed; and in speaking for the majority of the Court in respect of the Manitoba agreement in *Daniels v. The Queen*, [1969] 1 C.C.C. 299 at pp. 306-7, 2 D.L.R. (3d) 1 at pp. 7-8, [1968] S.C.R. 517, Judson, J., used these words which are applicable to the Alberta agreement:

> The whole tenor of the agreement is that of a conveyance of land imposing specified obligations and restrictions on the transferee, not on the transferor. This applies, in particular, to para. 13, which makes provincial game laws applicable to Indians in the Province subject to the proviso contained therein. That only provincial game laws were in the contemplation of the parties, and not federal enactments, is underscored by the words "which the Province hereby assures to them" in para. 13. As indicated by para. 11 of the agreement and para. 10 of the Alberta and Saskatchewan agreements, Canada, in negotiating these agreements, was mindful of the fact it had treaty obligations with Indians on the prairies. These treaties, among other things, dealt with hunting by Indians on unoccupied lands.
>
> . . . . .
>
> It being the expectation of the parties that the agreement would be given the force of law by the Parliament of the United Kingdom (para. 25) care was taken in framing para. 13 that the Legislature of the Province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands. Under the agreement this could only be done by concurrent statutes of the Parliament of Canada and the Legislature of the Province, in accordance with para. 24 thereof.

It is to be observed that the "unoccupied Crown lands" referred to in that case were in fact an Indian reserve, as appears from the judgment of Hall, J. The offence with which Daniels had been charged was a breach of provisions of the *Migratory Birds Convention Act* and Regulations: he had hunted and killed game for food on a reserve at a time of the year in which this was prohibited generally by that Act. I have no doubt that the areas designated in the proviso as "all unoccupied Crown lands and any other lands to which the said Indians may have a right of access" include reserves. Indeed, a reserve is in the nature of a home to a member of the Band to which it is assigned, and a right of access thereto is a right necessarily accruing to such member. Without this

50

interpretation of the proviso, a question might arise whether an Indian could hunt for food on his own reserve, although he may well be prohibited on another reserve to which he has no right of access. We are not here, however, concerned with hunting for food.

Paragraph 12 was before this Court in *R. v. Wesley*, 58 C.C.C. 269, [1932] 4 D.L.R. 774, 26 Alta. L.R. 433, and in delivering the judgment of the majority of the Court, McGillivray, J.A., had occasion to say [pp. 275-6 C.C.C., p. 781 D.L.R.]:

> It seems to me that the language of s. 12 is unambiguous and the intention of Parliament to be gathered therefrom clearly is to assure to the Indians a supply of game in the future for their support and subsistence by requiring them to comply with the game laws of the Province, subject however to the express and dominant proviso that care for the future is not to deprive them of the right to satisfy their present need for food by hunting and trapping game, using the word "game" in its broadest sense, at all seasons on unoccupied Crown lands or other land to which they may have a right of access.
>
> . . . . .
>
> If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the Province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.

The latter paragraph was quoted and agreed to by Hall, J., in delivering the judgment of the Court in *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403. He also agreed with the reasons of Freedman, J.A. [dissenting], in the Manitoba Court of Appeal in the same case [[1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234]. The following paragraph from those reasons is in point [p. 137]:

> The statement in para. 13 of the Schedule to the *Manitoba Natural Resources Act* that the law of the Province respecting game and fish shall apply to the Indians is, in my view, subordinate in character. Its operation is limited to imposing upon the Indian the same obligation as is normally imposed upon every other citizen, namely, that when he is hunting for sport or commerce he must hunt only

40

> in the manner and at the times prescribed by the Act. But the ordinary citizen does not hunt for food for sustenance purposes. The Indian does, and the statute, recognizing his right to sustenance, exempts him from the ordinary game laws when he is hunting for food in areas where he is so permitted.

Freedman, J.A., also quoted the last paragraph of the judgment of McGillivray, J.A., *supra*. There is an agreement between Canada and Saskatchewan in terms similar to that of the Alberta agreement, and para. 12 thereof is identical to para. 12 of the Alberta agreement. In speaking of it in *R. ex rel. Clinton v. Strongquill*, 105 C.C.C. 262 at p. 268, [1953] 2 D.L.R. 264 at pp. 269-70, 8 W.W.R. (N.S.) 247, Martin, C.J.S., said:

> Under this paragraph the intention is to assure the Indians a supply of game in the future for their subsistence by requiring them to comply with the game laws of the Province, subject, however, to the express provision that they have the right to hunt, trap and fish for food at all seasons of the year on all "unoccupied Crown lands" and on any other lands to which they may have the right of access.

From the foregoing it is apparent that Canada has by statutory agreement committed the Indians within the boundaries of Alberta to compliance with the game laws of the Province. On its part Alberta has by statute agreed that it will assure to Indians within the Province the right to hunt game and fish for food at all times on the designated areas: but the statutory assurance goes no farther than this. There is underlying both undertakings the stated purpose "to secure to the Indians of the province the continuance of the supply of game and fish for their support and subsistence". The means of achieving this purpose is the subordination by all Indians within the boundaries of Alberta to provincial game laws, and no territorial limitation is imposed either on the operation of the purpose or on the means of achieving it. In contrast to this is the territorial limitation imposed on the operation of the proviso. These statutory agreements cannot be varied without concurrent legislation and, in my opinion, cannot be ignored when interpreting federal statutes.

I turn now to consideration of the *Indian Act*, now R.S.C. 1970, c. I-6. In *Francis v. The Queen*, 3 D.L.R. (2d) 641 at p. 652, [1956] S.C.R. 618, Kellock, J., speaking for himself and Abbott, J., said:

> In my opinion the provisions of the *Indian Act* constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the *Customs Act* or the *Customs Tariff Act* is to be found in the *Indian Act*, the

52

terms of such general legislation apply to Indians equally with other citizens of Canada.

The first section requiring examination is s. 88, which formerly was numbered s. 87, and is in the following terms:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

In *R. v. George*, [1966] 3 C.C.C. 137 at p. 150, 55 D.L.R. (2d) 386 at pp. 397-8, [1966] S.C.R. 267, Martland, J., in speaking for the majority of the Court in respect of that section, said:

> I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *B.N.A. Act* subject to provincial laws of general application.
>
> The application of provincial laws to Indians was, however, made subject to "the terms of any treaty *and any other Act of the Parliament of Canada*" (the italics are mine). In addition, provincial laws inconsistent with the *Indian Act*, or any order, rule, regulation or by-law made thereunder, or making provision for any matter for which provision is made under that Act, do not apply.

As above discussed, I am of opinion that this section must be interpreted in the light of para. 12 of the Alberta agreement. The sections of the *Indian Act* which have been specifically raised are these:

> 73(1) The Governor in Council may make regulations
>
> (*a*) for the protection and preservation of fur-bearing animals, fish and other game on reserves; [formerly s. 72(1)(*a*)]
>
> 81. The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
>
> (o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve; [formerly s. 80(o)]

It is common ground that no Regulations have been made by the Governor in Council for the protection and preservation of fur-bearing animals, fish and other game on reserves, nor have any by-laws been made by the Band for the purpose of the preservation, protection and management of fur-bearing animals, fish and other game on the reserve. In my opinion, at least until Parliament has specifically declared otherwise

42

(and its power to do so is not in question here), the powers reserved by these sections can only be invoked within the framework of para. 12 of the Alberta agreement.

At this point I should observe that Sinclair, J., expressed his conclusion in these words:

> I am of opinion that the second exception to section 87 (now section 88) of *The Indian Act* applies. Both sections 72 and 80 (now respectively 73 and 81) of that Act make provision for the preservation, protection and management of game (including big game) on a reserve. Section 37 of *The Wildlife Act* of Alberta makes provision for a matter for which provision is made by *The Indian Act*. It follows that section 37 of *The Wildlife Act* is not applicable to Charlie Cardinal on the facts stated in the case.

I do not think that the mere reservation of powers in respect of the preservation, protection, or management of game on a reserve can be construed of itself, as imposing a territorial limitation on the operation of Alberta game laws which is not contemplated by para. 12 of the Alberta agreement. In my view what is contemplated by the second exception to s. 88 of the *Indian Act* is either a specific provision made *by* that Act, or a specific provision made *under* it, which is not at variance with para. 12 of the agreement. No such provision has been made. For these reasons I must, with respect, disagree with the opinion of Sinclair, J.

On the other hand, s. 37 of the *Wildlife Act* is completely consistent with para. 12 of the Alberta agreement, which has the force of law in this Province. That section, in the context of the Act, undoubtedly is for the preservation of game and being of general application has force within a reserve subject to such considerations as might arise if the trafficking were shown to involve hunting for food by an Indian.

In the result, in my opinion, s. 37 of the *Wildlife Act* operates within a reserve, and the answer to the question propounded by the stated case should be "No". A conviction should be entered against Cardinal, and the matter remitted to the Provincial Judge for sentence.

Appeal allowed.

MANITOBA COURT OF APPEAL

Freedman C.J.M., Guy, Monnin, Matas and O'Sullivan JJ.A.

R. v. Catagas

Crown — No power in Crown to dispense with operation of law — Executive direction not to charge Indians with offence under the Migratory Birds Convention Act, R.S.C. 1970, c. M-12, void.

APPEAL from judgment of L. P. Ferg Co. Ct. J., [1977] 3 W.W.R. 706, who held that the accused, an Indian, should be acquitted on a charge under the Migratory Birds Convention Act, not on the grounds that the Act did not apply to Indians, but on the grounds that, because the Department of Indian Affairs, following the decision in *Rourke v. R.*, had made a policy of not charging Indians with such an offence, the charge was an abuse of process.

Held, the appeal was allowed. The Crown may not dispense with laws by executive action; the dispensation was therefore void and not available to the accused as a defence.

Case of the Seven Bishops (1688), 12 State Tr. 183, 87 E.R. 136 referred to.

Daniels v. White, [1968] S.C.R. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1; *Rourke v. R.*, [1977] 5 W.W.R. 487, 38 C.R.N.S. 268, 35 C.C.C. (2d) 129, 76 D.L.R. (3d) 193, 16 N.R. 181 applied.

[Note up with 7 C.E.D. (West. 2nd) *Criminal Law (General)*, s. 282; 8 C.E.D. (West. 2nd) *Crown*, s. 2; 14 C.E.D. (West. 2nd) *Justices and Magistrates*, s. 6.]

B. A. MacFarlane and *J. M. Webster*, for appellant.

H. I. Pollock, Q.C., and *M. L. Thompson*, for (accused) respondent.

14th November 1977. The judgment of the court was delivered by

FREEDMAN C.J.M.:—In his classic work on The Constitutional History of England (1909), Maitland discusses the subject of the Royal dispensing power as well as the allied subject of the Royal suspending power. These subjects take us back to the 17th century and earlier. They represent a dark chapter in English legal and constitutional history. They were a part of the struggle for sovereignty between the Crown and Parliament, a struggle in which, fortunately, Parliament emerged the victor, as exemplified by the enactment of the Bill of Rights, 1688 (Imp.), c. 2.

The legal status of these powers today is well described in 7 Hals. (3d) 230, para. 486, thus:

"The Crown may not suspend laws or the execution of laws without the consent of Parliament; nor may it dispense with laws, or the execution of laws; and dispensations by *non obstante* of or to any statute or part thereof are void and of no effect, except in such cases as are allowed by statute."

That is clearly the law today. But Maitland's discussion centres upon a much earlier period when the Crown, as part of the Royal prerogative, suspended some laws and dispensed with obedience to others. The distinction between these two ancient powers may be briefly noted. By virtue of the suspending power the Crown suspended the operation of a duly enacted law of Parliament, and such suspension could be for an indefinite period. Very often the power was called into play in religious matters, James II frequently resorting to it for the purpose of annulling statutes which excluded Roman Catholics and others from office. But he was not always successful in his attempts, as will be recalled from the celebrated *Case of the Seven Bishops* (1688), 12 State Tr. 183, 87 E.R. 136, on which it is not necessary to linger here.

Under the dispensing power the Crown purported to declare that a law enacted by Parliament would be inapplicable to certain named individuals or groups. By virtue of a dispensation in their favour the law would not apply to them, but it would continue to apply to all others. It has been said that the dispensing power "was derived from the Papal practice of issuing bulls *non obstante statuto*, 'any law to the contrary notwithstanding'" (Chalmers and Hood Phillips on Constitutional Law, 6th ed., p. 16).

To return to Maitland, this is what he said about the suspending and dispensing powers (pp. 304-305):

"The Bill of Rights condemned absolutely the suspending power; its condemnation of the dispensing power was qualified. 'The pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.' It would have been going too far to declare that every exercise of the dispensing power had been illegal — many private rights and titles must have been acquired on the faith of dispensations. No attempt, however, was made to settle what dispensations had been legal: the words used were those which I have just read. As to the future, it was declared that no dispensation by *non obstante*

of any statute shall be allowed, 'except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills, to be passed during this present session of parliament.' There was some intention, at least among the lords, of passing an act defining in what cases dispensations should be valid; but the project fell to the ground — and so the words about a bill to be passed in the then session of parliament, never took effect. This is the last of the dispensing power."

"This is the last of the dispensing power." Maitland could never have thought that in the year 1968, nearly three centuries after the Bill of Rights, a certain departmental official of Manitoba, acting in fact or in law under the authority of his minister, would purport to grant a dispensation in favour of a certain group exempting it from obedience to a particular law to which all others continue to remain subject. That sorry episode must now be recounted.

Perhaps its proper starting point should be a reference to the case of *Daniels v. White*, [1968] S.C.R. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1. That case concerned the right of an Indian to hunt game for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which Indians might have a right of access. The specific issue facing the Supreme Court of Canada in that appeal was whether para. 13 of an agreement made on 14th December 1929 between the government of Canada and the government of Manitoba (approved by statutes of the United Kingdom Parliament, the Parliament of Canada, and the Legislature of Manitoba) exempted Daniels, an Indian, from compliance with the Migratory Birds Convention Act, R.S.C. 1952, c. 179 (now R.S.C. 1970, c. M-12) and the regulations made thereunder. An apparent conflict emerged between the statute-approved agreement on the one hand and the Migratory Birds Convention Act on the other. If the agreement prevailed, the Indian would win. If however the Migratory Birds Convention Act prevailed, the Indian would lose; and his loss would mean the loss also of all other Indians in the prairie provinces in similar situations to his.

The Supreme Court of Canada reached the conclusion that the Migratory Birds Convention Act prevailed over the agreement. So Daniels, the Indian in question, lost. He had hunted for and captured game birds out of season and he had these birds in his possession, contrary to the provisions of the Act and the regulations thereunder. That the issue was not a

simple one is indicated by the division within the court in the result. Four of the nine judges held that the agreement prevailed and that Daniels accordingly committed no offence when at the relevant time and place he, an Indian, had hunted game for food on land to which he had a right of access. But of course it is the judgment of the majority of the court that is decisive, not that of the minority. So the law was declared and settled: Indians were subject to the Migratory Birds Convention Act and its regulations.

The decision of the Supreme Court of Canada was delivered on 29th April 1968. Not many weeks later — on 14th June 1968 — a senior official of the Department of Mines and Natural Resources for the Province of Manitoba, under ministerial responsibility, announced to field staff the adoption of a policy whose avowed object was to overcome and negate the *Daniels* decision and to exempt Indians from compliance with the Migratory Birds Convention Act. In other words, it was a policy of dispensation in favour of Indians. Here is the way a later minister of the department described the policy, which he obviously endorsed and adopted:

"It is clear that recent decisions of the Supreme Court of Canada affirm that the Migratory Birds Convention Act and Regulations apply to Indians in the Prairie Provinces. They in fact apply to all Canadians whatever the circumstances. However, in recognition of the need for Treaty Indians to hunt ducks and geese for food under certain circumstances and at certain times, my office directed on June 14th, 1968 that no charges be laid against Indians hunting for food on Indian reserves or unoccupied Crown land unless there is clear evidence of waste of birds or unless Indians are found hunting with non-Indians in contravention of the Regulations. That policy still holds and will continue to be the policy under which my Conservation Officers conduct themselves until such time as a review of the situation is undertaken and completed to everyone's satisfaction.

"It is my understanding that the R.C.M. Police in Manitoba are operating under a similar directive."

The record makes it clear that this dispensation policy had the active concurrence of officialdom at the federal level, if indeed these federal officials were not the initiators of that policy. As early as 17th May 1968 the Director of Canadian Wildlife Services had written a letter on the subject to his

58

counterpart in Manitoba. Here are two extracts from this amazing document:

"The recent decision of the Supreme Court of Canada in the Daniels case affirms that the Migratory Birds Convention Act and Regulations apply to Indians in the Prairie Provinces. That judgment and the earlier judgments in the Sikyea case [*R. v. Sikyea*, [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80] and the George case [*R. v. George*, [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386] make it quite clear that the Migratory Birds Convention Act and Regulations apply to all Canadians whatever the circumstances.

"Notwithstanding those judgments, the policy of this Department is that Indians and Eskimos may take migratory birds for food."

And:

"I realize that the situation is most unsatisfactory as it still places enforcement officers in an awkward position. Nevertheless, I must ask that no charges be laid against Indians hunting for food on Indian Reserves or unoccupied Crown land unless there is clear evidence of waste of birds taken. If non-Indians are found hunting with Indians in contravention of the Regulations, charges should be laid.

"I have written a letter similar to this to the Commissioner of the R.C.M. Police."

The contents of that letter were embodied in a memorandum sent by the acting Director of Wildlife for Manitoba to all his field staff. The memorandum was dated 14th June 1968. It has already been referred to as the instrument through which the adoption of a policy in Manitoba concerning the hunting rights of Indians was announced to field staff. The memorandum declares that the R.C.M.P. advised that they would comply with the wishes of the Director of Canadian Wildlife Services. It adds that in order that enforcement be consistent Manitoba would also adopt that policy. And in its penultimate paragraph the memorandum expresses this cautionary note:

"This letter is classified as confidential and therefore is *Not* to be discussed with the general public."

In a civilized country priding itself on equality of all people before the law, a special dispensation in favour of a particular group would hardly be a matter suitable for public discussion.

5

So members of the field staff were appropriately cautioned. But in the following year the minister's letter, above referred to, was addressed to the Vice-President of the Manitoba Indian Brotherhood, thereby bringing the matter, to some degree, into the open.

So what we have here is a clear case of the exercise of a purported dispensing power by executive action in favour of a particular group. Such a power does not exist. The dispensation which it sought to create was, in the words of Halsbury, "void and of no effect".

Two points must here be noted. The first is that the attempted dispensation was no doubt benevolent in purpose. It flowed from a recognition of the Indian's historic right to hunt game for food at all seasons of the year. But that was precisely the position taken by the minority judges in the *Daniels* case, supra. The purported dispensation would have given legal validity to the judgment of the minority and negated the judgment of the majority. And that of course cannot legally be done, no matter how sympathetic one may be towards the Indian and his hunting rights.

The other point is that nothing here stated is intended to curtail or affect the matter of prosecutorial discretion. Not every infraction of the law, as everybody knows, results in the institution of criminal proceedings. A wise discretion may be exercised against the setting in motion of the criminal process. A policeman confronting a motorist who had been driving slightly in excess of the speed limit may elect to give him a warning rather than a ticket. An Attorney General faced with circumstances indicating only technical guilt of a serious offence but actual guilt of a less serious offence may decide to prosecute on the latter and not on the former. And the Attorney General may in his discretion stay proceedings on any pending charge, a right that is given statutory recognition in ss. 508 [am. 1972, c. 13, s. 43(1)] and 732.1 [en. 1972, c. 13, s. 62] of the Criminal Code, R.S.C. 1970, c. C-34. But in all these instances the prosecutorial discretion is exercised in relation to a specific case. It is the particular facts of a given case that call that discretion into play. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group or race. Today the dispensing power may be exercised in favour of Indians. Tomorrow it may be exercised in favour of Protestants, and the next day in favour of Jews. Our laws cannot be so treated. The Crown

may not by executive action dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle.

In the present case the accused, an Indian, was charged that on or about 13th September 1975 he unlawfully and without lawful excuse had in his possession migratory game birds, to wit, six ducks, during the time when the capturing, killing or taking of such birds was prohibited by s. 6 of the Migratory Birds Convention Act. The essential facts were not in dispute. The accused admitted that he had killed the birds in question and that he had them in his possession as alleged. His defence stemmed from the "no-prosecution" policy which the Crown had announced in favour of Indians. Unfortunately the presentation of that defence and its resistance by the Crown took the dispute off the main road where it belonged into a by-path which preferably it ought not to have entered. Specifically, the accused contended that, in the light of the declared "no-prosecution" policy, the present prosecution constituted an abuse of process of the court. The Crown met this submission by challenging the existence of an "abuse of process" doctrine in criminal matters, contending that such a doctrine is inconsistent with the Crown's prerogative and duty to enforce the criminal law.

Allied with the abuse of process defence was the contention that the "no-prosecution" policy had resulted in a "community belief" among Indians in Manitoba that they could safely hunt game for food at all seasons of the year. The accused shared this "community belief"; hence his hunting for and possession of migratory game birds could not properly be described as having occurred "without lawful excuse" as charged. But this approach to the problem only took the parties deeper into their detour along the by-path. It led to the production in evidence of certain letters and memoranda whose effect at once became a matter of dispute. The Crown contended that these documents, issued between April and June 1975 (if admissible at all), varied the "no-prosecution" policy of 1968 in certain respects — one respect being that the policy would not apply to an Indian who was gainfully employed and who therefore did not *need* to hunt for food; another, that the Indian people were there admonished to use some discretion in exercising their rights. The Crown also referred to a meeting which took place in May 1975 between an officer of the Department of Renewable Resources of Manitoba and certain members, including the chief, of the Waterhen Indian Reserve, of which

the accused is a member. According to that witness the foregoing changes in policy were communicated to the Indians there present. The accused, however, contended that the 1968 policy continued substantially unchanged, and that if in fact any changes had been made these had not been communicated to him. To prosecute him would accordingly be an abuse of process.

It should be noted that when this case was before the lower courts the decision of the Supreme Court of Canada in *Rourke v. R.*, [1977] 5 W.W.R. 487, 38 C.R.N.S. 268, 35 C.C.C. (2d) 129, 76 D.L.R. (3d) 193, 16 N.R. 181, had not yet been rendered. The present charge was first heard by Garson Prov. J. He acquitted the accused, declaring that to convict him would do grave violation to natural justice. An appeal in the form of a trial de novo was taken by the Crown. It came before L. P. Ferg Co. Ct. J. ([1977] 3 W.W.R. 706). That learned judge concluded that in the light of the "no-prosecution" policy "it would be manifestly unfair and an oppressive abuse of the court's process in this instance to convict the accused" (p. 716). But in the *Rourke* case, Pigeon J., writing for the majority (the court was divided 5 to 4 on the issue whether a judge has a discretionary power to stay proceedings in a criminal case on the ground that they are oppressive and an abuse of process), said at p. 505:

"For the reasons I gave in *Regina v. Osborn*, [1971] S.C.R. 184, 12 C.R.N.S. 1, 1 C.C.C. (2d) 482, 15 D.L.R. (3d) 85, I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive."

So the acquittal by L. P. Ferg Co. Ct. J., resting as it did on the doctrine of abuse of process, was without proper foundation and cannot be sustained.

But, as earlier stated, abuse of process, though it loomed large in the presentation of the case by both sides, was not the true issue. The true issue was the validity or invalidity of the dispensation granted by executive action in favour of Indians. For the reasons set forth above, that dispensation was void and of no effect. It was accordingly not available to the accused as an answer to the charge under the Migratory Birds Convention Act.

The appeal of the Crown is therefore allowed, the acquittal of the accused is set aside, and a verdict of guilty is substituted. The matter is remitted to the Provincial Court to deal with sentence.

B.C.

S.C.

1939.

REX v. RYAN.

Robertson J.A.

EDITORIAL NOTE: Certiorari is an apt remedy only where there is want of jurisdiction. Where the objection to the conviction is on the ground of error in admission or appreciation of evidence or similar matters the proper remedy is by appeal. For other cases see Chitty's Abridgment of Canadian Criminal Law, Vols. I and II, under Certiorari III and V.

RECENT CASES: *Re Shaw Dairy Co.* (Ont.), [1938] 2 D.L.R. 768, *R.* v. *Dwyer* (N.S.), 70 Can. C.C. 264, [1938] 3 D.L.R. 394, 13 M.P.R. 89.

CERTIORARI application to quash conviction under s. 18 of Fisheries Act, 1932 (Can.), c. 42. Dismissed.

A. D. Macfarlane, K.C., for Crown.

P. R. Leighton, for applicant.

ROBERTSON J.:—The accused was charged before a Justice of the Peace on January 28, 1939, with an offence under s. 18 of the *Fisheries Act*, 1932 (Can.), c. 42. He pleaded not guilty. He was convicted and ordered to pay a fine and costs. He now applies for a writ of *certiorari* on the ground that the only witness called to prove the charge was not sworn at any time during the proceedings. This is not denied. Jurisdiction in the Justice of the Peace to try the case is conceded; but it is said he exceeded his jurisdiction or afterwards became without jurisdiction because the sole witness for the Crown was not sworn.

The cases show jurisdiction is "determinable on the commencement, not at the conclusion of the inquiry:" *R.* v. *Nat Bell Liquors Ltd.* (1922), 65 D.L.R. 1 at p. 21, 37 Can. C.C. 129 at p. 149. Once there is jurisdiction, a conviction regular on its face cannot be quashed on *certiorari* on the ground there was no evidence to support the conviction: *R.* v. *Nat Bell Liquors Ltd.*, 65 D.L.R. at pp. 18-21, 37 Can. C.C. at pp. 146-149; *R.* v. *Cox*, [1929] 2 D.L.R. 785 at pp. 786-7, 51 Can. C.C. 203 at pp. 204-5, 41 B.C.R. 9; *Re Gustafson* (1929), 52 Can. C.C. 151, 42 B.C.R. 58.

The application is refused.

Application dismissed.

THE KING v. COMMANDA.

Ont.

S.C.

1939.

Ontario Supreme Court, Greene J. September 11, 1939.

Constitutional Law III A—Game Laws — Indians — Robinson Treaty, 1850 — Cession of lands by Ojibway Indians — Privilege to hunt and fish thereon—Whether "trust or interest other than that of Province"—Game and Fisheries Act (Ont.)—Closed seasons—Application of to Indians.

The provisions of the Game and Fisheries Act, R.S.O. 1937, c. 353 relating to closed seasons for hunting and fishing apply to

Ont.

S.C.

1939.

THE KING
v.
COMMANDA.

Greene J.

the Ojibway Indians upon the lands ceded by them to the Province of Canada under the Robinson Treaty, 1850, which passed to the Province of Ontario upon Confederation, the privilege therein granted them to hunt and fish on such lands not being a "trust or interest in respect of such lands other than that of the Province of Ontario" within the meaning of s. 109 of the B.N.A. Act. Moreover, the legislation is valid, whatever the nature of the privilege granted the Indians, as being designed for the protection of game and fish within the Province and thus coming within s. 92(13) and (16) of the B.N.A. Act, its effect upon the Indians, over whom the Dominion Parliament has exclusive jurisdiction under s. 91(24) of the B.N.A. Act, being only incidental to its true object.

Cases Judicially Noted: *St. Catherine's Milling & Lbr. Co.* v. *The Queen*. 14 App. Cas. 46; *A.-G. Can.* v. *A.-G. Ont.*, [1897] A.C. 199, apld.

Statutes Considered: *Game and Fisheries Act*, R.S.O. 1937, c. 353; *B.N.A. Act*. 1867 (Imp.), c. 3, ss. 109, 91(24), 92(13) and (16); *Robinson Treaty*. 1850: *Indian Treaties and Surrenders* (King's Printer, Ottawa, 1905), Vol. I, p. 149.

EDITORIAL NOTE: Although the meaning of the words "trust" and "interest" in s. 109 of the B.N.A. Act were considered in *A.-G. Can.* v. *A.-G. Ont.*, *supra*, in relation to the Robinson Treaty, 1850, that action, it should be noted, was not concerned with the hunting and fishing privilege given the Indians by the Treaty, which was not even mentioned.

APPEAL by way of stated case from conviction of an Ojibway Indian under the Game and Fisheries Act, R.S.O. 1937, c. 353 for unlawful possession of game during closed season upon lands ceded by Robinson Treaty, 1850. Affirmed.

J. H. McDonald, for appellant.

C. R. Magone, K.C., for the Crown, respondent.

GREENE J.:—The appellant Joe Commanda was convicted by the Police Magistrate of having in his possession during closed season parts of two moose and a deer contrary to the provisions of the Ontario *Game and Fisheries Act*, R.S.O. 1937, c. 353. This Act specifically brings Indians within its scope by defining the word "person" as including Indians.

The appellant contends that the legislation is *ultra vires* of the Province in so far as it includes Indians referred to in the Robinson Treaty hunting within the territories defined by the said Robinson Treaty.

On September 9, 1850, the Honourable W. B. Robinson on behalf of Her Majesty the Queen, entered into an agreement with the Ojibway Indian tribes inhabiting and claiming certain portions of Ontario, mainly the eastern and northern shores of Lake Huron to a considerable distance inland, by which in consideration of £2,000 paid down and certain annuities the Indians ceded and granted to Her Majesty all their right and title to the

described territory, less certain defined areas reserved for occupation by the various tribes. The agreement then contains the following:

"And the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees to make, or cause to be made, the payments as before mentioned; and further, to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them and to fish in the waters thereof, as they have heretofore been in the habit of doing; saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government." (Indian Treaties and Surrenders Vol. 1, p. 149—published by The King's Printer at Ottawa in 1905).

The appellant is a member of the Ojibway tribe referred to in the treaty and the alleged offence was committed on ceded territory not sold or leased by the Provincial Government.

In 1850 the lands were situate in the Province of Canada, formerly Upper Canada and Lower Canada, and in 1867 by the *B.N.A. Act*, returned to the previous division of Upper and Lower Canada, under the names Ontario and Quebec. The lands involved are now situate in the Province of Ontario.

By s. 109 of the *B.N.A. Act* the lands of the several Provinces entering the Union belong to the new Provinces "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

Legislative sanction was given the treaty or agreement under consideration by the appropriation by the Province of Canada of moneys to pay the annuities provided for until 1867 and thereafter by the Dominion of Canada.

The appellant contends that the reservation in s. 109 as to existing Trusts and any Interest other than that of the Province (*i.e.* the Province of Canada) includes the right reserved to the Indians under the Robinson Treaty to hunt and fish over the ceded lands as before the treaty. It is common ground that there were no restrictions on their hunting and fishing in 1850. The appellant then cites s-s. (24) of s. 91 of the *B.N.A. Act* by which the Parliament of Canada is given exclusive legislative jurisdiction in relation to "Indians and Lands reserved for the Indians."

The appellant argues that in so far as there was an interest in lands reserved to the Indians at the time of the *B.N.A. Act*, or a trust created in respect thereof, then that interest or trust

Ont.

S.C.

1939.

THE KING
v.
COMMANDA.

Greene J.

can only be interfered with or taken away by the Parliament of Canada.

The first question to be considered is as to whether within the meaning of s. 109 there is a Trust in favour of the Indians, or whether they have an interest in the lands other than that of the Province.

The rights of the Indians are dependent upon the royal proclamation of His Majesty King George the Third issued on October 7, 1763. In that connection Lord Watson in delivering the judgment of the Privy Council in *St. Catherine's Milling & Lbr. Co.* v. *The Queen* (1888), 14 App. Cas. 46 at pp. 54-5 said:

"Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never 'been ceded to or purchased by' the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories;' and it is declared to be the will and pleasure of the sovereign that, 'for the present,' they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

It was held in the *St. Catherine's* case that the Indian title was "an interest other than that of the Province in the same" within the meaning of s. 109. It must be borne in mind however in considering the *St. Catherine's* case and certain observations therein, that the Indian surrender therein under consideration was made in 1873, namely after the *B.N.A. Act* and not before

it, as in the case of the Robinson treaty made in 1850.

"By an article of the treaty (*i.e.* 1873) it is stipulated that, subject to such regulations as may be made by the Dominion Government, the Indians are to have the right to pursue their avocations of hunting and fishing throughout the surrendered territory, with the exception of those portions of it which may, from time to time, be required or taken up for settlement, mining, lumbering, or other purposes." (Lord Watson, at p. 51).

In the case of the Robinson treaties of 1850 the surrender was made to the Crown in the right of the Province of Canada and passed in 1867 to the Province of Ontario without the Dominion of Canada ever having any beneficial interest therein. In the lands involved in the *St. Catherine's Milling* case the surrender was made to the Dominion.

The Robinson treaty under consideration in the case at bar, and a similar one made about the same time with other Indian tribes, were considered in *A.-G. Can.* v. *A.-G. Ont.*, [1897] A.C. 199. At p. 213 the judgment is as follows:

"Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities."

In view of the foregoing I am constrained to hold that in regard to the land ceded by the Indians there was no trust existing in respect thereof in their favour, nor did they have any interest other than that of the Province in the same.

Even if some trust existed or there was some interest other than that of the Province, I cannot agree that the *Game and Fisheries Act* is legislation "relating to" Indians or Lands reserved for the Indians, and consequently *ultra vires* of the Province. It is true the legislation does affect the Indians, but that does not make it legislation "relating to" Indians within the meaning of s. 91(24) of the *B.N.A. Act*.

The *Game and Fisheries Act* is general in its application to all persons within the Province, controlling even the land owner as to game on his private land. Its primary object is protection of game and fish within the Province and that is what it "re-

Ont.

S.C.

1939.

THE KING v. COMMANDA.

Greene J.

lates'' to and not to Indians because it happens to affect them. It seems to me that the jurisdiction of the Province is exclusive under s-ss. (13) and (16) of s. 92 of the *B.N.A. Act.*

''(13) Property and Civil Rights in the Province.''

''(16) Generally all Matters of a merely local or private nature in the Province.''

The legislative authority of the Province is ''as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow:'' *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick,* [1892] A.C. 437 at p. 442.

The whole question involved in this case resolves itself down to the narrow issue as to whether the legislation is void as ''relating to'' Indians or Indian lands which I have already discussed. If I am right in holding that it is not, then it does not matter whether the Indians have any rights flowing from the reservation in the Robinson treaty or not. Such rights (if any) may be taken away by the Ontario Legislature without any compensation. We have no provision in our constitution as in that of the United States of America by which the Courts can declare confiscatory legislation to be *ultra vires* and void.

''In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine:'' *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275 at p. 279.

So that even if the Indian had any rights within the reservation in s. 109, the destruction of the same by the Ontario *Game and Fisheries Act* is *intra vires* the provincial Legislature.

It is hardly necessary to state that I do not wish to be understood as criticizing the purpose or scope of the Ontario *Game and Fisheries Act.* That is not my function or my purpose.

Appeal dismissed.

REGINA v. COOPER
REGINA v. GEORGE
REGINA v. GEORGE

British Columbia Supreme Court, Brown, J. May 31, 1968.

Indians — Fishing rights — Charge of possession of fish at a time when no validly dated permit issued — Whether treaty Indians subject to Fisheries Act, R.S.C. 1952, c. 119, and Regulations — Whether offence to have possession of fish caught for food — Indian Act, R.S.C. 1952, c. 149.

The accused, Indians belonging to the Sooke tribe, were charged with being in possession of salmon at a place where at that time fishing for such fish was prohibited by s. 18 of the *Fisheries Act*, R.S.C. 1952, c. 119. The accused at the time in question did not have validly dated permits under the *British Columbia Fishing Regulations*, P.C. 1954-1910, SOR Con. 1955, vol. 2, p. 1627. The Sooke tribe had entered into a treaty on May 1, 1850, preserving fishing rights to members of such tribe over certain territories which included the waters where the fish therein were caught. It was submitted on behalf of the accused that the treaty gave to members of the tribe an unrestricted right to fish and that, as such, the treaty constituted a defence to the charge. The accused were convicted and appealed by way of stated case. *Held*, the appeals should be dismissed and the convictions affirmed. The decision of the Supreme Court of Canada in *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, 47 C.R. 382, was conclusive authority against the accused which compelled the Court to hold that the treaty of May 1, 1850, was subordinate to the provisions of the *Fisheries Act* and the Regulations thereunder. For that reason the treaty was no defence to the within charge.

[*R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi, refd to; *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, 47 C.R. 382, folld]

APPEAL by the accused from their convictions on a charge of unlawful possession of fish contrary to the *Fisheries Act*, R.S.C. 1952, c. 119.

R. Beavan, for accused, appellants.
R. B. Hutchison, for the Crown, respondent.

BROWN, J.:—This is an appeal by way of stated case from three convictions each in the following terms:

> . . . on the 4th day of October A.D. 1966 in the waters of the Sooke River, County of Victoria, Province of British Columbia . . . did unlawfully have in possession fish, at a place where at that time fishing for such fish was prohibited by law, contrary to section 18 of the "Fisheries Act" R.S.C. 1952 c 119 as amended.

The appellants are native Indians. They did not contest Crown evidence to the effect that they were in fact on October 4, 1966, in possession of salmon, that fishing for such fish

was then and there *purportedly* prohibited by law, and that they did not have validly dated permits under Regulation 32(1) [am. P.C. 1957-588, SOR/57-234, s. 3; P.C. 1958-693, SOR/58-184, s. 3] of the *British Columbia Fishery Regulations*, P.C. 1954-1910, SOR Con. 1955, vol. 2, p. 1627, which reads as follows:

> 32(1) An Indian may at any time with the permission of the Area Director catch fish to be used as food for himself and his family, but for no other purpose; the Area Director may in any such permit . . .

But the reason I have used the word "purportedly" and italicized it is that they claim fishing rights under a treaty made on May 1, 1850, between the Sooke tribe (of which they are members) and James Douglas, the agent of the Hudson's Bay Company in Vancouver Island. In *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 [affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi], the Court of Appeal held (*per* Davey, J.A., at pp. 617-8 and Norris, J.A., at pp. 649-661) that a similar document was indeed a treaty and that the Hudson's Bay Company by Douglas was lawfully acting as an instrument of Imperial policy. The treaty here is as follows:

> SOOKE TRIBE — NORTH-WEST OF SOOKE INLET
>
> KNOW all men, We the chiefs of the family of Sooke, acting for and on behalf of our people, who being here present have individually and collectively ratified and confirmed this our act. Now know that we, who have signed our names and made our marks to this deed on the first day of May, one thousand eight hundred and fifty, do consent to surrender, entirely and forever, to James Douglas, the agent of the Hudson's Bay Company in Vancouver Island, that is to say, for the Governor, Deputy Governor, and Committee of the same, the whole of the lands situate and lying between the Bay of Syusung, or Sooke Inlet, to the Three Rivers beyond Thlowuck, or Point Shirringham, on the Straits of Juan de Fuca, and the snow covered mountains in the interior of Vancouver Island.
>
> The condition of or understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.
>
> We have received, as payment, Forty-eight pounds six shillings and eight pence.
>
> In token whereof, we have signed our names and made our

marks, at Fort Victoria, on the first day of May, One Thousand eight hundred and fifty.

(Signed) Wanseea his X mark
Tanasman his X mark
Chysimkan his X mark
Yokum his X mark

Chiefs commissioned by and representing the Sooke Tribe here assembled.

The Magistrate found as a fact that geographically the treaty covered the area recited in the charges.

The case as stated then continues as follows:

I held that for the treaty to be offered as a defence to this charge that the onus was on the accused to show that the fish were taken as formerly. That is taken by means and methods that were used at the time this treaty was entered into

I held that the Fisheries Act did not abrogate the rights of the Indians to take fish

I held that the onus was on the accused to comply with the provisions of the permit given to them and that any fish taken outside the time specified therein were taken contrary to Section 18 of the Fisheries Act

I found the accused Guilty and fined them each $1.00

On being advised by Counsel for the Defence that it was intended to have a case stated for the Supreme Court I ordered the accused to enter into a recognizance in the sum of Ten dollars without sureties

WHEREFORE the following question is humbly submitted for the Opinion of The Honourable the Supreme Court of British Columbia;

(1) Did I err in holding that the treaty was not a defence to the charge
(2) Did I err in holding that the Fisheries Act did not abrogate the treaty rights of the Indians to take fish.

With respect, I am unable to agree with the Magistrate that the onus was on the accused to show "that fish were taken as formerly". The document embodying this larcenous arrangement must have been drawn by or on behalf of the Hudson's Bay Company (the signing Chiefs being unable to write) and so any ambiguity must be construed in favour of the exploited Chiefs. I was informed by counsel that the fish of which the accused were in possession had been caught by nets made of nylon, a substance happily unknown in 1850. I have no hesitation in finding that the expression in the treaty "to carry on our fisheries as formerly" is to be read as describing the extent of fishing reserved to the tribe (presumably unlimited) rather than the method. In any event the convictions were for *possession* of fish rather than for *fishing* for them.

In *R. v. White and Bob, supra*, the British Columbia Court of Appeal (sustained by the Supreme Court of Canada, 52 D.L.R. (2d) 481*n*) held that the restrictive provisions of the British Columbia *Game Act*, R.S.B.C. 1960, c. 160, under which

the respondents (Nanaimo Indians) were prosecuted, had no application to that case, since the respondents were exercising rights declared and confirmed by a "treaty" within the meaning of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, which reads as follows:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

However, it was made clear by the majority judgment of the Supreme Court of Canada in *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, 47 C.R. 382, that s. 87 of the *Indian Act* did not protect the treaty rights of aborigines from incursions by federal legislation. Cartwright, J., dissenting, at pp. 149-50 C.C.C., pp. 396-7 D.L.R., said:

> We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty. Johnson, J.A., with obvious regret, felt bound to hold that Parliament had taken away those rights, but I am now satisfied that on its true construction s. 87 of the *Indian Act* shows that Parliament was careful to preserve them. At the risk of repetition I think it clear that the effect of s. 87 is twofold. It makes Indians subject to the laws of general application in force in the Province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in a case of conflict between the provisions of the laws and the terms of the treaty the latter shall prevail.

But Martland, J., at pp. 150-1 C.C.C., pp. 397-8 D.L.R., for the majority said:

> I have had the opportunity to read the reasons stated by my brother Cartwright. The facts giving rise to this appeal are there reviewed and it is unnecessary to repeat them here. With great respect, I am unable to agree with his interpretation of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, which provides as follows:
>
> > "87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

72

I cannot construe this section as making the provisions of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179, subordinate to the treaty of July 10, 1827. In my opinion, it was not the purpose of s. 87 to make any legislation of the Parliament of Canada subject to the terms of any treaty. I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *B.N.A. Act* subject to provincial laws of general application.

The application of provincial laws to Indians was, however, made subject to "the terms of any treaty *and any other Act of the Parliament of Canada*" (the italics are mine). In addition, provincial laws inconsistent with the *Indian Act*, or any order, rule, regulation or by-law made thereunder, or making provision for any matter for which provision is made under that Act, do not apply.

The incorporation in the section of the words italicized to me makes it clear that when the section refers to "laws of general application from time to time in force in any province" it did not include in that expression the statute law of Canada. If it did, the section, in so far as Federal legislation is concerned, would provide that the statute law of Canada applies to Indians, subject to the terms of any Act of the Parliament of Canada, other than the *Indian Act*. This would be a rather unusual provision, particularly in view of the fact that it did not require any express provision in the *Indian Act* to make Indians subject to the provisions of Federal statutes. In my view the expression refers only to those rules of law in a Province which are provincial in scope, and would include provincial legislation and any laws which were made a part of the law of a Province, as, for example, in the Provinces of Alberta and Saskatchewan, the laws of England as they existed on July 15, 1870.

This section was not intended to be a declaration of the paramountcy of treaties over Federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.

Accordingly, in my opinion, the provisions of s. 87 do not prevent the application to Indians of the provisions of the *Migratory Birds Convention Act*.

I am bound to follow this and must hold that the *Fisheries Act*, R.S.C. 1952, c. 119, and Regulations may impinge on treaty rights. It is with regret that I am unable to distinguish legally the situation before me from that in *R. v. George* merely on the ground that it dealt with the *Migratory Birds Convention Act* and regulations.

Accordingly, the convictions are affirmed. As to the questions posed by the convicting Magistrate, my decision on the appeal as argued may make it superfluous to answer them, but for the record I respectfully find that the answer to Q. 1 is "no" and to Q. 2 is "yes".

There will be no costs. *Appeal dismissed.*

5

PAUL DANIELS .....APPELLANT;

AND

RONALD ADDISON WHITE and HER MAJESTY THE QUEEN RESPONDENTS.

1967
*Nov. 20
1968
Apr. 29

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Indians—Hunting rights of Manitoba Indians—Possession of game birds prohibited season contrary to statute—Whether exempt from compliance with statute by virtue of agreement between Canada and Manitoba—Indian Act, R.S.C. 1952, c. 149—Migratory Birds Convention Act, R.S.C. 1952, c. 179, s. 12(1)—Manitoba Natural Resources Act, 1930 (Can.), c. 29; 1930 (Man.), c. 30—B.N.A. Act, 1930, c. 26.

The appellant is an Indian from the Province of Manitoba and was convicted of having game birds in his possession, contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. On appeal by way of trial *de novo*, the conviction was quashed. On a further appeal to the Court of Appeal, the conviction was restored by a majority judgment. The appellant was granted leave to appeal to this Court. The issue in the appeal is whether para. 13 of an agreement made on December 14, 1929, between the government of Canada and the government of Manitoba (approved by statutes of the United Kingdom Parliament, the Parliament of Canada and the Legislature of Manitoba) exempts the appellant from compliance with the *Migratory Birds Convention Act* and the regulations made thereunder. Paragraph 13 provides that..."Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians might have a right of access".

Held (Cartwright C.J. and Ritchie, Hall and Spence JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott, Martland, Judson and Pigeon JJ.: Paragraph 13 of the agreement did not have the effect of exempting the appellant from compliance with the *Migratory Birds Convention Act* and the regulations made thereunder. The whole tenor of the agreement is that of a conveyance of land imposing specified obligations and restrictions on the transferee, not on the transferor. This applied particularly to para. 13 which made provincial game laws applicable to Indians in the province subject to the proviso contained therein. That only provincial game laws were in the contemplation of the parties, and not federal enactments, is underscored by the words "which the Province hereby assures to them" in para. 13. Care was taken in framing para. 13 that the legislature of the province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands. The agreement and the legislation confirm-

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1968

DANIELS v. WHITE AND THE QUEEN

ing it did no more than impose specified obligations and restrictions upon the transferee province. They did not repeal by implication a statute of Canada giving effect to an international convention.

Per Pigeon J.: This was a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. The words in para. 13 of the agreement "Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof" contemplate the laws of Manitoba. It is perfectly possible without doing violence to the language used to construe para. 13 as applicable solely to provincial laws and thus to avoid any conflict. Furthermore, it would not only be foreign to the declared object of the agreement but even inconsistent with it, to provide for an implied modification of the *Migratory Birds Convention Act*.

Per Cartwright C.J., *dissenting:* The words "which the Province hereby assures to them" do not cut down the right of hunting which in plain and unequivocal words para. 13 says the Indians shall have. The rights given to the Indians by the words of para. 13 have been, since 1930, enshrined in our Constitution and given the force of law "notwithstanding anything in...any Act of the Parliament of Canada". There is no rule which permits to add after the words "Canada" the words "except the *Migratory Birds Convention Act*".

Per Ritchie, Hall and Spence JJ., *dissenting:* The words in para. 13 of the agreement "which the Province hereby assures to them" do not have the effect of limiting the rights thereby accorded to the Indians, to provincial rights, but rather to constitute additional assurance of the general rights described in that paragraph.

In view of the words of s. 1 of the *B.N.A. Act*, 1930, giving the agreement the force of law "notwithstanding anything in...any Act of the Parliament of Canada", the agreement takes precedence over the *Migratory Birds Convention Act* and the regulations made thereunder, with the result that these enactments do not apply to Indians in Manitoba when engaged in hunting migratory birds for food in the areas set out in para. 13.

Droit criminel—Indiens—Droit de chasse des Indiens du Manitoba—Possession de gibier en temps prohibé contrairement au statut—Convention entre le Canada et le Manitoba dispense-t-elle d'obéir au statut—Loi sur les Indiens, S.R.C. 1952, c. 149—Loi sur la Convention concernant les oiseaux migrateurs, S.R.C. 1952, c. 179, art. 12(1)—Loi des ressources naturelles du Manitoba, 1930 (Can.), c. 29; 1930 (Man.), c. 30—Acte de l'Amérique du Nord britannique, 1930, c. 26.

L'appelant, un Indien du Manitoba, a été déclaré coupable d'avoir eu en sa possession du gibier contrairement à l'art. 12(1) de la *Loi sur la Convention concernant les oiseaux migrateurs*, S.R.C. 1952, c. 179. Sur appel par voie de procès *de novo*, la déclaration de culpabilité a été annulée. Sur appel subséquent à la Cour d'appel, la déclaration de culpabilité a été rétablie par un jugement majoritaire. L'appelant a obtenu la permission d'appeler à cette Cour. La question à débattre est de savoir si le para. 13 de la convention faite le 14 décembre 1929

entre le gouvernement du Canada et le gouvernement du Manitoba (ratifiée par les statuts du parlement du Royaume-Uni, du parlement du Canada et de la législature du Manitoba) dispense l'appelant d'obéir à la *Loi sur la Convention concernant les oiseaux migrateurs* et les règlements établis en vertu d'icelle. Le para. 13 stipule que...«le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès».

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright et les Juges Ritchie, Hall et Spence étant dissidents.

Les Juges Fauteux, Abbott, Martland, Judson et Pigeon: Le paragraphe 13 de la convention ne dispense pas l'appelant d'obéir à la *Loi sur la Convention concernant les oiseaux migrateurs* et aux règlements établis en vertu d'icelle. La convention est un acte de transmission de propriété imposant des obligations et des restrictions spécifiques au cessionnaire, mais non pas au cédant. Ceci s'applique particulièrement au para. 13 qui rend les lois de chasse provinciales applicables aux Indiens dans la province sous réserve de la condition y prévue. Les mots «que la province leur assure par les présentes» dans le para. 13 montrent bien que les parties n'avaient en vue que les lois de chasse provinciales et non pas les lois fédérales. On a pris soin de s'assurer que la province ne pourrait pas unilatéralement porter atteinte au droit des Indiens de chasser pour se nourrir sur les terres inoccupées de la Couronne. La convention ainsi que la législation la ratifiant n'ont pas d'autre effet que d'imposer des obligations et des restrictions spécifiques à la province cessionnaire. Elles n'ont pas eu pour effet d'abroger implicitement un statut du Canada qui donnait effet à une convention internationale.

Le Juge Pigeon: Il s'agit d'un cas où l'on doit appliquer la règle d'interprétation disant que le parlement n'est pas censé légiférer à l'encontre d'un traité ou d'une manière incompatible avec les convenances et les règles établies du droit international. Dans le para. 13 de la convention, les mots «le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province» visent les lois du Manitoba. Sans faire violence aux mots dont on s'est servi, il est parfaitement possible d'interpréter ce para. 13 comme s'appliquant uniquement aux lois provinciales et ainsi d'éviter tout conflit. Interpréter ce paragraphe comme une modification implicite de la *Loi sur la Convention concernant les oiseaux migrateurs* serait non seulement s'éloigner de l'objet de la convention mais aller à l'encontre.

Le Juge en Chef Cartwright, *dissident*: Les mots «que la province leur assure par les présentes» n'enlèvent rien au droit de chasser qu'en des termes clairs et non équivoques le para. 13 dit que les Indiens possèdent. Les droits donnés aux Indiens par le para. 13 ont été, depuis 1930, consacrés par notre constitution et sont devenus la loi «nonobstant tout ce qui est contenu...dans toute loi du Parle-

1968

DANIELS v. WHITE AND THE QUEEN

ment du Canada». Il n'y a aucune règle qui permette d'ajouter après les mots «Canada» les mots «excepté la *Loi sur la Convention concernant les oiseaux migrateurs*».

Les Juges Ritchie, Hall et Spence, *dissidents:* Dans le para. 13 de la convention, les mots «que la province leur assure par les présentes» n'ont pas l'effet de limiter aux seuls droits provinciaux les droits qui y sont accordés aux Indiens, mais au contraire constituent une garantie additionnelle des droits généraux décrits dans ce paragraphe.

Vu les termes de l'art. 1 de l'*Acte de l'Amérique du Nord britannique*, 1930, donnant à la convention force de loi «nonobstant tout ce qui est contenu...dans toute loi du Parlement du Canada», la convention a priorité sur la *Loi sur la Convention concernant les oiseaux migrateurs* et les règlements établis en vertu d'icelle. Il en résulte que cette législation ne s'applique pas aux Indiens du Manitoba lorsqu'ils chassent pour se nourrir les oiseaux migrateurs dans les endroits spécifiés au para. 13.

APPEL d'un jugement de la Cour d'appel du Manitoba[1], rétablissant une déclaration de culpabilité. Appel rejeté, le Juge en Chef Cartwright et les Juges Ritchie, Hall et Spence étant dissidents.

APPEAL from a judgment of the Court of Appeal of Manitoba[1], restoring the appellant's conviction. Appeal dismissed, Cartwright C.J. and Ritchie, Hall and Spence JJ. dissenting.

William R. Martin, for the appellant.

D. H. Christie, Q.C., for the respondents.

THE CHIEF JUSTICE (*dissenting*):—The question to be determined on this appeal, the relevant facts (all of which are undisputed) and the historical background in the light of which the controversy must be considered are set out in the reasons of other members of the Court.

That the problem is not free from difficulty is attested by the differences of opinion in the Courts below and in this Court.

Since the decisions of this Court in *Sikyea v. The Queen*[2] and *The Queen v. George*[3], it must be accepted

---

[1] (1966), 56 W.W.R. 234, 49 C.R.1, 57 D.L.R. (2d) 365.

[2] [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80.

[3] [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386.

that, if it were not for the provisions contained in section 13 of the agreement between the Government of Canada and the Government of Manitoba which was approved and given the force of law by Statutes of the Imperial Parliament, the Parliament of Canada and the Legislature of Manitoba, the conviction of the appellant would have to be upheld.

Nothing would be gained by my repeating the reasons which I gave in *George*'s case for thinking that both it and *Sikyea*'s case should have been decided differently. I accept those decisions.

The first question before us is as to the meaning of the words used in section 13 of the agreement and particularly the following:

> ...provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians might have a right of access.

I share the view of my brothers Ritchie and Hall that the words "which the Province hereby assures to them" do not cut down "the right of hunting, trapping and fishing game and fish for food at all seasons of the year" which in plain and unequivocal words the clause says that the Indians shall have.

In *Sikyea*'s case and *George*'s case the Court decided that this right, secured to the Indians by treaty, could be, and as a matter of construction had been abrogated by the terms of the *Migratory Birds Convention Act* and the *Regulations* made thereunder. In *George*'s case the Court held that while s. 87 of the *Indian Act* preserved the treaty rights of the Indians against encroachment by laws within the competency of the Provincial Legislature it had no such effect in regard to an Act of Parliament.

The situation in the case at bar is different. The right of hunting, trapping and fishing given to the Indians by the words of section 13 quoted above has been, since 1930, enshrined in an amendment to our Constitution and given:

> ... the force of law notwithstanding anything in the *British North America Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

I find it impossible to uphold the conviction of the appellant unless we are able to say that, by the application

78

1968

DANIELS v. WHITE AND THE QUEEN

Cartwright C.J.

of some rule of construction, there should be inserted in s. 1 of the *British North America Act*, 1930, immediately after the words "Parliament of Canada" the words "except the *Migratory Birds Convention Act*". I know of no rule which permits us to take such a course.

I would dispose of the appeal as proposed by my brother Hall.

The Judgment of Fauteux, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—The appellant is an Indian within the meaning of para. (*g*) of subs. (1) of s. 2 of the *Indian Act*, R.S.C. 1952, c. 149. He was convicted on December 7, 1964, of having in his possession

> Migratory Game Birds, during a time when the capturing, killing, or taking of such birds, is prohibited, contrary to the Regulations under the *Migratory Birds Convention Act*, thereby committing an offence under Section 12(1) of the said *Migratory Birds Convention Act*.

On an appeal by way of trial *de novo* his conviction was quashed. On a further appeal to the Court of Appeal of Manitoba[4], his conviction was restored and the sentence affirmed by a majority judgment. He appeals to this Court with leave.

The issue in this appeal is whether by operation of para. 13 of the agreement made on December 14, 1929, between the Government of the Dominion of Canada and the Government of the Province of Manitoba (hereinafter referred to as "the agreement") the appellant was exempted from compliance with the *Migratory Birds Convention Act* and *Regulations* made thereunder bearing in mind that at the relevant time and place he was an Indian who had hunted game for food on land to which he had a right of access.

There can be no doubt that apart from para. 13 of the agreement above quoted the appellant was, in the circumstances of this case, subject to the *Migratory Birds Convention Act and Regulations*. See: *Sikyea v. The Queen*[5]; *The Queen v. George*[6]; *Sigeareak v. The Queen*[7].

---

[4] [1966], 56 W.W.R. 234, 49 C.R. 1, 57 D.L.R. (2d) 365.

[5] [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80.

[6] [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386.

[7] [1966] S.C.R. 645, 49 C.R. 271, 56 W.W.R. 473, [1966] 4 C.C.C. 393, 57 D.L.R. (2d) 536.

Paragraph 13 of the agreement provides:

> 13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Paragraph 13 is part of an agreement dated December 14, 1929, between the Government of Canada and the Government of the Province of Manitoba for the transfer to the province from the Dominion of all ungranted Crown lands. This agreement was approved by the Manitoba Legislature and by Parliament. (Statutes of Manitoba, 1930, c. 30; Statutes of Canada. 1930, c. 29.) It was subsequently affirmed by the *British North America Act*, 1930, 20-21 Geo. V., c. 26. Three similar agreements involving Alberta, Saskatchewan and British Columbia were subsequently affirmed.

Section 1 of the *British North America Act* 1930 provides:

> 1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *British North America Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

Prior to the coming into force of the agreement, title to all ungranted Crown lands in the Province of Manitoba was vested in the Dominion. Briefly, the relevant history is that by the *Rupert's Land Act*, 1868, 31-32 Vict., c. 105 (R.S.C. 1952, vol. VI, p. 99) provision was made for the surrender of Rupert's Land by the Hudson's Bay Company and for the acceptance thereof by Her Majesty. Section 3 of the said Act provided:

> that such Surrender shall not be accepted by Her Majesty until the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty, and embodied in an address to Her Majesty from both the Houses of the Parliament of Canada in pursuance of the 146th Section of the *British North America Act* 1867.

By Imperial Order in Council of June 23, 1870, Rupert's Land was admitted into and became part of the Dominion of Canada effective July 15, 1870—R.S.C. 1952, vol. VI, p. 113. By operation of the *Manitoba Act* 1870, 33 Vict.,

1968

DANIELS v. WHITE AND THE QUEEN

Judson J.

c. 3 (Canada), subsequently affirmed with retrospective effect by the Parliament of the United Kingdom (*B.N.A. Act, 1871*, 34-35 Vict., c. 28, s. 5, R.S.C. 1952, vol. VI, p. 146), the Province of Manitoba was carved out of Rupert's Land and came into being on the same date Rupert's Land entered Confederation. By s. 30 of the *Manitoba Act, 1870*, all ungranted or waste lands in the Province vested in the Crown to be administered by the Government of Canada for the purposes of the Dominion.

The Crown in right of the Dominion being the owner of all Crown lands, including the mines and minerals therein, in the Province of Manitoba that Province, together with Alberta and Saskatchewan, was in a less favourable condition than the other Provinces who by operation of s. 109 of the *British North America Act, 1867*, retained Crown lands upon entering Confederation. The purpose of the agreement was to transfer these lands to Manitoba in order that it might be in the same position as the other provinces under s. 109 of the *British North America Act, 1867*. This is apparent from the preamble to and paragraph 1 of the agreement and from the following cases where the matter was under consideration:

Saskatchewan Natural Resources Reference[8]*:*

Reference concerning Refunds of Dues paid to the Dominion of Canada in respect of Timber Permits in the Western Provinces[9]*;*

Anthony v. Attorney General of Alberta[10]*;*

Attorney General of Alberta v. Huggard Assets Limited[11]*:*

Western Canadian Collieries Limited v. Attorney General of Alberta[12].

The whole tenor of the agreement is that of a conveyance of land imposing specified obligations and restrictions on the transferee, not on the transferor. This applies, in particular, to paragraph 13, which makes provincial game laws applicable to Indians in the province subject to the

---

[8] [1931] S.C.R. 263, 1 D.L.R. 865; affirmed [1931] 3 W.W.R. 488, 4 D.L.R. 712, [1932] A.C. 28.

[9] [1933] S.C.R. 616; affirmed [1935] A.C. 184, 1 W.W.R. 607, 2 D.L.R. 1.

[10] [1943] S.C.R. 320, 3 D.L.R. 1.

[11] [1951] S.C.R. 427, 2 D.L.R. 305; reversed [1953] A.C. 420, 8 W.W.R. (N.S.) 561, 3 D.L.R. 225.

[12] [1953] A.C. 453.

proviso contained therein. That only provincial game laws were in the contemplation of the parties, and not federal enactments, is underscored by the words "which the Province hereby assures to them" in para. 13. As indicated by para. 11 of the agreement and para. 10 of the Alberta and Saskatchewan agreements, Canada, in negotiating these agreements, was mindful of the fact it had treaty obligations with Indians on the Prairies. These treaties, among other things, dealt with hunting by Indians on unoccupied lands. For example, treaties 5 and 6, which cover portions of Manitoba, Saskatchewan and Alberta, provide:

> Her Majesty further agrees with Her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

Treaty No. 8, which covers portions of Alberta and Saskatchewan, provides:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Treaty No. 7, which covers a portion of Alberta, is to the same effect.

It being the expectation of the parties that the agreement would be given the force of law by the Parliament of the United Kingdom (Paragraph 25) care was taken in framing para. 13 that the Legislature of the province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands. Under the agreement this could only be done by concurrent Statutes of the Parliament of Canada and the Legislature of the province, in accordance with para. 24 thereof.

The majority opinion in the Manitoba Court of Appeal held that the agreement, affirmed as it was by legislation of all interested governments, could not be reconciled with

1968

DANIELS v. WHITE AND THE QUEEN

Judson J.

the *Migratory Birds Convention Act* and that the latter Act must prevail. The *Migratory Birds Convention Act*, being of general application throughout Canada, ought not to be construed as circumscribed by the restricted legislation that is to be found in the *Manitoba Natural Resources Act*. It was desirable that a matter within the legislative responsibility of Parliament and governed by international treaty be uniform in application throughout the country unless specifically provided otherwise.

The dissenting opinion would have held that para. 13 of the agreement should prevail over the *Migratory Birds Convention Act* notwithstanding that such a result gives the Act a different effect in Manitoba from that which it has in other parts of Canada.

The *Migratory Birds Convention Act* was enacted in 1917. It confirms a treaty made between Canada and the United States. The regulations under the Act go back to 1918. (P.C. 871, April 23, 1918). In my opinion, the agreement and the legislation of 1930 confirming it did no more than impose specified obligations and restrictions upon the transferee province. They did not repeal by implication a statute of Canada giving effect to an international convention.

On this subject I adopt the law as stated in 36 Hals., 3rd ed., p. 465:

> Repeal by implication is not favoured by the courts for it is to be presumed that Parliament would not intend to effect so important a matter as the repeal of a law without expressing its intention to do so. If, however, provisions are enacted which cannot be reconciled with those of an existing statute, the only inference possible is that Parliament, unless it failed to address its mind to the question, intended that the provisions of the existing statute should cease to have effect, and an intention so evinced is as effective as one expressed in terms. The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together. If it is reasonably possible so to construe the provisions as to give effect to both, that must be done; and their reconciliation must in particular be attempted if the later statute provides for its construction as one with the earlier, thereby indicating that Parliament regarded them as compatible, or if the repeals expressly effected by the later statute are so detailed that failure to include the earlier provision amongst them must be regarded as such an indication.

I would dismiss the appeal.

RITCHIE J. (*dissenting*):—I have had the benefit of reading the reasons for judgment prepared by other members of the Court in which the circumstances giving rise to this appeal are fully recited.

I agree with Mr. Justice Hall that the words "which the Province hereby assures to them" as they occur in paragraph 13 of the agreement which is a schedule to the *Manitoba Natural Resources Act*, Statutes of Canada 1930, c. 29, do not have the effect of limiting the rights thereby accorded to Indians, to provincial rights, but rather that they constitute additional assurance of the general rights described in the said paragraph.

Like my brother Hall, I can only read the provisions of s. 1 of the *British North America Act*, 1930, as giving the agreement "the force of law notwithstanding anything in ... any Act of the Parliament of Canada..." and I am therefore of opinion that the agreement takes precedence over the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179 and the regulations made thereunder, with the result that these enactments do not apply to Indians in Manitoba when engaged in hunting migratory birds for food in the areas set out in section 13.

I would accordingly dispose of this matter in the manner proposed by my brother Hall.

The judgment of Hall and Spence JJ. was delivered by

HALL J. (*dissenting*):—The facts in this appeal are not in dispute. The appellant, Paul Daniels, who is a Treaty Indian of the Chemahawin Indian Reserve in the Province of Manitoba, was convicted by Police Magistrate Neil McPhee, at The Pas, Manitoba, for an offence contrary to subs. (1) of s. 12 of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. The charge on which he was convicted was that he, the said

> Paul Daniels, of Chemahawin Indian Reserve, Manitoba, on the 3rd day of July, A.D. 1964, at Chemahawin Indian Reserve, in the Province of Manitoba, did unlawfully and without lawful excuse have in his possession Migratory Game Birds, during a time when the capturing, killing or taking of such birds is prohibited, contrary to the regulations under the *Migratory Birds Convention Act*, thereby committing an offence under Section 12(1) of the said *Migratory Birds Convention Act*.

Against the conviction the accused appealed to the County Court by way of trial *de novo*. His Honour J. W. Thompson, sitting as a judge of the County Court of Manitoba,

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

allowed the appeal and acquitted the accused. The Crown then took an appeal to the Court of Appeal for Manitoba[13] which Court, Freedman J.A. dissenting, allowed the appeal and restored the conviction. The appellant then applied for and was given leave to appeal to this Court.

On July 3, 1964, the appellant had in his possession two wild ducks, one described as a redhead and the other a mallard or greenhead. At a point along the Saskatchewan River, within the Reserve, he had, on his own admission, shot and killed the birds for food and they were being cooked over a campfire when two constables of the R.C.M.P. entered the area. Section 6 of the *Migratory Birds Convention Act* provides:

> No person, without lawful excuse, the proof whereof shall lie on such person, shall buy, sell or have in his possession any migratory game bird, migratory insectivorous bird or migratory nongame bird, or the nest or egg of any such bird or any part of any such bird, nest or egg, during the time when the capturing, killing or taking of such bird, nest or egg is prohibited by this Act.

Under s. 3(*b*)(i) "Migratory Game Birds" includes wild ducks. Section 12(1) of the *Act* provides that every person who violates any provision of this *Act* or any regulation, is, for each offence, liable upon summary conviction to a fine of not more than three hundred dollars and not less than ten dollars, or to imprisonment for a term not exceeding six months or to both fine and imprisonment.

Section 5(1) of the *Regulations* provides:

> Unless otherwise permitted under these Regulations to do so, no person shall
>
> (*a*) in any area described in Schedule A, kill, hunt, capture, injure, or take or molest a migratory bird at any time except during an open season specified for that bird and that area in Schedule A...

Part VII of Schedule A to the *Regulations* defines the open season for ducks in Manitoba. In the area north of Parallel 53 which includes the Chemahawin Indian Reserve, the open season is from noon September 11 to November 28, inclusive of the closing date.

---

[13] (1966), 56 W.W.R. 234, 49 C.R. 1, 57 D.L.R. (2d) 365.

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

may have rights of access were not subject to any of the limitations which the *Game and Fisheries Act* of Manitoba, R.S.M. 1954, c. 94, imposes upon the non-Indian residents of Manitoba. Section 72(1) of *The Game and Fisheries Act*, R.S.M. 1954, c. 94, reads as follows:

> 72(1) Notwithstanding this Act, and in so far only as is necessary to implement The Manitoba Natural Resources Act, any Indian may hunt and take game for food for his own use at all seasons of the year on all unoccupied Crown lands and on any other lands to which the Indian may have the right of access.

The question which falls to be determined in this appeal is whether the terms of the agreement between the Government of Canada and the Government of Manitoba as ratified by Parliament and by the Legislature of Manitoba and confirmed at Westminster in the *British North America Act* 1930 take precedence over the provisions of the *Migratory Birds Convention Act* and the *Regulations* made thereunder. If full effect is to be given to s. 13 of the agreement in question, it must be held that the provisions of the *Migratory Birds Convention Act* and the *Regulations* made thereunder do not apply to Indians in Manitoba when engaged in hunting migratory birds for food in the areas set out in the section. On the other hand, if the provisions of the *Migratory Birds Convention Act* take precedence, the right of Indians in Manitoba to hunt game for food at all seasons of the year in accordance with said s. 13 is wiped out. Accordingly, the decision must be made as to which legislation is paramount.

Freedman J.A., in his dissenting judgment in the Court of Appeal, dealt with the problem as follows:

> At first blush it might be thought that the reference to Indians and their hunting rights both in the Convention and in the regulations of the *Migratory Birds Convention Act*—under which they are permitted to hunt scoters, auks, auklets, etc.—settles the matter. Obviously such rights are far smaller than the unrestricted right to hunt all game for food, which is provided by Sec. 13 of *"The Manitoba Natural Resources Act"*. The reference to Indians in the Convention and in the regulations is in general terms, no exception being made with regard to Indians of Manitoba or elsewhere. It might accordingly be plausibly argued that the Indians in Manitoba have only such rights with respect to migratory birds as are conferred by the *Migratory Birds Convention Act*. But this is not necessarily so. We must remember that when the Convention of 1917 was entered into, the agreement relating to the transfer of Manitoba's natural resources was not yet in existence nor even in contemplation. Hence no exception with regard to Manitoba Indians could have been expected in the Convention. As for the regulations of 1958, it is true that they were enacted subsequent to *The Manitoba Natural Resources Act* and that they contain no exception in favour of Indians of Manitoba. But the

It is further provided in s. 5(2) of the *Regulations:*

> Indians and Eskimos may take auks, auklets, guillemots, murres, puffins and scoters and their eggs at any time for human food or clothing, but they shall not sell or trade or offer to sell or trade birds or eggs so taken and they shall not take such birds or eggs within a bird sanctuary.

Unless the appellant's status as an Indian in Manitoba permits him to hunt and possess migratory game birds at all seasons of the year, he was properly convicted: *Sikyea v. The Queen*[14].

The appellant claimed immunity from the provisions of the *Migratory Birds Convention Act* by virtue of the *Manitoba Natural Resources Act*, Statutes of Canada 1930, c. 29, which he contends exempts him from the operations of the *Migratory Birds Convention Act* because he is an Indian residing in the Province of Manitoba.

In the year 1929, some twelve years after the enactment of the *Migratory Birds Convention Act*, the Government of Canada and the Government of Manitoba reached an agreement respecting the transfer to Manitoba of the unalienated natural resources within the Province. The agreement was approved by the Parliament of Canada in the *Manitoba Natural Resources Act, supra,* and by the Legislature of Manitoba by the *Manitoba Natural Resources Act*, R.S.M. 1954, c. 180. The schedule to both statutes contains the terms of the agreement, in which s. 13 reads as follows:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians might have a right of access.

This section of the agreement was dealt with by this Court in *Prince and Myron v. The Queen*[15], which held that Indians in Manitoba hunting for food on all unoccupied Crown lands and on any other lands to which they

[14] [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80.

[15] [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, 3 C.C.C. 1.

regulations could not enlarge or go beyond the provisions of the statute pursuant to which they were enacted. Rather they would conform to the terms of that statute; so no such exception would be expected in the regulations either.

The parallel argument on the other side appears to me to be far more cogent. The terms of Sec. 13 contained in *The Manitoba Natural Resources Act* are comprehensive and permit the hunting by Indians of game for food at all seasons of the year. No exception is made with respect to migratory birds, even though the *Migratory Birds Convention Act* had been on the statute books since 1917. Instead of making the provisions of Sec. 13 subject to the terms of the *Migratory Birds Convention Act*, the legislators did quite the opposite. They enshrined the agreement within the Canadian constitutional framework by having it confirmed at Westminster in the *British North America Act, 1930*, and declared it should have the force of law "notwithstanding anything in... any Act of the Parliament of Canada". I believe it should be given that force and not be read as subject to the provisions of the *Migratory Birds Convention Act*.

I am conscious of the fact that this conclusion will give to the *Migratory Birds Convention Act* a different effect in Manitoba (and incidentally in Saskatchewan and Alberta, which have similar provisions to Sec. 13) from that which it has in other parts of Canada. The decision of the Supreme Court of Canada in *Reg. vs. Sikyea*, (1964) S.C.R. 642, upheld the application of the *Migratory Birds Convention Act* to an Indian of the Northwest Territories notwithstanding hunting rights contained in treaties. The decision of that Court in *The Queen vs. George*, (1966) 55 D.L.R. (2d) 386, came to the same conclusion as regards an Indian in Ontario. In neither case, of course, did Sec. 13 of *The Manitoba Natural Resources Act* apply. If the application of Sec. 13 gives to the *Migratory Birds Convention Act* a disparate result in different parts of Canada, that is simply an unfortunate but inevitable consequence of the conflicting legislation on the subject.

I am in full agreement with Freedman J.A. and the fact that the conclusion arrived at by him gives the Indians of Manitoba, Saskatchewan and Alberta a latitude while hunting for food on unoccupied crown lands and on other lands to which Indians might have a right of access greater than that possessed by other Indians in Canada is not of itself a reason for putting a strained interpretation on said s. 13 or for failing to give effect to the very plain language in the *British North America Act* 1930. The lamentable history of Canada's dealings with Indians in disregard of treaties made with them as spelt out in the judgment of Johnson J.A. in *Regina v. Sikyea*[16] and by McGillivray J.A. in *Rex v. Wesley*[17] ought in justice to allow the Indians to get the benefit of an unambiguous law which for

[16] [1964] 2 C.C.C. 325 at 327 to 336, 43 C.R. 83, 46 W.W.R. 65, 43 D.L.R. (2d) 150.

[17] [1932] 58 C.C.C. 269 at 274 to 285, 2 W.W.R. 337, 26 Alta. L.R. 433.

1968

DANIELS
v.
WHITE AND
THE QUEEN

Hall J.

once appears to give them what the treaties and the Commissioners who were sent to negotiate those treaties promised.

I said at p. 646 of my reasons in *Sikyea* which were concurred in by the six other members of this Court who heard the appeal:

> On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal, (1964) 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

It should be noted that in *Sikyea* the *British North America Act* 1930 had no application because the offence there being dealt with had occurred in the Northwest Territories, an area wholly within the legislative jurisdiction of the Parliament of Canada. Parliament has the power to breach the Indian treaties if it so wills: *Regina v. Sikyea, supra.* That point is dealt with by Johnson J.A. at p. 330 as follows:

> Discussing the nature of the rights which the Indians obtained under the treaties, Lord Watson, speaking for the Judicial Committee in *A.-G. Can. v. A.-G. Ont., A.-G. Que. v. A.-G. Ont.*, (1897) A.C. 199 at p. 213, said:
>
> > "Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due..."
>
> While this refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing. It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement", like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the *B.N.A. Act*, from doing so.

However, parliament cannot legislate in contravention of the *British North America Act* and that is why the *British North America Act* 1930 is decisive in this case.

A reading of Johnson J.A.'s historical review in *Sikyea*, particularly at pp. 335-6, where he said:

> It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think it can be

described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked—a case of the left hand having forgotten what the right hand had done. The subsequent history of the Government's dealing with the Indians would seem to bear this out. When the treaty we are concerned with here was signed in 1921, only five years after the enactment of the *Migratory Birds Convention Act*, we find the Commissioners who negotiated the treaty reporting:

> "The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case, and the Government will expect them to support themselves in their own way, and, in fact, that more twine for nets and more ammunition were given under the terms of this treaty than under any of the preceding ones; this went a long way to calm their fears. I also pointed out that any game laws made were to their advantage, and, whether they took treaty or not, they were subject to the laws of the Dominion."

and there is nothing in this report which would indicate that the Indians were told that their right to shoot migratory birds had already been taken away from them. I have referred to Art. 12 of the agreement between the Government of Canada and the Province of Alberta signed in 1930 by which that Province was required to assure to the Indians the right of "hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands". (The amendment to the *B.N.A. Act* (1930 (U.K.), c. 26) that confirmed this agreement, declared that it should "have the force of law notwithstanding anything in the British North America Act... or any Act of the Parliament of Canada...") It is of some importance that while the Indians in the Northwest Territories continued to shoot ducks at all seasons for food, it is only recently that any attempt has been made to enforce the Act.

confirms what I said in *Sikyea* and I am fortified in that view by the judgment of McGillivray J.A. in *R. v. Wesley*, particularly at pp. 283-4 where, in dealing with s. 12 of the Alberta agreement, identical in effect with s. 13 of the Manitoba agreement, he said:

> In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements. See *A.-G. Can. v. A.-G. Ont.* (Indian Annuities case), (1897) A.C. 199, at p. 213.
>
> Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles which the Senate and the House of Commons declared in addressing Her Majesty in 1867, uniformly governed the British Crown in its dealings with the aborigines.
>
> At the time of the making of this Indian Treaty it was of first class importance to Canada that the Indians who had become restless after the

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

sway of the Hudson's Bay Co. had come to an end, should become content and that such title or interest in land as they had should be peacefully surrendered to permit of settlement without hindrance of any kind. On the other hand it goes without saying that the Indians were greatly concerned with "their vocations of hunting" upon which they depended for their living.

In this connection it is of historical interest although of no assistance in the interpretation of the treaty, that Governor Laird who with Colonel Macleod negotiated this treaty, said to the Chiefs of the Indian tribes:—

"I expect to listen to what you have to say today, but first, I would explain that it is your privilege to hunt all over the prairies, and that should you desire to sell any portion of your land, or any coal or timber from off your reserves, the Government will see that you receive just and fair prices, and that you can rely on all the Queen's promises being fulfilled."

And again he said:—"The reserve will be given to you without depriving you of the privilege to hunt over the plains until the land be taken up."

It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land.

In the case *A.-G. v. Metropolitan Electric Supply Co.*, 74 L.J. Ch. 145, at p. 150, Farwell J., said:—

"I think it is germane to the subject to consider what the Legislature had in view in making the provisions which I find in the Act of Parliament itself. As Lord Halsbury said in *Eastman Photographic Materials Co. v. Comptroller General of Patents, Designs, and Trade Marks*, (1898) (A.C. 571) referring to *Heydon's Case* (1584), (3 Co. Rep. 7a) 'We are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy.' That is a very general way of stating it, but no doubt one is entitled to put one's self in the position in which the Legislature was at the time the Act was passed in order to see what was the state of knowledge as far as all the circumstances brought before the Legislature are concerned, for the purpose of seeing what it was the Legislature was aiming at."

If as Crown counsel contends, s. 12 taken as a whole gives rise to apparent inconsistency and is capable of two meanings then I still have no hesitation in saying in the light of all the external circumstances relative to Indian rights in this Dominion to which I have alluded, that the law makers in 1930 were in the making of this proviso, aiming at assuring to the Indians covered by the section, an unrestricted right to hunt for food in those unsettled places where game may be found, described in s. 12.

It was argued that para. 13 of the agreement in question is limited in its application solely to provincial laws because of the presence of the clause "which the Province hereby assures to them", in the sentence under consideration. That clause inserted parenthetically between commas

cannot derogate from the thrust of the principal clause which contains the specific declaration "that the said Indians shall have the right, ... of hunting, trapping and fishing game and fish for food at all seasons of the year". In my view it adds emphasis to the declaration by making manifest the application of the declaration to the Province as though the clause read "which the Province *also* hereby assures to them".

If all that s. 13 of the agreement was intended to achieve in 1930 was a declaration by the Province that Indians were to have the right to fish, hunt and trap for food at all seasons of the year, it was, according to that interpretation, an empty, futile and misleading gesture. Either the Indians then had those rights or they did not have them for the *Migratory Birds Convention Act* had been on the statute books since 1917. The only interpretation that makes sense is the one that acknowledges that the right of hunting, trapping and fishing game and fish for food at all seasons of the year existed in 1930 regardless of the *Migratory Birds Convention Act* and the Federal Government wanted those rights to continue notwithstanding the transfer to the Provinces of Manitoba, Saskatchewan and Alberta of the unalienated natural resources withheld when the Provinces were formed. What logic could there have been in having the Provinces assure to Indians non-existing rights?

The Federal authority was already under treaty obligation contained in Treaties 5 and 6 which read:

> Her Majesty further agrees with Her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

to preserve the Indians' right to hunt and fish for food at all seasons of the year, and it was merely making certain that the Provinces would accord the same rights when they got control of the unalienated Crown lands. The obligation of Canada to preserve the right to hunt and fish for food at all seasons was an historical one arising out of the rights of Indians as original inhabitants of the territories from

92

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

which Manitoba, Saskatchewan and Alberta were carved and arising out of the treaties above mentioned. The subject of aboriginal rights as they apply to Indians of Western Canada and the effect of the treaties made with the Indians were dealt with by the Court of Appeal for British Columbia in *Regina v. White and Bob*[18]. This Court upheld that decision in an oral judgment[19] as follows:

> Mr. Justice Cartwright delivered the following oral judgment:
>
> "Mr. Berger, Mr. Sanders and Mr. Christie. We do not find it necessary to hear you. We are all of the opinion that the majority in the Court of appeal were right in their conclusion that the document, Exhibit 8, was a 'treaty' within the meaning of that term as used in s. 87 of the *Indian Act* (R.S.C. 1952, c. 149). We therefore think that in the circumstances of the case, the operation of s. 25 of the *Game Act* (R.S.B.C. 1960, c. 160) was excluded by reason of the existence of that treaty."

It follows that if Exhibit 8 in *White and Bob* which reads:

> Know all men that we the Chiefs and people of the Sanitch Tribe who have signed our names and made our marks to this Deed, on the 6th day of February 1852 do consent to surrender entirely and forever, to James Douglas the Agent of the Hudsons Bay Company, in Vancouver Island that is to say for the Governor Deputy Governor and Committee of the same, the whole of the lands situate and lying between Mount Douglas and Cowitchen Head on the Canal de Arro and extending thence to the line running through the centre of Vancouver Island north and south.
>
> The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people forewer; *it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.* We have received as payment—Forty one pounds thirteen shillings and four pence.—In token whereof we have signed our names, and made our marks at Fort Victoria, on the seventh day of February, One thousand eight hundred and fifty two.

(Emphasis added.)

was a treaty within s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, so are Treaties 5 and 6 aforesaid.

Soon after the agreement in question was entered into, the Court of Appeal for Saskatchewan in *Rex v. Smith*[20],

---

[18] (1964), 52 W.W.R. 193 at 210-250, 50 D.L.R. (2d) 613.

[19] (1965), 52 D.L.R. (2d) 481.

[20] [1935] 2 W.W.R. 433, 64 C.C.C. 131.

dealt with the effect of s. 12 of the Saskatchewan agreement which is identical with s. 13 now under review and in that case Turgeon J.A. (later C.J.S.) said:

> Although this case is of great interest and importance I do not think it will be necessary in disposing of it to examine minutely the state of the law existing prior to recent date, nor the Indian treaty or treaties referred to in the argument. If these treaties, or the various Dominion or provincial statutes referred to have any present bearing on the case it is only in so far as they may throw some light upon the interpretation of certain words in the instrument which, in my opinion, now governs the relations of these Indians with the game laws of Saskatchewan, and to which I am about to refer.
>
> The 24th enumeration of sec. 91 of the *British North America Act, 1867*, ch. 3, confers upon the parliament of Canada exclusive jurisdiction upon the subject of "Indians and Lands Reserved for the Indians," while, on the other hand, the provinces have power to make laws concerning the hunting, fishing, preservation, etc. of game in the province. As a result, controversies have arisen in the past as to the application of provincial game laws to Indians: *Rex v. Rodgers* (1923) 2 W.W.R. 353, 33 Man. R. 139, 40 C.C.C. 51.
>
> But in the years 1929 and 1930 something occurred which, in my opinion, had the effect of recasting the jurisdiction of the province of Saskatchewan in respect to the operation of its game laws upon our Indian population. In December, 1929, an agreement was entered into between the Dominion and the province having for its primary object the transfer from the one to the other of the natural resources within the province. This transfer was accompanied by many terms, some of which had to do with matters pertaining to the Indians. Among these is par. 12 of the agreement, which reads as follows (L.R. 1929-30, p. 293):
>
> > 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.
>
> It is admitted in this case that the accused was hunting for food.
>
> This agreement between the Dominion and the province was made "subject to its being approved by the Parliament of Canada and the Legislature of the Province" and also to confirmation by the Parliament of the United Kingdom. Ratification by the Imperial Parliament was necessary in so far at least as the agreement purported to make any change in the constitutional powers of the Dominion or of the province. In a recent decision of this Court, *Rex v. Zaslavsky, ante* p. 34, the learned Chief Justice quoted from the remarks of Lord Watson in the course of the argument in *C.P.R. v. Notre Dame de Bonsecours Parish* (1899) A.C. 367, 68 L.J.P.C. 54. The statement quoted by the learned Chief Justice may fittingly be repeated here:
>
> > The Dominion cannot give jurisdiction or leave jurisdiction with the province. The provincial Parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the

94

1968

DANIELS
v.
WHITE AND
THE QUEEN

Hall J.

other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or other can enlarge the jurisdiction of the other or surrender jurisdiction.

Consequently no legislative jurisdiction can be taken from the Dominion Parliament and bestowed upon a provincial Legislature, or *vice versa*, without the intervention of the parliament of the United Kingdom.

The Imperial statute confirming the agreement is 1930, 20 & 21 Geo. V., ch. 26, sec. 1 of which enacts that the agreement shall have the force of law "notwithstanding anything in the *British North America Act* of 1867 or any Act amending the same." etc. It follows therefore that, whatever the situation may have been in earlier years the extent to which Indians are now exempted from the operation of the game laws of Saskatchewan is to be determined by an interpretation of par. 12, *supra*, given force of law by this Imperial statute. This paragraph says that the Indians are to have the right to hunt, trap and fish for food in all seasons "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access".

For the purposes of the present inquiry we can confine ourselves to Crown lands (excluding lands owned by individuals as to which some other question might arise) because this game preserve is Crown land. The question then is (1) is it unoccupied Crown land, or (2) is it occupied Crown land to which the Indians have a right of access? If it is either of these no offence was committed by the accused.

(Emphasis added.)

Counsel for the accused, in proposing a test for the meaning which must be given to the word "occupied" and "unoccupied" referred to the treaty made between the Crown and certain tribes of Indians near Carlton, on August 23, 1876, whereby, on the one hand, these Indians consented to the surrender of their title of whatsoever nature in an area of which this game preserve forms part and, on the other hand, the Crown undertook certain obligations towards them and assured them certain rights and privileges. As I have said, it is proper to consult this treaty in order to glean from it whatever may throw some light on the meaning to be given to the words in question. *I would even say that we should endeavour, within the bounds of propriety, to give such meaning to these words as would establish the intention of the Crown and the Legislature to maintain the rights accorded to the Indians by the treaty.*

(Emphasis added.)

I have already dealt with the meaning of s. 13 of the Manitoba agreement. To me it is clear and unambiguous and by s. 1 of the *British North America Act* 1930 which reads:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *British North America Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

has the force of law, notwithstanding "any Act of the Parliament of Canada". The *Migratory Birds Convention Act* is an Act of the Parliament of Canada. One would suppose that that should end the matter, but it is urged

that s. 1 of the *British North America Act* 1930 does not necessarily refer to every provision of the agreement and, in particular, that s. 13 is outside the plain and unambiguous language of the *Act* in that Ottawa and Westminster could not conceivably have intended s. 13 to take precedence over the *Migratory Birds Convention Act* of 1917. One should, I think, be slow to accept the argument that the negotiators of the Manitoba agreement and Parliament at Ottawa were in 1929 and 1930 totally forgetful of the existence of the *Migratory Birds Convention Act* of 1917. Rather is it not more logical that knowing of the solemnity with which the Indian treaties had been negotiated and how highly they were regarded by the Indians, neither the negotiators of the agreement nor the Government at Ottawa had the slightest intention of breaching those treaties.

If it had been intended that the *Migratory Birds Convention Act* should take precedence, it would have been a simple matter to have said so in the agreement or in the *Manitoba Natural Resources Act*. Much would have to be read into s. 13 of the agreement to make it subject to the *Migratory Birds Convention Act*. I am not prepared to add exclusions which Parliament and Westminster did not see fit to do.

It is argued that this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. The rule does not, of course, come into operation if a statute is unambiguous for in that event its provisions must be followed even if they are contrary to the established rules of international law. The case of *Inland Revenue Commissioners v. Collco Dealings Ltd.*[21] is a case in which this very argument was made. In that case the Court was being asked to read into a section of the *Income Tax Act* 1952 additional words which would enlarge the meaning of the section so as to include persons not included by the precise words of the enactment but which were included under an agreement between the British Government and the Republic of Ireland providing for exemption

[21] [1962] A.C. 1, 39 Tax Cas. 526.

1968

DANIELS
v.
WHITE AND
THE QUEEN

Hall J.

from tax where the claimant was a resident in the Republic of Ireland and was not a resident in the United Kingdom.

In dealing with the argument, Viscount Simonds said at pp. 18 and 19:

> It has been urged that the general words of the subsection should be so construed as not to have the effect of imposing or appearing to impose the will of Parliament upon persons not within its jurisdiction. This argument, which had influenced the special commissioners, was not advanced before this House. A somewhat similar argument was, however, pressed upon your Lordships and was perhaps more strongly than any other relied on by the appellant company. It was to the effect that to apply section 4(2) to the appellant company would create a breach of the 1926 and following agreements, and would be inconsistent with the comity of nations and the established rules of international law: the subsection must, accordingly, be so construed as to avoid this result.
>
> My Lords, the language that I have used is taken from a passage at p. 148 of the 10th edition of "Maxwell on the Interpretation of Statutes" which ends with the sentence: "But if the statute is unambiguous, its provisions must be followed even if they are contrary to international law." It would not, I think, be possible to state in clearer language and with less ambiguity the determination of the legislature to put an end in all and every case to a practice which was a gross misuse of a concession. What, after all, is involved in the argument of the appellant? It is nothing else than that, when Parliament said "under any enactment," it meant "any enactment except..." But it was not found easy to state precisely the terms of the exception. The best that I could get was "except an enactment which is part of a reciprocal arrangement with a sovereign foreign state." It is said that the plain words of the statute are to be disregarded and these words arbitrarily inserted in order to observe the comity of nations and the established rules of international law. I am not sure upon which of these high-sounding phrases the appellant company chiefly relies. But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear.

I would paraphrase the latter part of this statement as follows in applying it to the Indians of Manitoba, Saskatchewan and Alberta by saying: *But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state (Canada) from taking what steps it thinks fit to protect its own aboriginal population (Indians) from being deprived of their ancient rights to hunt and to fish for food assured to them in Treaties 5 and 6* made with them.

It took those steps when it included s. 13 of the Manitoba agreement, confirmed by the *Manitoba Natural Re-*

sources Act and petitioned Parliament at Westminster to enact s. 1 of the *British North America Act* 1930. If there is inconsistency or repugnancy between the *Migratory Birds Convention Act* and the *Manitoba Natural Resources Act* the later prevails over the earlier; *British Columbia Railway Co. v. Stewart* [22] and *Summers v. Holborn District Board of Works*[23]. It is difficult, I think, to find language more forthright and less ambiguous than s. 1 of the *British North America Act* 1930. To repeat, it reads:

> 1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *British North America Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

I would, accordingly, allow the appeal and quash the conviction. The appellant is entitled to his costs in this Court and in the Courts below.

PIGEON J.:—The facts are summarized in the reasons of my brother Judson with whom I am in agreement.

I wish to add that, in my view, this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. It is a rule that is not often applied, because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law, as was said recently in *Inland Revenue Commissioners v. Collco Dealings Ltd.*[24], where all relevant authorities are reviewed. In that case, the House of Lords came to the conclusion that the intent of Parliament was clear and unmistakable and, therefore, the plain words of a statute could not be disregarded in order to observe the comity of nations and the established rules of international law. However, the principle of construction was recognized as applicable in a proper case.

Here we must not be misled by the clear and unambiguous provision of section 1 of the *British North America Act* 1930 into believing that, because it is there said that

---

[22] [1913] A.C. 816.

[23] [1893] 1 Q.B. 612 at 619, 68 L. T. 226, 57 J.P. 326.

[24] [1962] A.C. 1, 39 Tax Cas. 526.

1968

DANIELS
v.
WHITE AND
THE QUEEN

Pigeon J.

the agreement shall have the force of law notwithstanding any act of the Parliament of Canada, every provision of the agreement was intended to override all federal legislation.

The question to be decided is whether in par. 13 of the agreement, the words "Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof" contemplate laws of Canada as well as laws of Manitoba. The language certainly is not that which one would normally use in referring to both classes of laws. It is rather the language one would be expected to use in a provision intended to subject the Indians to provincial game laws. This is further borne out by the fact that the proviso on which this appeal is based is in a form of an assurance by the province only. Can it be said that where Canada stipulates in the agreement: "that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year..." the intention was expressed in clear language and without ambiguity to amend the *Migratory Birds Convention Act* contrary to Canada's international obligations? In my view, the least that can be said is that the intention to derogate from the statute implementing the treaty is not clearly expressed. It is perfectly possible without doing violence to the language used to construe the provision under consideration as applicable solely to provincial laws and thus to avoid any conflict.

It must also be considered that an agreement is not to be construed as applying to anything beyond its stated scope unless the intention to do so is unmistakable. Here the purpose of the agreement is stated in its preamble to be that the Province be placed in a position of equality with the other provinces with respect to the administration and control of its natural resources. It is quite consistent with this declared object to provide that provincial laws respecting the use of some resources, namely fish and game, shall apply to Indians subject to a restriction the effect of which is to carry out Canada's treaty obligations towards the Indians in that respect. On the other hand, it would not only be foreign to this object but even inconsistent with it, to provide for an implied modification of the *Migratory Birds Convention Act*. The result would be to

enact a provision having no relation with the stated purpose of the agreement and also to create a lack of uniformity by establishing in favour of the Indians in one province an exception that does not exist in favour of the Indians in other provinces.

In *Danby v. Coutts & Co.*[25], it was held that a power of attorney granted in general terms for the purpose stated in the recitals, to act for the grantor during his absence from England, must be construed as limited to the duration of such absence. Concerning statutes, Maxwell says (The Interpretation of Statutes, 11th ed., p. 79): "General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act." and he adds quoting Lord Halsbury in *Leach v. Rex*[26], "It would be 'perfectly monstrous' to construe the general words of the Act so as to alter the previous policy of the law."

Appeal dismissed, CARTWRIGHT C.J. *and* RITCHIE, HALL *and* SPENCE JJ. *dissenting.*

Solicitor for the appellant: W. R. Martin, The Pas.

Solicitor for the respondents: D. S. Maxwell, Ottawa.

1968
*Feb. 1
Apr. 29

LOUIS MAYZEL (*Plaintiff by Counterclaim*) ..... APPELLANT;

AND

RUNNYMEDE INVESTMENT CORPORATION LIMITED and REXDALE INVESTMENTS LIMITED (*Defendants by Counterclaim*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Power of sale—Legislation with effective date September 1, 1964, respecting notice of exercising power—Sale on October 6, 1964—Whether proceedings under power of sale were commenced by notice given May 20, 1964, and were consequently outside legislation—The Mortgages Act, R.S.O. 1960, c. 245, s. 20 (rep. & sub. 1964, c. 64, ss. 4 and 5).

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Pigeon JJ.

[25] (1885), 29 Ch.D. 500, 54 L.J. Ch. 577, 52 L.T. 401.

[26] [1912] A.C. 305.

down; it is under a strict duty to use its powers in good faith for the purposes for which they are given.

The authority delegated to the Attorney-General by s. 25 must, in my view, be held to have been so delegated to him in his administrative capacity and for the purposes of the statute, not for the purpose of discovering whether offences against the *Criminal Code* have been committed. I am greatly influenced in arriving at this conclusion by the very drastic nature of some of the powers vested in the appointee — powers the exercise of which is traditionally not available to investigators of crimes.

For these reasons I think that the Attorney-General, by his appointment of Mr. Kinsey in the terms stated, has exceeded the authority granted to him by s. 25. It follows that, in my opinion, the appeal must be allowed, the judgment appealed against set aside, and an order made to restrain the respondent Kinsey from exercising any powers purportedly conferred on him by that appointment.

BRANCA, J.A.:—I have been privileged to read the reasons for judgment given herein by my brother McFarlane with which I agree. I have also had the privilege and advantage of reading the reasons given by my brother Davey herein. I am also in agreement for the reasons stated by my brother Davey that the authority conferred upon Kinsey upon the appointment under s. 25 of the *Securities Act* exceeds the powers conferred in and by that section in that it authorizes Kinsey to investigate any and all trades in securities in British Columbia by the named persons and I would therefore allow the appeal in the terms set forth in the reasons of my brother McFarlane.

Appeal allowed.

REGINA v. DANIELS

Manitoba Court of Appeal, Miller, C.J.M., Schultz, Freedman, Guy and Monnin, JJ.A. April 25, 1966.

Indians — Right to hunt game birds for food in Manitoba — Whether eliminated by Migratory Birds Convention Act (Can.) or preserved by Manitoba Natural Resources Act (Can.).

Constitutional law — Irreconcilable conflict between statutes of Parliament — Whether Migratory Birds Convention Act (Can.) to prevail over Manitoba Natural Resources Act (Can.), Manitoba Natural Resources Act (Man.) and B.N.A. Act, 1930.

The *Manitoba Natural Resources Act*, 1930 (Man.), c. 30, now R.S.M. 1954, c. 180, and the *Manitoba Natural Resources Act*, 1930 (Can.),

1 · 101

c. 29, confirmed by the *B.N.A. Act*, 1930 (U.K.), c. 26, enacted for the purpose of vesting in Manitoba the administration and control of its natural resources, have the effect of affirming the right of Indians in Manitoba to hunt game for food at all seasons of the year. On the other hand, the *Migratory Birds Convention Act*, 1917 (Can.), c. 18, now R.S.C. 1952, c. 179, together with the Regulations, P.C. 1958-1070, SOR/58-308, made thereunder ratifying and confirming the Convention of August, 1916, between Great Britain (on behalf of Canada) and the U.S.A. for the preservation of migratory birds, prohibit having possession of a migratory game bird during the close season relating to such bird, with the proviso that Indians and Eskimos may take certain specified birds at any season of the year. On appeal by the Crown from an order allowing the appeal of the accused, an Indian in Manitoba, from his conviction for having in his possession migratory game birds during the close season therefor, *held*, Freedman, J.A., dissenting, the two Acts cannot be reconciled and the *Migratory Birds Convention Act* must prevail with the result that the rights given to the Indians by their various treaties with respect to migratory birds must be held to have been taken away from them by Parliament. The *Migratory Birds Convention Act* is of much ampler scope, being of general application throughout Canada, and ought not to be construed as circumscribed by the restricted legislation that is to be found in the *Manitoba Natural Resources Act*. Such a conclusion follows from the desirability that a matter within the legislative responsibility of Parliament and governed by any international treaty, be uniform in application throughout the country unless specifically provided otherwise.

Per Freedman, J.A. (dissenting): Paragraph 13 of the Schedule to the *Manitoba Natural Resources Act*, which permits the hunting by Indians of game for food at all seasons of the year and which assures Indians of the continued enjoyment of a right which they have exercised from time immemorial, should prevail. Notwithstanding that such a result gives the Act a different effect in Manitoba from that which it has in other parts of Canada, it is supported by the fact that the terms of para. 13 of the Schedule to the *Manitoba Natural Resources Act*, being comprehensive and permitting the hunting by Indians of game for food all year, make no exception with respect to migratory birds even though the *Migratory Birds Convention Act* had been in existence since 1917, and no attempt was made by the legislators to make the provisions of para. 13 subject to the *Migratory Birds Convention Act*. Further support for this position may be found in the confirmation in the *B.N.A. Act, 1930* declaring that the provisions of the *Manitoba Natural Resources Act* should have the force of law notwithstanding anything in any Act of the Parliament of Canada.

[*R. v. Sikyea*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, 44 C.R. 266, [1964] S.C.R. 642, 49 W.W.R. 306; *R. v. George*, 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, 47 C.R. 382, [1966] S.C.R. 267, refd to]

APPEAL by the Crown from the judgment of Thompson, Co.Ct.J., allowing the accused's appeal from his conviction by Macphee, P.M., for an offence under s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

S. Breen, for the Crown, appellant.
W. R. Martin, for accused, respondent.

SCHULTZ, J.A.:—Preliminary to judgment being given on this appeal, I made the following statement in Court:

The issue in this case being a constitutional one of some importance, the full Court of five Judges sat to hear argument on December 3rd last. Owing to the illness of the Chief Justice, we do not have the advantage of his judgment in this matter. However, as three of the members of the Court are agreed as to the result and there is therefore no reason for delaying delivery of judgment, we are now prepared to deliver judgment under the authority of ss. 16 and 19 of the *Court of Appeal Act*, R.S.M. 1954, c. 48, which sections read as follows:

> 16. The determination of any question before the court shall be according to the opinion of the majority of the members of the court hearing the cause or matter.
>
> 19. It shall not be necessary for all the judges who have heard the argument in a cause or matter to be present in order to constitute the court for delivery of judgment therein; but in the absence of any judge, from illness or any other cause, judgment may be delivered by a majority of the judges who were present at the hearing.

Two judgments will now be read, the dissenting judgment by my brother Freedman, and the judgment of the majority of the Court by my brother Monnin.

SCHULTZ, J.A., concurs with MONNIN, J.A.

FREEDMAN, J.A. (dissenting):—This appeal presents the Court with a conflict between two legislative enactments and the need either of reconciling them or of choosing between them. One of these enactments is para. 13 of the agreement [Schedule] contained in the *Manitoba Natural Resources Act*; the other is the *Migratory Birds Convention Act* in its application to Manitoba Indians.

The former enactment is part of the agreement which was entered into in 1929 between the Government of the Dominion of Canada and the Government of the Province of Manitoba for the purpose of vesting in Manitoba the administration and control of its natural resources. It was given legislative approval both by the Province and by the Dominion. See the *Manitoba Natural Resources Act*, 1930, c. 30, now R.S.M. 1954, c. 180, and the *Manitoba Natural Resources Act*, 1930 (Can.), c. 29. Moreover, it was confirmed by a statute of the United Kingdom, namely, the *B.N.A. Act*, 1930 (U.K.), c. 26, which expressly declared that the agreement "shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act of the Parliament of Canada . . ."

As for the *Migratory Birds Convention Act* it was first enacted as 1917 (Can.), c. 18, and now appears as R.S.C. 1952, c. 179. The Act sanctioned, ratified and confirmed the Convention of August 16, 1916, which had been entered into by Great Britain (on behalf of Canada) and the United States of America. Its object was the preservation of birds which in the course of their annual migrations traverse certain parts of the Dominion of Canada and the United States. To that end it established certain close seasons during which no hunting of migratory birds (with certain exceptions) should be done. One of such exceptions, as regards migratory game birds, permitted Indians to take at any time scoters for food but not for sale. Another exception, with respect to migratory non-game birds, allowed Indians and Eskimos to take at any season auks, auklets, guillemots, murres, and puffins for food. The Act provided that the Governor in Council might make such Regulations as are deemed expedient to protect the migratory birds that inhabit Canada during the whole or any part of the year. Such Regulations were in fact made, but not until the year 1958. Indeed, it appears to be only in recent years that the Dominion has sought to enforce the provisions of the Act. Certainly that is the situation so far as Manitoba is concerned.

Paragraph 13 of the agreement, set forth in the *Manitoba Natural Resources Act*, reads thus:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

The proviso to the section affirms the right of Indians of the Province to hunt game for food at all seasons of the year. As such it assures them of the continued enjoyment of a right which they have exercised from time immemorial.

The legislative conflict is apparent and may now be stated. To give full effect to the terms of para. 13 of the agreement is to hold that the provisions of the *Migratory Birds Convention Act* and its Regulations do not apply to Indians in Manitoba when engaged in hunting migratory birds for food. On the other hand, to give effect to the *Migratory Birds Convention Act* is to wipe out, so far as most migratory birds are concerned, the right of the Indians in Manitoba to hunt game

for food at all seasons of the year in accordance with para. 13 of the agreement. For myself I can see no possible reconciliation between the two so far as Indians of Manitoba are concerned. I must accordingly choose between them and decide which shall here prevail.

At first blush it might be thought that the reference to Indians and their hunting rights both in the Convention and in the Regulations of the *Migratory Birds Convention Act* — under which they are permitted to hunt scoters, auks, auklets, etc. — settles the matter. Obviously such rights are far smaller than the unrestricted right to hunt all game for food, which is provided by para. 13 in the *Manitoba Natural Resources Act*. The reference to Indians in the Convention and in the Regulations is in general terms, no exception being made with regard to Indians of Manitoba or elsewhere. It might accordingly be plausibly argued that the Indians in Manitoba have only such rights with respect to migratory birds as are conferred by the *Migratory Birds Convention Act*. But this is not necessarily so. We must remember that when the Convention of 1917 was entered into, the agreement relating to the transfer of Manitoba's natural resources was not yet in existence nor even in contemplation. Hence no exception with regard to Manitoba Indians could have been expected in the Convention. As for the Regulations of 1958, it is true that they were enacted subsequent to the *Manitoba Natural Resources Act* and that they contain no exception in favour of Indians of Manitoba. But the Regulations could not enlarge or go beyond the provisions of the statute pursuant to which they were enacted. Rather they would conform to the terms of that statute; so no such exception would be expected in the Regulations either.

The parallel argument on the other side appears to me to be far more cogent. The terms of para. 13 contained in the *Manitoba Natural Resources Act* are comprehensive and permit the hunting by Indians of game for food at all seasons of the year. No exception is made with respect to migratory birds, even though the *Migratory Birds Convention Act* had been on the statute books since 1917. Instead of making the provisions of para. 13 subject to the terms of the *Migratory Birds Convention Act*, the legislators did quite the opposite. They enshrined the agreement within the Canadian constitutional framework by having it confirmed at Westminster in the *B.N.A. Act, 1930*, and declared it should have the force of law "notwithstanding anything in . . . any Act of the Parliament of Canada". I believe it should be given that force and

105

not be read as subject to the provisions of the *Migratory Birds Convention Act.*

I am conscious of the fact that this conclusion will give to the *Migratory Birds Convention Act* a different effect in Manitoba (and incidentally in Saskatchewan and Alberta, which have similar provisions to para. 13) from that which it has in other parts of Canada. The decision of the Supreme Court of Canada in *R. v. Sikyea*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642, upheld the application of the *Migratory Birds Convention Act* to an Indian of the Northwest Territories notwithstanding hunting rights contained in treaties. The decision of that Court in *R. v. George* (January 25, 1966), not yet reported [since reported 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, [1966] S.C.R. 267], came to the same conclusion as regards an Indian of Ontario. In neither case, of course, did para. 13 in the *Manitoba Natural Resources Act* apply. If the application of para. 13 gives to the *Migratory Birds Convention Act* a disparate result in different parts of Canada, that is simply an unfortunate but inevitable consequence of the conflicting legislation on the subject. If any remedy is thought desirable it would have to come from Parliament.

In my view, Thompson, Co.Ct.J., was right in acquitting the accused. I would accordingly dismiss the appeal.

GUY, J.A., concurs with MONNIN, J.A.

MONNIN, J.A.:—This is an appeal from a decision of Thompson, Co.Ct.J., who himself was sitting on appeal from a decision of Macphee, P.M.

Macphee, P.M., convicted the accused for that he

> Paul Daniels, of Chemahawin Indian Reserve, Manitoba, on the 3rd day of July, A.D. 1964, at Chemahawin Indian Reserve, in the Province of Manitoba, did unlawfully and without lawful excuse have in his possession Migratory Game Birds, during a time when the capturing killing or taking of such birds, is prohibited, contrary to the regulations under the Migratory Birds Convention Act, thereby committing an offence under Section 12(1) of the said Migratory Birds Convention Act.

My brother Freedman has clearly and succinctly defined the problem as a conflict between two enactments of the Parliament of Canada and the need of reconciling them, if at all possible, and, if not, of selecting which of the two statutes is to prevail.

Sections 6 and 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179, formerly 1917 (Can.), c. 18, are as follows:

> 6. No person, without lawful excuse, the proof whereof shall lie on such person, shall buy, sell or have in his possession any migratory game bird, migratory insectivorous bird or migratory nongame bird, or the nest or egg of any such bird or any part of any such bird, nest or egg during the time when the capturing, killing or taking of such bird, nest or egg is prohibited by this Act.
>
> 12(1) Every person who violates any provision of this Act or any regulation is, for each offence, liable upon summary conviction to a fine of not more than three hundred dollars and not less than ten dollars, or to imprisonment for a term not exceeding six months, or to both fine and imprisonment.

Article II, s. 3 of the Convention between Canada and the United States of America, executed in 1916, is as follows:

> 3. The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres and puffins, and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

Section 5(2) of the Regulations [P.C. 1958-1070, SOR/58-308] under the *Migratory Birds Convention Act, supra*, passed in 1958 only, is as follows:

> (2) Indians and Eskimos may take auks, auklets, guillemots, murres, puffins and scoters and their eggs at any time for human food or clothing, but they shall not sell or trade or offer to sell or trade birds or eggs so taken and they shall not take such birds or eggs within a bird sanctuary.

The *Manitoba Natural Resources Act* was enacted in 1930, c. 30, now R.S.M. 1954, c. 180, and was also enacted by the Federal Parliament — see 1930, c. 29. This latter legislation was enacted for greater certainty, because it dealt with the natural resources of the three Prairie Provinces; it was confirmed by a statute of the United Kingdom, namely, the *British North America Act*, 1930, c. 26.

Paragraph 13 of the Schedule to the *Manitoba Natural Resources Act, supra*, is as follows:

> 13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

If the above para. 13 is to apply, then the provisions of the *Migratory Birds Convention Act* and Regulations passed pursuant thereto do not apply to Indians in Manitoba while hunting migratory birds for food. It will also mean that,

depending in what Province the Indian hunter resides, he may face different laws — laws absolutely opposed to those in force in another Province.

To give effect to the international treaty annexed to the *Migratory Birds Convention Act* is to wipe out the rights of Indians in Manitoba to hunt migratory birds for food at all seasons of the year — rights which relate back many years and which many thought were confirmed by para. 13 in the *Manitoba Natural Resources Act*. One or the other of these two Acts must prevail since they cannot be reconciled.

When the International Convention was executed there was in it no reservation of the Indians' rights to hunt except to hunt for auks, etc., as provided in s. 3 of Art. II of the Convention. Later this was further embodied in the Regulations passed in 1958 — see s. 5(2) of the Regulations, *supra*. In so doing, Parliament reaffirmed its understanding of the 1916 Convention and set up the machinery to enforce its legislation.

Basically the *Manitoba Natural Resources Act* dealt with the transfer of natural resources from the Federal Government to the provincial Government. Reservation of some Indian rights was only a side issue. One or the other of these Federal enactments indicates, to a certain degree, a breach of faith. If Indian rights had been taken away by the 1917 *Migratory Birds Convention Act*, then there is a breach of faith to the Indians by virtue of the many old treaties guaranteeing to them such rights of hunting at all seasons. Though one must admit that life is no longer what it was when these treaties were signed, hunting for food no longer means the difference between life and death for the Indian and his family, especially nowadays, with all the social security measures available for all Canadian citizens, as well as others available only to Indians.

To say that para. 13 in the *Manitoba Natural Resources Act* is the preferable legislation simply compounds another breach of faith — this time in our international convention with the United States of America. Can it be thought that Parliament, being fully cognizant of all the facts, would compound breach upon breach, even if the second breach had the apparent effect of reinstating Indian rights taken away by the first breach?

It cannot be said that in 1930 Parliament had forgotten its 1917 enactment, especially not when in 1958, by publication of its Regulations, it set forth the machinery to enforce its 1917 legislation.

I must find that the rights given to the Indians by their various treaties with respect to migratory birds were taken away from them by Parliament in the *Migratory Birds Convention Act.*

Section 87 of the *Indian Act,* R.S.C. 1952, c. 149, has no bearing on this case. This aspect was disposed of by the Supreme Court in two decisions: *R. v. Sikyea,* 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642; *R. v. George* (unreported) [since reported 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, [1966] S.C.R. 267].

Further, para. 13 refers only to provincial game laws, and assures, to Indians only, the right of hunting, trapping, and fishing for food at all seasons of the year, on unoccupied Crown lands and on such other lands to which they have a right of access. This means Indians have a very limited right to fish, hunt and trap in Manitoba. Surely Federal legislation of much ampler scope — actually of general application throughout the Dominion — is not circumscribed by this restricted legislation.

If para. 13 in the *Manitoba Natural Resources Act* gives to Indians the unrestricted right to hunt for food at all times, what is the purpose of s. 5(2) of the Regulations since it only refers to a few types of birds and eggs which they may take at any time? It is common knowledge that laws are not identical in all parts of Canada. But surely a matter within the legislative responsibility of the Federal Parliament, governed by an international treaty entered into by Canada with its neighbours in all its solemn form, deserves uniformity of application throughout the country unless specifically cally provided otherwise.

I conclude that the *Migratory Birds Convention Act* prevails, since it is of paramount importance, applies to the country as a whole, and was enacted prior to the *Manitoba Natural Resources Act, supra.*

I would accordingly allow the Crown's appeal, set aside the acquittal by Thompson, Co.Ct.J., and restore the conviction and confirm the sentence imposed by Macphee, P.M.

Appeal allowed; conviction restored.

KNIGHT v. HYDE et al.

British Columbia Court of Appeal, Bull, McFarlane and Branca, JJ.A. February 28, 1966.

Partnership — Contract under seal — Signature of one partner only — No authority for signature under seal in existence — Whether partner not signing is bound — Partnership Act (B.C.), s. 9.

Deeds — Partner signing on behalf of partnership — Contract not required to be under seal — No authority for non-signing partner's signature under seal in existence — Whether partner not signing and not mentioned in deed bound by it.

Defendant B failed to complete his performance of a contract under seal by which he had agreed to build three cottages for plaintiff. The contract described B as "operating under the firm name and style of Kar-Nor Construction" but was signed and sealed by B only. Defendant H appealed from a finding by the trial Judge that H was in fact in an informal partnership relation with B and therefore jointly liable for the debts of Kar-Nor. *Held*, nothing in s. 9 of the *Partnership Act*, R.S.B.C. 1960, c. 277, affects the centuries-old rule that a partner cannot be bound by a deed under seal unless he has actually given authority for his signature under seal and is designated as a party in the deed itself. It is immaterial that the seal was not necessary to the validity of the contract or the instrument or that it was in fact signed on behalf of and for the benefit of the partner who does not himself sign.

[*Porter v. Pelton* (1903), 33 S.C.R. 449, folld; *Marchant v. Morton, Down & Co.*, 70 L.J.K.B. 820, [1901] 2 K.B. 829; *Re Briggs & Co., Ex p. Wright*, 75 L.J.K.B. 591, [1906] 2 K.B. 209, consd; *Wray v. Wray*, [1905] 2 Ch. 349, 74 L.J. Ch. 687, distd; *Gilchrist v. Douglas*, [1924] 1 D.L.R. 38; [1923] 3 W.W.R. 1367, disaprvd]

APPEAL by one of two defendants from a judgment of Wootton, J., awarding damages for breach of a building contract.

D. M. Gordon, Q.C., and *C. O. D. Branson*, for defendant, appellant.

W. R. McIntyre, for plaintiff, respondent.

The judgment of the Court was delivered by

MCFARLANE, J.A.:—The respondent (plaintiff) claimed against two defendants, Bellagente and Hyde, damages for breach of a contract for the construction of three cottages. By his judgment pronounced April 28, 1965, Wootton, J., awarded damages against both defendants, assessing the damages in part and directing a reference to the Registrar at Victoria to ascertain the amount, if any, of additional damages to be added to the amount so assessed by him.

leaving of a suicide note by the appellant with his parents before entering upon the episode in question; his statement to Warrant Officer Rooker that he "wanted to die"; his statement that he was feeling quite depressed, that he was going to kill himself (later changed to his belief that it would be more heroic to die in a gunfight); his bizarre and erratic behaviour during the episode in question (*e.g.*, offering Cpl. Gebhart's gun back to him in the midst of the robbery).

For these reasons, I am not satisfied that the learned trial Judge properly instructed himself.

Respondent's counsel urged upon us the provisions of s. 204 of the *National Defence Act*, R.S.C. 1970, c. N-4, which would empower this Court to "disallow an appeal if, in the opinion of the Court, to be expressed in writing, there has been no substantial miscarriage of justice". I am not prepared to apply said section to the facts and circumstances here present because I am not satisfied that no substantial miscarriage of justice has occurred. It is thus my view that the conviction on the first charge should be quashed and a new trial ordered on the same charge.

Appeal dismissed.

REGINA v. DENNIS AND DENNIS

Provincial Court of British Columbia,
O'Connor, Prov.Ct.J. November 25, 1974.

Indians — Aboriginal title — Accused Indians charged with unlawfully hunting wildlife contrary to provincial statute — Accused hunting food in traditional hunting area on unoccupied Crown land — Whether accused having aboriginal hunting rights — Whether provincial statute incompetent to override hunting rights — Whether accused should be acquitted — Wildlife Act (B.C.), ss. 4(1)(c), 26, 53(1)(b) 2 — Indian Act (Can.), s. 88 — British North America Act 1867, s. 91 (24).

Constitutional law — Validity of legislation — Indians — Hunting rights — Whether provincial legislation capable of extinguishing aboriginal hunting rights — Wildlife Act (B.C.), s. 4(1)(c) — Indian Act (Can.), s. 88 — British North America Act, 1867, s. 91(24).

Indians hunting for food on their traditional hunting grounds on unoccupied Crown land have always had an aboriginal or native interest or title to do so, and such rights have not apparently been, in general, extinguished. Whatever else the aboriginal title may encompass, the right to hunt for food is certain. Therefore where, in respect of such activities, an Indian is charged with unlawfully hunting wildlife contrary to a provincial statute, the *Wildlife Act*, 1966 (B.C.), c. 55, s. 4(1)(*c*), he must be acquitted, since provincial legislation cannot extinguish or restrict such a right. Section 91(24) of the *British North*

America Act, 1867, confers exclusive legislative jurisdiction with respect to Indians upon the federal Parliament, and to the extent that it is sought to apply provincial legislation to restrict native hunting rights, the legislation would be *ultra vires* the Province.

Nor does s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, providing that "laws of general application . . . in force in any province are applicable to . . . Indians", operate to make such legislation applicable to an Indian accused. The phrase "of general application" should not be interpreted to include such provincial legislation, since to do so would result in different treatment of Indian rights as between the Provinces and further would have the effect of permitting the extinction of native rights in the absence of any treaty or compensation.

[*R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, apld; *Cardinal v. A.-G. Alta.* (1973), 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553, [1973] 6 W.W.R. 205, [1974] S.C.R. 695, distd; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485, not folld; *Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1; *Re Paulette et al. and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8, [1973] 6 W.W.R. 97, 115; *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi; *R. v. Sikyea*, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306; *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267, 47 C.R. 382; *Union Colliery Co. of B.C. Ltd. v. Bryden*, [1899] A.C. 580; *A.-G. Man. v. A.-G. Can.*, [1929] 1 D.L.R. 369, [1929] 1 W.W.R. 136, [1929] A.C. 260; *A.-G. Can. v. Reader's Digest Ass'n (Can.) Ltd.* (1961), 30 D.L.R. (2d) 296, [1961] S.C.R. 775, [1961] C.T.C. 530; *R. v. Martin* (1917), 29 C.C.C. 189, 39 D.L.R. 635, 41 O.L.R. 79; *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403, 46 W.W.R. 121; *St. Catherine's Milling and Lumber Co. v. The Queen* (1889), 14 App. Cas. 46; *R. v. Shade* (1952), 102 C.C.C. 316, 14 C.R. 56, 4 W.W.R. (N.S.) 430; *Re Adoption Act* (1974), 44 D.L.R. (3d) 718, [1974] 3 W.W.R. 363, 14 R.F.L. 396, *sub nom. Re Birth Registration No. 67-09-022272*, refd to]

Indians — Treaty rights — Accused Indians charged with offence — Treaty covering area providing defence to charge — Accused's tribe not signatory of treaty — Treaty not applicable to accused — Only applicable to tribes signing treaty — Treaty similar to contract — Wildlife Act (B.C.), s. 4(1)(c).

[*R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi, refd to]

TRIAL of the accused on a charge of unlawfully killing wildlife contrary to s. 4(1)(*c*) of the *Wildlife Act* (B.C.).

P. Asselin, for the Crown.
R. Veale, for accused.

O'CONNOR, PROV.CT.J.:—The two defendants are jointly charged that on or about March 11, 1974, at or near mile 3 of the Cassiar Rd., in the Province of British Columbia, they did unlawfully kill wildlife, to wit: one moose during the closed

season without having previously obtained a permit, contrary to the form of statute in such case made and provided. Section 4(1)(*c*) [am. 1971, c. 69, s. 3] of the *Wildlife Act*, 1966 (B.C.), c. 55, provides:

> 4(1) No person shall hunt, trap, wound, or kill wildlife
> (*c*) at any time not within the open season.

Section 26(1) of the Act provides,

> 26(1) The Director or his authorized representative may, to the extent authorized by and in accordance with regulations made by the Lieutenant-Governor in Council, by the issuance of a permit, authorize any person to do anything that he may do only by authority of a permit or that he is prohibited from doing by this Act or Regulations . . .

Section 53(1) [rep. & sub. 1971, c. 69, s. 25] of the Act provides:

> 53(1) Subject to subsection (2), a person who contravenes any provision of this Act, or of the Regulations, or any term or condition of a licence or permit issued under this Act or the regulations, or refuses, omits, or neglects to fulfil, observe, carry out, or perform any duty or obligation thereby created, prescribed, or imposed, is guilty of an offence and is liable, on summary conviction,
>
> . . . . .
>
> (*b*) For shooting, killing, or taking big game, except deer and black bear, during the closed season, to a penalty of not less than one hundred dollars and not more than one thousand dollars for each animal, or to a term of imprisonment not exceeding ninety days, or to both such a fine and imprisonment.

A moose is big game, as that phrase is used in cl. (*b*) of s. 53(1).

The facts giving rise to the charge are not in dispute and were admitted by Crown counsel and defence at the trial. No witnesses were called. The facts are as follows: The two defendants, on March 11, 1974, shot a moose near mile 3 of the Cassiar Rd., in the Province of British Columbia. Both defendants are registered as Indians under the *Indian Act*, R.S.C. 1970, c. I-6, and are members of the Tahltan Band. The moose was shot for the purposes of providing food for the defendants themselves and for the wife and three children of the defendant, Jimmy Dennis. Jimmy Dennis resides in the Province of British Columbia with his family, near the location where the moose was shot. Joan Dennis resides in the Town of Watson Lake, in the Yukon Territory, which is approximately 15 miles from where the moose was shot.

The moose was shot at a time not within the open hunting season for moose, and neither defendant had a permit issued

pursuant to s. 26(1) of the *Wildlife Act* to kill moose outside the open hunting season.

The Tahltan Indians historically have resided in the Telegraph Creek area of the Province of British Columbia. They have inhabited the area where the moose was shot from time immemorial, and have exercised hunting rights in that area continuously. The area where the moose was shot is described as being "unoccupied Crown land".

The first question to be determined is whether or not treaty No. 8 between the Crown and certain Indians specified therein applies to the defendants. This treaty is dated June 21, 1899. Mile 3 of the Cassiar Rd. is east of the central range of the Rocky Mountains and just south of the 60th parallel. An examination of the map appended to treaty No. 8 outlining the area covered by the treaty reveals that mile 3 of the Cassiar Rd. falls within the treaty area. However, the ancestors of the defendants were not signatories to treaty No. 8 nor to any adhesions thereto. Although they resided outside the western boundary of the treaty area, they did exercise hunting rights within that area. The treaty, if it applies, affords a complete defence as it reserves hunting rights to the Indians within the treaty area. It is now accepted that treaty-protected hunting rights supersede provincial game legislation: *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affirmed 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi.

A reading of the treaty makes it clear that only the signatories and chose whom they represented are legally affected by its provisions. The treaty is similar to an agreement or contract. Neither the Tahltan Indian Band from Telegraph Creek nor its chief were parties to that treaty. The treaty is not a surrender of Indian rights by Indians not parties to it, and conversely does not purport to confer on such Indians the hunting rights set out in the treaty. The fact that the incident giving rise to the charge occurred within the treaty area does not afford the defendants with an answer to the charge.

The second question to be decided is whether or not the defendants have an aboriginal or native interest or title to hunt for food on the lands in question. In recent years there has been a great deal of judicial and academic writing with respect to the question of the existence of aboriginal rights in the native people of Canada. I have carefully reviewed the authorities dealing with the question and am in agreement with, and adopt the reasoning of those Judges and authors

who conclude that aboriginal rights do exist in the native people of Canada until they have either been surrendered or extinguished by Act of Parliament. I refer to the following: *Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, judgment of Hall, J., in the Supreme Court of Canada; *Re Paulette et al. and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8, [1973] 6 W.W.R. 97, 115, judgment of Morrow, J., in the Northwest Territories Supreme Court; *Kanatewat v. James Bay Development Corp.* (unreported), judgment of Hugessen, J., in the Superior Court of the Province of Quebec; *R. v. White and Bob* (1965), 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi; Cumming and Mickenberg, *Native Rights in Canada*, 2d ed. (1972), and D. E. Saunders "Indian Hunting and Fishing Rights", 38 *Sask. L. Rev.* 45 (1974).

It is submitted by the Crown that even if aboriginal rights did once exist in the Indian people of British Columbia, those rights have since been extinguished. The case of *Calder v. A.-G. B.C., supra*, dealt exhaustively with this very question. That case involved an application by the Nishga nation of Indians before the Supreme Court of British Columbia for a declaration that they held an aboriginal title or interest in the unoccupied Crown lands which they inhabited. The evidence indicated that the Nishgas had inhabited the area in question on the northwest coast of British Columbia near the southern tip of the Alaska Panhandle since time immemorial. The application for a declaration was dismissed at trial. The appeal by the Nishgas was dismissed by the Court of Appeal by a majority of three to two. The matter was further appealed to the Supreme Court of Canada and that appeal resulted in what amounts to a judicial stalemate on the substantive questions that were before the Court. Seven Judges sat on the appeal. Mr. Justice Hall writing a judgment, concurred in by Justices Spence and Laskin, concluded that aboriginal rights did exist in the Nishga peoples, that in so far as the natives of British Columbia were concerned, these rights had been recognized and confirmed in the Royal Proclamation of 1763, and that the rights had not been extinguished either by surrender or by legislative enactment. Mr. Justice Judson, writing a judgment concurred in by Justices Martland and Ritchie, concluded that even if aboriginal rights had existed as a result of the occupation of the lands by the Nishga Indians, such rights had been extinguished by the enactment of various Executive Orders between the years

1858 and 1871, which Orders asserted the Sovereignty of the Crown over the lands in question and which Orders were inconsistent with the continued existence of aboriginal rights in the native people occupying those lands. He further concluded that the Royal Proclamation of 1763 did not apply, in that the lands were *terra incognita* at the time of the enactment of that Proclamation. The seventh Judge hearing the appeal, Mr. Justice Pigeon, decided that the application by the Nishgas had been improperly brought, in that a fiat had not been obtained prior to its institution. He concurred in the result reached by Judson, J., and dismissed the appeal. The issues raised before the Court in that case are, therefore, left in a state of uncertainty, which uncertainty will only be resolved when the Supreme Court has an opportunity of deciding the questions some time in the future.

I do not propose to review the reasoning set out in the two conflicting judgments of the Supreme Court in the *Calder* case. With the greatest respect, I am strongly persuaded by the reasoning of Mr. Justice Hall, to the effect that aboriginal rights in the Province of British Columbia were not extinguished by the Executive Orders enacted between 1858 and 1871 and that except where surrendered, they continue to exist. I find particularly compelling the argument that subsequent to the enactment of those Executive Orders the federal Government entered into negotiations and treaties with some native peoples in the Province, providing for the surrender of their aboriginal rights. It only seems logical that had the federal Government intended to extinguish aboriginal rights by the enactment of the Executive Orders, no subsequent negotiations or settlements would have been necessary. The existence of such rights having been recognized at the time of the treaties, and compensation for their surrender having been provided in the treaties, it would be an unfortunate result to now conclude that the natives of the Province not covered by the treaties had been dispossessed of their rights and are, therefore, left in an inferior position to treaty Indians.

It is suggested, however, that because this issue was left unsettled by the Supreme Court of Canada, the majority decision of the British Columbia Court of Appeal in the *Calder* case continues to be the law of the Province until overruled. The majority of the Court, Davey, C.J.B.C., Tysoe and MacLean, JJ.A., decided, as did Judson, J., in the Supreme Court of Canada, that if the Indians of the Province of British Columbia were ever possessed of aboriginal rights, those rights

had been lawfully extinguished. The minority took the contrary view and decided as Hall, J., did in the Supreme Court, that aboriginal rights had been vested in the native peoples of British Columbia and had not been extinguished prior to British Columbia's confederation. This same view of the situation was taken by Norris, J.A., of the British Columbia Court of Appeal in the case of *R. v. White and Bob, supra.* He was not a member of the Court which heard the *Calder* case. Therefore, of the six Justices of that Court who have dealt with the question, there has been an even split of opinion. It is true that the majority in the *Calder* case decided that such rights had been extinguished, however, it is of significance that the decision was appealed on the very point in question, and was neither upheld nor reversed.

I find myself in the difficult position of deciding whether or not I am bound as a matter of *stare decisis* by the majority decision of the Court of Appeal in the *Calder* case.

The preferable view to take, it seems to me, is that the question remains undecided. The issue can only be clarified by the Supreme Court of Canada. To decide that the Court of Appeal decision is binding is to bring certainty to an issue that is uncertain. To do so in circumstances where a trial Judge is strongly persuaded by the opposite view, and where the decision will result in a conviction and the carriage of an appeal will fall to the defendants, is not a desirable result. The issue involved is one of great public importance with broad social, economic and cultural consequences to the native people of British Columbia. The matter ought to be clarified by the Courts and it is important that either this or a case with the same issue be appealed so the uncertainty might be resolved. In the meantime, I am of the view that there has been such a difference of judicial opinion in both the Supreme Court of Canada and the British Columbia Court of Appeal that the question remains open. I am aware that the contrary view on this point was taken by Mr. Justice Aikins of the British Columbia Supreme Court in the case of *R. v. Derriksan*, unreported [since reported 20 C.C.C. (2d) 157, 52 D.L.R. (3d) 744, [1975] 1 W.W.R. 56]. However, with the greatest of respect, for the reasons set out above, I conclude that I am not bound as a matter of *stare decisis* to follow the majority of the Court of Appeal in the *Calder* case.

In the many judgments and articles dealing with the question of aboriginal rights, there has been surprisingly little written on what these rights encompass. However, it does appear certain that at the very least there is included the right

117

of Indians to hunt for food for themselves and their dependants on unoccupied Crown lands. I, therefore, am able to conclude that in the present case that at the time the two defendants shot the moose, they were doing so in exercise of their aboriginal or native rights.

The question then arises whether or not non-treaty aboriginal hunting rights can be extinguished or restricted by the enactment of provincial legislation. There are two possible sources of legislative jurisdiction for the Provinces in this area. The first is by virtue of the jurisdiction conferred on the Provinces under the *British North America Act, 1867*, and the second by virtue of s. 88 of the *Indian Act*. Section 91(24) of the *B.N.A. Act, 1867* provides that the federal Government has exclusive legislative jurisdiction with respect to Indians and lands reserved for Indians. It is settled that federal legislation can extinguish or restrict aboriginal hunting rights without compensation in circumstances where there has been no surrender of such rights: *R. v. Sikyea*, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642; *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267.

It is well accepted that the Provinces have legislative jurisdiction with respect to the enactment of game laws. The *Wildlife Act* of British Columbia is general and purports to apply to all who come within the boundaries of the Province. It makes no specific reference to Indians other than defining an Indian in s. 2. The legislation in so far as it purports to apply to Indians must be tested against two standards. Does it fall within the area of exclusive federal jurisdiction set out in s. 91(24) of the *B.N.A. Act, 1867*? If so, then the Province is not competent to enact legislation in that field. The fact that the federal Government may itself not have enacted any legislation to occupy the field, does not have the effect of transferring to the Province the legislative authority assigned to the federal Government under s. 91(24): *Union Colliery Co. of B.C. Ltd. v. Bryden*, [1899] A.C. 580. If the legislation is not within the exclusive jurisdiction of Parliament, then the question is whether or not the legislation is overridden by any existing federal legislation.

This case concerns what amounts to a restriction by the *Wildlife Act* of the natives' aboriginal right to hunt for food. The inclusion in the *British North America Act, 1867* of a separate head of legislative power respecting Indians and Indian lands, was a recognition that consideration was to be given to the uniqueness of their situation within the framework of Confederation. Part of the unique position of the

Indian, which it was felt required a separate head of legislative authority in the federal Government, must have been the treatment of the Indian's right to hunt, fish and trap on the lands he had occupied since time immemorial.

In characterizing the legislation for purposes of determining whether nor not it falls within s. 91(24) of the *B.N.A. Act, 1867* one must look not only to the purpose of the legislation but also to its effect: *A.-G. Man. v. A.-G. Can.*, [1929] 1 D.L.R. 369, [1929] 1 W.W.R. 136, [1929] A.C. 260; *A.-G. Can. v. Reader's Digest Ass'n (Can.) Ltd.* (1961), 30 D.L.R. (2d) 296, [1961] S.C.R. 775, [1961] C.T.C. 530. The effect of ss. 4 [am. 1971, c. 69, ss. 3 and 4] and 26 of the *Wildlife Act* in so far as Indians are concerned is to restrict their aboriginal right to hunt for food for themselves or their dependants. In the case of *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193, Norris, J.A., at p. 648 said:

> It is well that what is now attempted by the enforcement of the game laws against the Indians in this case be understood. This is not a case merely of making the law applicable to native Indians as well as to white persons so there may be equality of treatment under the law, but of depriving Indians of rights vested in them from time immemorial, which white persons have not had, *viz.*, the right to hunt out of season on unoccupied land for food for themselves and their families.

The decision of the Court was upheld by the Supreme Court of Canada.

Such legislation is seems to me, as a matter of common sense, ought to be considered as being legislation "in respect to Indians", or to use the expression of Mr. Justice Martland in the case of *Cardinal v. A.-G. Alta.* (1973), 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553 [1973] 6 W.W.R. 205, "legislation relating to Indians *qua* Indians".

The British Columbia Court of Appeal in the case of *R. v. White and Bob, supra,* decided that the treaty-protected right to hunt food prevailed over conflicting provisions in provincial game legislation. Chief Justice Davey [then J.A.] at p. 618 stated:

> Legislation that abrogates or abridges the hunting rights reserved to Indians under the treaties and agreements by which they sold their ancient territories to the Crown and to the Hudson's Bay Company for white settlement is, in my respectful opinion, legislation in relation to Indians because it deals with rights peculiar to them.

It would seem a logical extension of this proposition that legislation that extinguishes or restricts aboriginal hunting rights

is also legislation in relation to Indians because it also deals with rights peculiar to them.

This same question of provincial competence to enact game legislation that affects the hunting rights of Indians was discussed indirectly in the recent decision of the Supreme Court of Canada in the case of *Cardinal v. A.-G. Alta., supra.* That case dealt with a status Indian selling moose meat on a reservation in the Province of Alberta. The Court was concerned there with the interpretation of ss. 10 and 12 of the Alberta Natural Resources Transfer Agreement, and whether or not provincial game legislation was *intra vires* the Legislature in so far as Indians on reserves were concerned. The appellant in the case, an Indian, argued that the Parliament of Canada had exclusive legislative authority concerning Indian reservations and that provincial laws could not apply unless referentially introduced through federal legislation. I will deal with the question of referential incorporation of legislation later in the judgment. Presently I wish to refer to comments made by Mr. Justice Martland with respect to the legislative competence of the Provinces in the area of game laws as those laws might affect the rights of Indians. Mr. Justice Martland in writing the majority judgment, concurred in by Fauteux, C.J.C., Abbott, Judson, Ritchie, and Pigeon, JJ., at p. 9 C.C.C., p. 562 D.L.R., p. 213 W.W.R., approved a statement of Mr. Justice Riddell in the case of *R. v. Martin* (1917), 39 D.L.R. 635, 41 O.L.R. 79, as follows:

> "In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them."

It is noted that Mr. Justice Riddell was dealing with a charge laid against an Indian not on a reserve under the Ontario *Temperance Act.* Mr. Justice Martland at pp. 9-10 C.C.C., p. 562 D.L.R., pp. 213-4 W.W.R., went on to say:

> In none of these cases is it decided that a provincial game law, of general application, would not affect an Indian outside a reserve. Legislation of this kind does not relate to Indians, *qua* Indians, and the passage above quoted would, in my opinion, be applicable to such legislation.
>
> . . . . .
>
> Cases decided before the Agreement, such as *R. v. Martin, supra,* had held that general legislation by a Province, not relating to Indians *qua* Indians, would apply to them. On their facts, these cases dealt with Indians outside reserves. The point is that the provisions of para. 12 were not required to make provincial game laws apply to Indians off the reserve.

Mr. Justice Martland proceeds in his judgment to interpret

para. 12 of the Alberta Land Resources Transfer Agreement as applying to Indian reserves and finds that the game laws of Alberta are therefore applicable to Indians on reservations. It is important to note that Mr. Justice Martland was dealing with a charge against an Indian on a reserve of selling moose meat. He was not dealing with a charge relating to a factual situation where an Indian was hunting for food. In Alberta, Manitoba and Saskatchewan, such right to hunt for food is specifically excluded from the Provincial legislation by virtue of provisos contained in para. 12, or similar paragraphs of the Land Transfer Agreements. It can be persuasively argued that the comments of Mr. Justice Martland relating to the application of provincial game laws to Indians were intended only to apply to situations were a provincial Legislature is regulating hunting for sport or for commerce. Laws of this nature are laws of general application, and fall within the ambit of the passage of Mr. Justice Riddell in the case of *R. v. Martin* (1917), 29 C.C.C. 189, 39 D.L.R. 635, 41 O.L.R. 79. These laws have the same general effect on the people to whom they apply. On the other hand, legislation that restricts Indians from hunting for purposes of food for themselves or for their dependants has much more serious consequences to them than the rest of the population. It infringes on their aboriginal rights and, in my view, should not be characterized in so far as Indians are concerned as legislation of general application.

The importance of the distinction between the kind of hunting involved was discussed by Mr. Justice McGillivray of the Alberta Court of Appeal in the case of *R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337. That case was concerned with a charge against an Indian in respect of hunting activities on unoccupied Crown land. The deer which he had killed was used for food, and the issue before the Court was the interpretation of the protection afforded to him under para. 12 of the Alberta Land Resources Transfer Agreement. Mr. Justice McGillivray, at p. 276 C.C.C., p. 781 D.L.R., p. 344 W.W.R., stated:

> I cannot think that the language of the section supports the view that this was the intention of the lawmakers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso of s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.

121

This passage was quoted with approval by the Supreme Court of Canada in the case of *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403.

In deciding whether or not the legislation falls within the exclusive jurisdiction of the federal Government under s. 91 (24) of the *B.N.A. Act, 1867* it is important as well for the Court to consider the most desirable social objective in the over-all legislative scheme dealing with Indians. To hold that the Provinces in enacting game legislation have authority to extinguish or restrict aboriginal hunting rights of Indians would result in Indians in the various Provinces and territories being treated differently with respect to this matter which is of such importance to their livelihood and to their culture. The *Yukon Act*, R.S.C. 1970, c. Y-2, and the *Northwest Territories Act*, R.S.C. 1970, c. N-22, provide that territorial Ordinances cannot restrict Indian and Eskimo rights to hunt for food. Similarly, the Natural Resources Transfer Agreements between the federal Government and the Provinces of Manitoba, Saskatchewan and Alberta [see 1930 (Can.), cc. 29, 41 and 3], provide that the laws respecting game in force in the Provinces from time to time shall apply to Indians with the exception that Indians shall have the right of hunting, trapping and fishing game and fish for food at all seasons of the year in all unoccupied Crown lands. The rights of the native people of the two territories and the three prairie Provinces to hunt for food can only be interfered with by legislation of Parliament. These rights are protected from infringement by the territorial or provincial Governments. The protection of hunting rights contained in the agreements between the federal Government and the Governments of the three prairie Provinces has been given the force of law by virtue of the affirmation of the agreements by the *British North America Act*, 1930 (U.K.), c. 26.

The importance of the uniformity of legislation dealing with Indians in Canada was referred to by Lord Watson in *St. Catherine's Milling and Lumber Co. v. The Queen* (1889), 14 App. Cas. 46 at p. 59.

> It appears to be the plain policy of the Act [*B.N.A. Act*] that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

Concern for the uniformity of legislation extinguishing or restricting aboriginal hunting rights of Indians leads to an interpretation of s. 91(24) of the *B.N.A. Act, 1867* which will confer exclusive jurisdiction in this matter on Parlia-

ment. Mr. Justice Laskin in a dissenting judgment in the *Cardinal* case makes reference to the importance of the uniformity of legislation relating to Indians and adopts that as a consideration in his decision that legislation with respect to Indian reservations should be within the exclusive jurisdiction of Parliament. For the reasons set out above, I conclude that legislation which extinguishes or restricts aboriginal hunting rights of Indians is legislation relating to Indians and within the exclusive jurisdiction of Parliament. Provincial legislation is therefore incompetent to do so.

A further argument can be made that such legislation falls exclusively within federal competence because it is legislation that relates to lands reserved for Indians, in that hunting rights are integrally tied to the lands over which they are exercised. In view of the conclusion I have reached, I do not find it necessary to deal with that proposition, nor is it necessary to consider the question whether there is federal legislation occupying the field.

The final question to be considered is whether or not the sections of the *Wildlife Act* of British Columbia in question have been referentially incorporated as a part of federal legislation by virtue of s. 88 of the *Indian Act*. Section 88 of the *Indian Act* reads:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Section 88 was first enacted in 1951. It can be interpreted as either being a statement of what was the situation prior to its enactment — namely, that provincial laws of general application are not laws in respect of Indians, and if otherwise competent they continue to be so, or as being a referential incorporation into federal legislation of provincial legislation not already competent with respect to Indians.

I have been able to find only two authorities directly dealing with the interpretation of s. 88. The first case is a decision of Judge Schultz of the British Columbia County Court in the case of *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485. In that case the learned trial Judge decided that the game laws of British Columbia were laws of general application and fell within s. 88 of the *Indian Act* and were, therefore, applicable to the Indian defendant charged with

hunting without a permit. The second decision is a decision of Judge Washington, also of the British Columbia County Court in the case of *R. v. Kruger and Manuel*, unreported [since reported 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435, [1974] 6 W.W.R. 206]. That case dealt with a fact situation indistinguishable from the facts in the present case. It involved a charge of hunting moose out of season in the Penticton area. The defendants were non-treaty Indians, and it was admitted that their ancestors had inhabited the lands in question since time immemorial. The lands on which the kill took place were unoccupied Crown lands. The learned trial Judge chose to follow the judgment of Mr. Justice Hall in the *Calder* case and decided that aboriginal rights continued to exist at the present time in the non-treaty Indians of the Province. He went on to find that these rights had been recogniezd by the Royal Proclamation of 1763, and concluded that only Parliament could interfere with aboriginal rights of Indians to hunt for food. Since Parliament has not done so he concluded the law remained as it has been since the Royal Proclamation of 1763. He went on to decide that the Royal Proclamation of 1763 has the force and effect of an Act of Parliament and as such the operation of s. 88 of the *Indian Act* is subject to the provisions of the Proclamation and, therefore, provincial game laws do not apply to Indians hunting for food.

I agree with the result reached in the *Kruger and Manuel* case. However, I base my decision on reasons other than those expressed by the learned Judge in that case. His decision, based as it was upon the applicability of the Royal Proclamation of 1763, has two difficulties. The first is that there is considerable difference of opinion as to whether or not the Royal Proclamation applies to Indians resident in the Province of British Columbia. This issue was thoroughly discussed in both judgments in the *Calder* case in the Supreme Court of Canada. Suffice it to say that the possibility exists that when the matter is before that Court again, the Supreme Court will decide that the Royal Proclamation of 1763 has no application to Indians resident in this Province. Should that be the case, the reasoning in *Kruger and Manuel* would be without foundation.

Secondly, the proviso in s. 88 of the *Indian Act* reads:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada . . .

It may be argued that the Royal Proclamation of 1763 although having the force and effect of an Act of Parliament, is an Executive Order and not an Act of Parliament, and,

therefore, not included within the exception set out at the beginning of s. 88.

If s. 88 is a referential incorporation of provincial legislation of general application, one must consider whether or not game legislation which has the effect of regulating or extinguishing native aboriginal hunting rights is legislation of general application. The phrase is open to two interpretations. The first is that the game laws apply to all persons within the Province including the Indians and are, therefore, by simple definition, laws of general application. The second is that the game laws if applied to all persons would affect the Indian differently than the rest of the population in that they would extinguish or restrict his aboriginal rights to hunt for food. It is not apparent from the legislation itself whether Parliament when enacting this section intended that one interpretation or the other be placed upon the wording used in the section.

The phrase, "of general application" should not be interpreted to include the legislation involved in the case before the Court. I say this for two reasons. First, to hold that s. 88 confers on the Provinces jurisdiction to enact legislation regulating or interfering with the hunting rights of Indian people would result in different treatment of the Indian rights in this Province from that in the two territories and the three prairie Provinces. The undesirability of this result is magnified by the facts of the present case. Had the defendants shot the moose a very short distance to the north, they would have been within the boundary of the Yukon Territory, where territorial legislation has no application. The areas over which the Indians exercised their traditional hunting and fishing rights were not defined by the boundaries between Provinces and territories. To extinguish these rights on such a basis is unfair and illogical.

Secondly, there is undoubtedly legislative authority in the Parliament of Canada to extinguish or regulate Indian aboriginal rights, and indeed the Government has legislated to this effect on a number of occasions. There is a presumption that aboriginal rights once established or recognized, are to continue until the contrary is established by context or circumstances. Mr. Justice Hall in the *Calder* case, 34 D.L.R. (3d) 145 at p. 208, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, reviews the English and American authorities on the question of the extinguishment of aboriginal rights and concludes at p. 210 as follows:

> It would, accordingly, appear to be beyond question that the onus

> proving that the Sovereign intended to extinguish the Indian title lies on the respondent [in this case the Attorney-General for the Province of B.C.] and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect.

Cumming and Mickenberg in *Native Rights in Canada* at p. 43, on reviewing the American authorities had this to say:

> The policy of extinguishing Indian title only upon equitable terms has been so consistently applied in American history that not only will the courts presume that the government intended to act fairly, but further, only the most deliberate governmental action will be viewed as properly extinguishing aboriginal rights at all. The position has recently been restated in *Lipan Apache Tribe v. United States* (1967), 180 Ct. Cl. 487 at p. 492):
>
> > While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of [claimants'] rights" in their property Indian title continues. In sum, while Congress can undoubtedly extinguish Indian title, such "an extinguishment cannot be lightly implied . . . (United States v. Santa Fe Pac. R.R., 314 U.S. at p. 354).

And further:

> The history of Canada demonstrates the traditional seriousness and respect with which the Crown regarded Indian rights. While the sovereign undoubtedly has had the authority to extinguish Indian title, the law and consistent political history in this area show that courts should proceed with great caution before assuming that an extinguishment has occurred.

The federal Government has, in the past, negotiated settlements of Indian title through treaties with the Indians residing in different areas throughout the country. Such treaties have provided for compensation to Indians by setting aside reserves, by protecting hunting and fishing rights, and otherwise in return for the surrender of the aboriginal title. To hold that s. 88 of the *Indian Act* incorporates referentially provincial legislation restricting or extinguishing the hunting rights of non-treaty Indians would be to encourage the practice of doing so without negotiation or compensation.

I conclude, therefore, that if s. 88 operates to referentially incorporate provincial legislation, legislation restricting or extinguishing Indian hunting rights is not legislation of general application as the phrase is used in that section. The result of so concluding may be that no provincial legislation not otherwise competent is added to the federal legislative scheme dealing with Indians. In such case the section would be merely a statement of the law as it otherwise exists. There is judicial

support for this interpretation of s. 88, *R. v. Shade* (1952), 102 C.C.C. 316, 14 C.R. 56, 4 W.W.R. (N.S.) 430, and *Re Adoption Act* (1974), 44 D.L.R. (3d) 718, [1974] 3 W.W.R. 363, 14 R.F.L. 396, *sub nom. Re Birth Registration No. 67-09-022272*.

It might further be argued that legislation restricting or regulating rights of Indians to hunt for food is legislation in respect of Indian lands and is, therefore, not covered by s. 88 of the *Indian Act*. In view of the conclusion I have reached, I do not find it necessary to deal with this point.

In summary I conclude as follows:

1. The defendants are not affected by treaty No. 8.
2. There are aboriginal hunting rights vested in the defendants.
3. These rights have not been extinguished.
4. The British Columbia *Wildlife Act*, in so far as it extinguishes or restricts native hunting rights, is not competent provincial legislation under the *British North America Act, 1867*.
5. Section 88 of the *Indian Act* does not operate to make such legislation applicable to the defendants.

The charge is, therefore, dismissed against both defendants.

Accused acquitted.

REGINA v. SCHWENGER CONSTRUCTION LTD.

Ontario High Court of Justice, Lieff, J. November 15, 1974.

Municipal law — By-laws — Governing statute authorizing by-laws as to "keeping, storing and transporting" of explosives — By-law regulating "use" of explosives — By-law invalid — "Keeping" means retention of possession and care and control — "Storing" means keeping for future purposes — Neither word wide enough to permit by-law regulating "use" — Semble, area occupied by provisions of Criminal Code in any event — Municipal Act, R.S.O. 1970, c. 284, s. 354(1), para. 9 — Cr. Code, ss. 77, 78.

Explosives — Municipal by-law regulating "use" of explosives — Governing statute authorizing by-laws as to "keeping, storing and transporting" of explosives — By-law regulating "use" of explosives — By-law invalid — "Keeping" means retention of possession and care and control — "Storing" means keeping for future purposes — Neither word wide enough to permit by-law regulating "use" — Semble, area occupied by provisions of Criminal Code in any event — Municipal Act, R.S.O. 1970, c. 284, s. 354(1), para. 9 — Cr. Code, ss. 77, 78.

[*London County Council v. Fairbank*, [1911] 2 K.B. 32, distd; *Thompson v. Equity Fire Ins. Co.*, [1910] A.C. 592, consd; *Hall v. Connecticut*

Supreme Court of Canada
Laskin, C.J.C., Martland, Judson,
Ritchie, Spence, Pigeon, Dickson,
Beetz and de Grandpré, JJ.
October 19, 1976.

FISH AND GAME - TOPIC 924

Indian and Eskimo rights - Hunting by Indians on aboriginal title lands - The accused, an Okanagan Indian, was charged with fishing offences under the federal Fisheries Act Regulations - The accused fished for kokanee salmon in traditional fishing grounds for Indians in the Okanagan Valley of British Columbia - The accused alleged that he had a right to fish for food in traditional fishing grounds and was not subject to federal regulatory laws - The Supreme Court of Canada affirmed the conviction of the accused - The Supreme Court of Canada stated that assuming the accused had an aboriginal right to fish, that such a right was subject to regulations imposed by validly enacted federal laws.

Summary:

This case arose out of a charge of fishing salmon contrary to regulations made under the federal Fisheries Act. The accused was an Okanagan Indian and he alleged that he had a right to hunt for food in traditional fishing grounds in the Okanagan Valley of British Columbia. The trial judge convicted the accused - See paragraphs 46 to 56.

On appeal by way of stated case to the British Columbia Supreme Court the appeal was dismissed and the conviction of the accused was affirmed - See paragraphs 13 to 45.

On appeal to the British Columbia Court of Appeal the appeal was dismissed and the conviction of the accused was affirmed - See paragraphs 2 to 12.

On appeal to the Supreme Court of Canada the appeal was dismissed and the conviction of the accused was affirmed - See paragraph 1. The Supreme Court of Canada stated that assuming the accused had an aboriginal right to fish, that such a right was subject to regulations imposed by validly enacted federal laws.

See also R. v. Kruger, 15 N.R. 495 at paragraph 14.

CASES JUDICIALLY NOTICED:

Calder v. Attorney General of British Columbia (1970), 74 W.W.R. 481; 13 D.L.R. (3d) 64; [1973] S.C.R. 313; [1973] 4 W.W.R. 1; 34 D.L.R. (3d) 146; (1970), 71 W.W.R. 81; 8 D.L.R. (3d) 59, folld. [para. 5, 21 and 52].

R. v. Sikyea (1964), 46 W.W.R. 65, folld. [para. 7].

R. v. George, [1966] S.C.R. 267, folld. [para. 10].

R. v. Francis (1969), 10 D.L.R. (3d) 189, folld. [para. 11 and 54].

R. v. White and Bob (1965), 52 W.W.R. 193, ref'd to. [para. 20 and 53].

Tee-Hit-Ton Indians v. U.S. (1955), 348 U.S. 272, ref'd to. [para. 35].

Oyekan v. Adele, [1957] 2 A.E.R. 785, ref'd to. [para. 51].

R. v. Discon and Baker (1968), 67 D.L.R. (2d) 619, folld. [para. 52].

STATUTES JUDICIALLY NOTICED:

Fisheries Act Regulations (Can.), S.O.R. Con. 1955, vol. 2, page 1627.

Royal Proclamation 1873, R.S.C. 1970, Appendices, page 123 [para. 8 and 20 to 22].

COUNSEL:

DOUGLAS SANDERS, for the appellant,

CHARLES C. LOCKE, Q.C., NORMAN J. PRELYPCHAN, for the respondent,

G.W. AINSLIE, Q.C., for Attorney General of Canada.

This appeal was heard by LASKIN, C.J.C., MARTLAND, JUDSON, RITCHIE, SPENCE, PIGEON, DICKSON, BEETZ and de GRANDPRE, JJ. at Ottawa, Ontario on October 19, 1976. The judgment of the Supreme Court of Canada was delivered orally on October 19, 1976 by LASKIN, C.J.C.

1 LASKIN, C.J.C. [*Orally for the Court*]: On the assumption that Mr. Sanders is correct in his submission (which is one which the Crown does not accept) that there is an aboriginal right to fish in the particular area arising out of Indian occupation and that this right has had subsequent reinforcement (and we express no opinion on the correctness of this submission), we are all of the view that the *Fisheries Act* and the Regulations thereunder which, so far as relevant here, were validly enacted, have the effect of subjecting the alleged right to the controls imposed by the Act and Regulations. The appeal is accordingly dismissed. There will be no order as to costs.

For these reasons, the dismissal of the information against the bank for a breach of s. 55 of The Public Utilities Board Act is set aside and the question raised in the stated case is answered in the affirmative. The matter is remitted to the learned Provincial Judge for appropriate disposition in accordance with the terms of this judgment.

BRITISH COLUMBIA COURT OF APPEAL

Farris C.J.B.C., Branca, Robertson, Seaton and McIntyre JJ.A.

Regina v. Derriksan

Indians — Fishing in prohibited place — Applicability to Indians of British Columbia Fishery Regulations, Regs. 76(1), 80(1)(c), 81 (1)(d) — The Fisheries Act, R.S.C. 1970, c. F14.

The British Columbia Fishery Regulations made under the Fisheries Act apply with equal force to Indians as to others. Appellant, an Indian, was convicted of fishing at a place where fishing was prohibited by Reg. 81(1)(*d*), and by methods prohibited by Regs. 76(1) and 80(1)(*c*). It was held that he had no aboriginal right to fish so as to exclude the application of the Regulations: [1975] 1 W.W.R. 56, 20 C.C.C. (2d) 157.

Held, the appeal should be dismissed and the conviction upheld: the words "No person shall" in the Regulations admitted of no exceptions: *Sikyea v. The Queen*, 46 W.W.R. 65, 43 C.R. 83, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 130, affirmed 49 W.W.R. 306, [1964] S.C.R. 642, 44 C.R. 266, [1965] 2 C.C.C. 129; *Francis v. The Queen*, 9 C.R.N.S. 249, 2 N.B.R. (2d) 14, [1970] 3 C.C.C. 165, 10 D.L.R. (3d) 189 (C.A.) applied.

[Note up with 13 C.E.D. (West. 2nd) *Indians*, s. 22.]

B. F. Fraser, for appellant.

F. H. Herbert, Q.C., for the Crown.

28th February 1975. The judgment of the Court was delivered by

ROBERTSON J.A.:—The appellant was charged with offences against the British Columbia Fishery Regulations made under the Fisheries Act, R.S.C. 1970, c. F-14. Collver Prov. J. convicted him and then, on the application of the appellant, stated a case. Aikins J. heard the appeal by way of stated case and dismissed it [[1975] 1 W.W.R. 56, 20 C.C.C. (2d) 157]. Against that dismissal the appellant has appealed to this Court.

The, appellant is an Indian within the meaning of the Indian Act, R.S.C. 1970, c. I-6. In October 1970 he caught fish in Peachland Creek, a tributary of Okanagan Lake, where fish-

ing was prohibited by Reg. 81(1)(*d*), and he did so by methods prohibited by Regs. 80(1)(*e*) and 76(1).

Some of the findings stated in the case are:

"2. That at all material times herein, the accused caught kokanee as alleged, for food and not for sale . . .

"7. That the accused did not, at any material time herein, have a permit issued to him under Section 32 of the Regulations made under the Fisheries Act, being Chapter 119 of the Revised Statutes of Canada, 1952, and amendments thereto . . .

"10. That generations of Okanagan Indians have fished for kokanee salmon in Peachland Creek during the spawning season and that Peachland Creek, or Deep Creek as it is known to the Okanagan Indians, must still be considered as traditional fishing grounds for Indians of the Okanagan Valley."

The questions propounded by the Provincial Court Judge were these [p. 58]:

"1. Was I correct in holding that Noll Derriksan as an Okanagan Indian has no aboriginal right to fish for food for his own use on ancient tribal territory, namely, at or near Peachland Creek, known to him as Deep Creek?

"2. Was I correct in holding that the Royal Proclamation of 1763 does not apply to the Okanagan Valley of the Province of British Columbia?

"3. Was I correct in holding that it would only be if the Royal Proclamation of 1763 were applicable to Okanagan Indians, that pursuant to the provisions of Section 88 of the Indian Act, the accused, Noll Derriksan could have lawfully done the acts complained of?"

To both question 1 and question 2 Aikins J. answered "Yes". In so doing he relied on *Calder v. A.G. B.C.* in which the reasons of Gould J. are reported at 71 W.W.R. 81, 8 D.L.R. (3d) 59, the reasons of this Court are reported at 74 W.W.R. 481, 13 D.L.R. (3d) 64, and the reasons of the Supreme Court of Canada are reported at [1973] 4 W.W.R. 1, [1973] S.C.R. 313, 34 D.L.R. (3d) 145. Aikins J. found it unnecessary to answer question 3. In the result, as I have already stated, he dismissed the appeal and affirmed the convictions.

Each of the Regulations under which the charges were laid provides that "No person shall" do the acts in question and so, upon its face, applies to all persons. There is no provision exempting Indians from the operation of those Regulations.

In *Sikyea v. The Queen*, 46 W.W.R. 65, 43 C.R. 83, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, the Court of Appeal of the Northwest Territories had to consider the application of the Migratory Birds Convention Act, 1917 (Can.), c. 18, and the Regulations made thereunder to an Indian. From the decision of that Court an appeal was taken to the Supreme Court of Canada, whose judgment is reported at 49 W.W.R. 306, [1964] S.C.R. 642, 44 C.R. 266, [1965] 2 C.C.C. 129. Hall J. delivered the judgment of the Court. After discussing whether a bird that the appellant had shot was a "wild bird" within the meaning of the Act, Hall J. said at p. 646:

"On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written."

Johnson J.A. referred to the rights of Indians that had their origin in the Royal Proclamation that followed the Treaty of Paris in 1763 and to certain other treaties. Then, after quoting from the Act and the Regulations, he said at p. 74:

"I have quoted sec. 5 (1) of the regulations which says that ' . . . no person shall . . . kill . . . a migratory bird at any time except during an open season . . . ' It is difficult to see how this language admits of any exceptions. When, however, we find that reference in both the Convention and in the regulations to what kind of birds an Indian and Eskimo may 'take' at any time for food, it is impossible for me to say that the hunting rights of the Indians as to these migratory birds have not been abrogated, abridged or infringed upon.

"It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its regulations."

Again at p. 75 he said:

"I can come to no other conclusion than that the Indians, notwithstanding the rights given to them by their treaties, are prohibited by this Act and its regulations from shooting migratory birds out of season."

In the first passage that I have quoted from Johnson J.A.'s judgment he says that it is difficult to see that the language that "No person shall kill any migratory bird at any time" admits of any exceptions. Equally I cannot see that the language of the Regulations under the Fisheries Act in question

here admits of any exceptions. This would in itself be sufficient to dispose of the matter, but, as in the case of *Regina v. Sikyea*, supra, there is an additional reason for thinking that the Regulations under the Fisheries Act apply to Indians, notwithstanding their rights (if any) under the Proclamation. I refer to Reg. 32, which reads in part:

"32. (1) Notwithstanding subsection (1) of section 68, an Indian may at any time under a permit issued by the Regional Director or a fishery officer catch fish for food for himself and his family, but for no other purpose.

"(1*a*) The Regional Director or a fishery officer may, in issuing a permit referred to in subsection (1)

"(*a*) limit or fix the area of the waters in which any fish may be caught;

"(*b*) limit or fix the means by which or the manner in which any fish may be caught; and

"(*c*) limit or fix the time during which the permit shall be operative.

"(2) an Indian shall not fish for or catch fish pursuant to the said permit except in the waters, by the means or in the manner and within the time expressed in the said permit, and no person shall sell, attempt to sell or otherwise dispose of any fish caught pursuant to such permit; any violation of the provisions of the permit shall be deemed to be a violation of these Regulations."

The Regulations were obviously intended to apply generally to Indians.

Section 88 of the Indian Act was referred to in question 3 but I shall not discuss it, because it has no application to Dominion legislation, for the reasons stated in *Regina v. George*, 47 C.R. 382, [1966] S.C.R. 267, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386.

The opinion I have reached coincides with that of the Appeal Division of the New Brunswick Supreme Court in *Francis v. The Queen*, 9 C.R.N.S. 249, 2 N.B.R. (2d) 14, [1970] 3 C.C.C. 165, 10 D.L.R. (3d) 189. There Hughes J.A., for the Court, said at p. 195:

"There can be no doubt that since the decisions of the Supreme Court of Canada in *Sikyea v. The Queen* [supra] and *Regina v. George, supra*, legislation of the Parliament of Canada and Regulations made thereunder, properly within s. 91 of the B.N.A. Act, 1867, are not qualified or in any way made

unenforceable because of the existence of rights acquired by Indians pursuant to treaty. It follows that even if the appellant had established that a right to fish salmon in the Richibucto River had been conferred by an Indian treaty, the benefit of which he was entitled to claim, such right could afford no defence to the charge on which he was convicted."

My view of the way in which this appeal falls to be decided makes it unnecessary for me to consider *Regina v. Calder*, supra, or to answer questions 2 and 3. Since I am of the opinion that the affirmative answer to question 1 was correct, in that the Regulations in question apply to the appellant, I would dismiss the appeal.

ALBERTA SUPREME COURT

[APPELLATE DIVISION]

McDermid, Clement and Haddad JJ.A.

Harder v. Hayter

Practice — Notice of appeal — When service may be made on solicitor of record — Alberta RR. 14, 554, 555.

A notice of appeal is not a document by which an action or other proceeding is commenced within the meaning of R. 14, and it need not be served personally; it may properly be served on the solicitor of record for the opposite party unless that solicitor has taken steps to remove himself from the record pursuant to R. 554(1) or R. 555(1), or a notice has been filed pursuant to R. 554 (2); in the absence of any such steps a notice of appeal may be served on the solicitor even though his retainer was expressly terminated by the client on the completion of the proceedings from which appeal has been taken.

[Note up with 18 C.E.D. (West. 2nd) *Practice*, s. 128.]

J. M. Hattersley, for applicant.

B. Schepanovich, for respondent.

9th April 1975. The judgment of the Court was delivered by

HADDAD J.A.:—The respondent, Hayter, has applied to the Court to quash a notice of appeal filed by the applicant, Harder, on the grounds that the same was not served on the respondent within 20 days of the signing, entry and service of the order appealed from in compliance with RR. 506 and 510 of the Supreme Court Rules. There is also before us an application by Harder to extend the time for service of the notice. In view of the conclusion to which I have come it is necessary for me to deal with Hayter's application only.

REGINA v. DERRIKSAN

British Columbia Supreme Court, Aikins, J., in Chambers
September 4, 1974.

Indians — Aboriginal rights — Accused Indian taking fish for food in tribe's traditional fishing ground — Whether accused having aboriginal right to hunt and fish on tribal lands — Fisheries Act, R.S.C. 1970, c. F-14, s. 34 — British Columbia Fishery Regulations, P.C. 1954-1910, SOR Con. 1955, vol. 2, p. 1627, ss. 81(1)(d), 80(1)(e), (2), 76(1) — Indian Act, R.S.C. 1970, c. I-6, s. 88.

Even if there was an aboriginal title to Indian lands in the Indian tribes of British Columbia, such title was extinguished, probably even before Confederation, both by legislation and by the settlement of Canada by the new settlers which resulted in the Indians' society being moved onto reservations.

[*Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1; affg 13 D.L.R. (3d) 64, 74 W.W.R. 481; affg 8 D.L.R. (3d) 59, 71 W.W.R. 81, apld; *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, 75 S. Ct. 313, 99 L. Ed. 314, refd to]

Indians — Aboriginal rights — Royal Proclamation, 1763 protecting, inter alia, traditional fishing rights — Accused Indian charged in British Columbia with unlawful fishing — Conviction affirmed — Proclamation not applicable to British Columbia — Fisheries Act, R.S.C. 1970, c. F-14, s. 34 — British Columbia Fishery Regulations, P.C. 1954-1910, SOR Con. 1955, vol. 2, p. 1627, ss. 81(1)(d), 80(1)(e), (2), 76(1) — Indian Act, R.S.C. 1970, c. I-6, s. 88.

[*Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1; affg 13 D.L.R. (3d) 64, 74 W.W.R. 481; affg 8 D.L.R. (3d) 59, 71 W.W.R. 81, apld; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 [affd 52 W.W.R. 481*n*, [1965] S.C.R. vi], refd to]

APPEAL by the accused by way of stated case from his convictions for unlawful fishing contrary to s. 34 of the *Fisheries Act* (Can.).

B. F. Fraser, for accused, appellant.
F. H. Herbert, Q.C., for the Crown.

AIKINS, J.:—This is an appeal by way of stated case. It is conceded that the appeal is properly brought as to formal requirements. The appellant was charged with three offences under the *British Columbia Fishery Regulations*, P.C. 1954-1910, SOR Con. 1955, vol. 2, p. 1627 [am. SOR/68-273, s. 6], made pursuant to s. 34 [am. R.S.C. 1970, c. 17 (1st Supp.), s. 4] of the *Fisheries Act*, R.S.C. 1970, c. F-14.

The first count was laid under s. 81(1)(*d*) of the Regulations which reads in part as follows:

> 81(1) . . . no person shall
>
> (*d*) fish for, catch or kill kokanee in creeks or streams, up which such fish go to spawn;

The substantive part of the first count reads:

> ... that you, on the fourth day of October, A.D. 1970, near Peachland, in the County of Yale, Province of British Columbia, did catch kokanee in a stream, to wit, Peachland Creek, up which such fish go to spawn ...

The second count was laid under s. 80(1)(*e*) of the Regulations which reads in part as follows:

> 80(1) No person shall
>
> (*e*) catch or attempt to catch a fish by impaling it on a hook through some part of its body instead of luring the fish to take the hook into its mouth as in angling;

The substantive part of the second count reads:

> ... that you, on the fourth day of October, A.D. 1970, near Peachland, in the County of Yale, Province of British Columbia, did catch a fish by impaling it on a hook through some part of its body, instead of luring the fish to take the hook into its mouth, as in angling ...

The third count is laid under s. 76(1) of the Regulations which reads:

> 76(1) Except as otherwise authorized by these Regulations, no person shall fish for, take, or kill any game fish, salmon, northern pike, walleye, whitefish or sturgeon in non-tidal waters except by angling.

As to this count reference should also be made to s. 80(2) of the Regulations, as follows:

> 80(2) Any person may use a spear or bow and arrow to take fish other than game fish, salmon, whitefish or sturgeon.

The substance of the third count is this:

> ... that you on the fourth day of October, A.D. 1970, near Peachland, in the County of Yale, Province of British Columbia, did take a game fish, to wit, kokanee, in non-tidal waters in a manner other than by angling ...

These are the questions propounded for the opinion of the Court:

> 1. Was I correct in holding that Noll Derriksan as an Okanagan Indian has no aboriginal right to fish for food for his own use on ancient tribal territory, namely, at or near Peachland Creek, known to him as Deep Creek?
>
> 2. Was I correct in holding that the Royal Proclamation of 1763 does not apply to the Okanagan Valley of the Province of British Columbia?
>
> 3. Was I correct in holding that it would only be if the Royal Proclamation of 1763 were applicable to Okanagan Indians, that pursuant to the provisions of Section 88 of the Indian Act, the accused, Noll Derriksan could have lawfully done the acts complained of?

Section 88 of the *Indian Act*, R.S.C. 1970, c. I-6, referred to in the third question, is as follows:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, execept to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The Provincial Judge set out his findings of fact in the stated case. Those numbered 1, 2 and 10 are relevant to the issues raised by the questions propounded for the opinion of the Court. I reproduce the three findings of fact, as follows:

> 1. The accused is an Indian and a member of the Westbank Indian Band, within the meaning of the Indian Act, Chapter 149, of the Revised Statutes of Canada, 1952, and Amendments thereto.
>
> 2. That at all material times herein, the accused caught Kokanee as alleged, for food and not for sale.
>
> 10. That generations of Okanagan Indians have fished for Kokanee salmon in Peachland Creek during the spawning season and that Peachland Creek, or Deep Creek as it is known to the Okanagan Indians, must still be considered as traditional fishing ground for Indians of the Okanagan Valley.

The convenient course is to first consider the second question propounded in the stated case. The *Royal Proclamation, 1763*, referred to in the second question is set out in the volume entitled "Appendices" of the Revised Statutes of Canada, 1970, App. II, at p. 123. The point involved in the second question is that it was contended that the Proclamation protected, *inter alia*, the traditional fishing rights of the Indian people. As will appear it is my opinion that the second question must be answered in the affirmative because, in my view, as the law stands the Proclamation has no application to British Columbia. It would not, I think, serve any useful purpose to set out the material part of the proclamation which, it is contended, protects or preserves the fishing rights of the Indian people of the Okanagan, but I comment that the relevant part of the Proclamation was extracted by Sheppard, J.A., in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193, and reproduced at p. 620 D.L.R., p. 200 W.W.R. The passage is also found at p. 127 of the Appendices to the Revised Statutes of Canada, 1970, App. II.

The determinative case, in my respectful view, on the applicability of the *Royal Proclamation, 1763* to the Province of British Columbia is *Calder et al. v. A.-G. B.C.* The judgments of the Court of Appeal in *Calder* are reported in (1970), 13 D.L.R. (3d) 64, 74 W.W.R. 481; the judgments in the Supreme

137

Court of Canada are reported in 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1. The judgment of Gould, J., the trial Judge in *Calder*, is reported in (1969), 8 D.L.R. (3d) 59, 71 W.W.R. 81. My brother Gould held that the *Royal Proclamation, 1763* did not apply to British Columbia. In the Court of Appeal Davey, C.J.B.C., and Tysoe and Maclean, JJ.A., each held that the Proclamation did not apply to the Indians of or the territory of British Columbia. Mr. Justice Judson, Martland and Ritchie, JJ., concurring, held that the Proclamation had no application in British Columbia, in these words in 34 D.L.R. (3d) at p. 153, [1973] 4 W.W.R. at p. 7:

> I say at once that I am in complete agreement with judgments of the British Columbia Courts in this case that the Proclamation has no bearing upon the problem of Indian title in British Columbia. I base my opinion upon the very terms of the Proclamation and its definition of its geographical limits and upon the history of the discovery, settlement and establishment of what is now British Columbia.

The dissenting judgment of Mr. Justice Hall, Mr. Justice Spence and Mr. Justice Laskin (now Chief Justice of Canada) was delivered by Mr. Justice Hall. Put shortly, the three dissenting Justices of the Supreme Court held, on consideration of the wording of the Proclamation, earlier authority and more particularly on review of the historical background, that the Proclamation did apply to British Columbia. Mr. Justice Pigeon held that the appeal should be dismissed on the preliminary point that a fiat was required as a condition of jurisdiction and the lack of a fiat permitting the suit against the Crown provincial was fatal. I should add that Mr. Justice Judson at the conclusion of his reasons for judgment was of the opinion it was not necessary, in view of his conclusion as to the disposition of the appeal, to determine the jurisdictional question turning on the lack of a fiat under the *Crown Procedure Act*, R.S.B.C. 1960, c. 89, but added that he agreed with Mr. Justice Pigeon on that issue.

Mr. Fraser for the appellant concedes, and rightly in my view, that in the particular situation in *Calder* which I have described, the judgment of the Court of Appeal for British Columbia stands unreversed and that, therefore, the law as to the applicability of the Proclamation to British Columbia is to be found in the judgments of the Court of Appeal for British Columbia and the judgment of Mr. Justice Judson, Mr. Justice Martland and Mr. Justice Ritchie concurring, in the Supreme Court of Canada. The second question propounded must be answered in the affirmative; the Provincial

Judge was correct in holding that the *Royal Proclamation, 1763* does not apply to the Okanagan Valley of the Province of British Columbia. Thus the argument for the appellant based on the applicability of the Proclamation fails. Without going into the detail of Mr. Fraser's very able argument, it is sufficient to say that the argument is that under s. 88 of the *Indian Act* the rights conferred or preserved by the *Royal Proclamation, 1763* override the *Fisheries Act* and the *British Columbia Fishery Regulations* made pursuant to s. 34 of that Act which it is said, paraphrasing s. 88, are laws of general application in force in British Columbia.

I now turn to the first question which for convenience I reproduce again:

> 1. Was I correct in holding that Noll Derriksan as an Okanagan Indian has no aboriginal right to fish for food for his own use on ancient tribal territory, namely, at or near Peachland Creek, known to him as Deep Creek?

I should say by way of preface that it is common ground that there is no treaty which affects the Okanagan Indian people or the land or territory in which Peachland Creek is located.

The starting point in Mr. Fraser's argument on the first question is the tenth finding of fact made by the Provincial Judge which, for convenience I reproduce again here:

> 10. That generations of Okanagan Indians have fished for Kokanee salmon in Peachland Creek during the spawning season and that Peachland Creek, or Deep Creek as it is known to the Okanagan Indians, must still be considered as traditional fishing grounds for Indians of the Okanagan Valley.

In my view the finding of fact just reproduced may fairly be construed as meaning that from time immemorial the Indian people of the Okanagan have fished Peachland Creek for kokanee during the spawning season. It is contended for the appellant that the Okanagan Indian people had an aboriginal right to fish Peachland Creek and that that right has not been extinguished. Counsel for the appellant contends that the aboriginal right, not extinguished, is a private right and cannot be taken away by general legislation, such as is found in s. 88 of the *Indian Act*, without provision for compensation.

Counsel for the appellant's argument is based on the premise that the Indian tribes of British Columbia acquired aboriginal title to the lands which the various tribes used and occupied for generations in the past and that one attribute of that aboriginal title is the right to hunt and fish on tribal lands. The next step in counsel's argument is that even if, as I have found to be the case, the *Royal Proclamation, 1763* protecting

and preserving aboriginal rights does not run to British Columbia, nevertheless the Indian title to lands in British Columbia has not been extinguished. Counsel relies primarily on the judgment of Mr. Justice Hall in *Calder*. The view taken by Mr. Justice Hall, with Mr. Justice Spence and Mr. Justice Laskin, as his Lordship then was, concurring, is in my view concisely and accurately stated in the headnote to *Calder* in [1973] S.C.R. at pp. 315-6:

> The proposition accepted by the Courts below that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer was wholly wrong. There is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aboriginees precisely analogous to the Nishga situation.
>
> Paralleling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question was the guarantee of Indian rights contained in the Royal Proclamation of 1763. The wording of the Proclamation indicated that it was intended to include the lands west of the Rocky Mountains.
>
> Once aboriginal title is established, it is presumed to continue until the contrary is proven. When the Nishga people came under British sovereignty they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and that only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did the Parliament of Canada.

Mr. Justice Judson in *Calder* points out at pp. 152-3 D.L.R., p. 7 W.W.R., that there were two distinct questions in that case. The first question was whether the *Royal Proclamation, 1763* applied to Nishga territory in British Columbia, thus entitling those people to its protection. The second question, if the *Royal Proclamation, 1763* did not apply to Nishga territory, was whether the Nishgas' Indian title was entitled to recognition by the Courts.

In *Calder*, in the British Columbia Court of Appeal, Chief Justice Davey, on the issue of aboriginal rights, agreed with Tysoe, J.A. The Chief Justice's view of the matter is expressed in the following paragraph, which I take from 13 D.L.R. (3d) at p. 67, 74 W.W.R. at pp. 483-4:

> Under the authorities cited by my brother Tysoe, to which I add *Tamaki v. Baker*, [1901] A.C. 561, it is, I think clear, in the circumstances of this case that the appellants must establish that by a prerogative or legislative Act, or by a course of dealing by the Crown from which a prerogative Act can be inferred, the Crown

> ensured to the Nishga Nation aboriginal rights in the lands in question, which might be asserted and enforced in the Courts of this Province. Unless that can be determined affirmatively, no declaratory judgment can be delivered that such rights have not been extinguished, because to say that they have not been extinguished implies that they exist.

At the conclusion of the judgment Chief Justice Davey said at p. 69 D.L.R., p. 486 W.W.R.:

> If I be wrong, and the Indians of British Columbia did acquire any aboriginal rights, I agree with my brother Tysoe that the historical and legislative material which he has cited shows that they have been extinguished.

I turn to the judgment of Tysoe, J.A., in *Calder*. That learned Justice, after an exhaustive review of authorities, American, Canadian and British, and of the historical background with particular reference to the sequence of relevant legislation in British Columbia, stated this short but plain conclusion at p. 98 D.L.R., p. 522 W.W.R.:

> In my opinion the answer to the question "Has the aboriginal title, otherwise known as the Indian title, of the appeliants to their ancient tribal territory been extinguished?" is "If it ever existed, it has been extinguished."

Mr. Justice Maclean in *Calder* came to the same conclusion as Mr. Justice Tysoe, likewise after a full review of authorities and of legislative history. I cite from that learned Justice's reasons at pp. 107-8 D.L.R., p. 533 W.W.R.:

> The learned trial Judge has reviewed the pre-Confederation legislation of the Colony from 1858 till the Province entered Confederation in 1871 and has held, and I think correctly, that [8 D.L.R. (3d) at p. 82, 71 W.W.R. at p. 108]:
>
> > "In result I find that, if there ever was such a thing as aboriginal or Indian title in, or any right analogous to such over, the delineated area, such has been lawfully extinguished *in toto*. It is not necessary to explore what 'aboriginal title, otherwise known as the Indian title' may mean, or in earlier times may have meant, in a different context. Lord Watson, for the Privy Council, in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at p. 55, said:
> >
> > > " 'There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished.' "

At p. 110 D.L.R., p. 535 W.W.R., Maclean, J.A., summed up in these words:

141

> To put the matter another way — if there ever was an "Indian title" it was extinguished by the pre-Confederation legislation of the Colony.

It is clear that if the law as enunciated by the Court of Appeal in *Calder* stands undisturbed, then even assuming an aboriginal Indian title for the Okanagan Indian people to the land in which Peachland Creek is situate, carrying with it the unrestricted right to fish in that creek, that right has been wholly extinguished. This takes me back to the judgment of Judson, J., in the Supreme Court of Canada in *Calder*. Mr. Justice Judson agreed that the *Royal Proclamation, 1763* did not extend to British Columbia. That learned Justice then went on to state the problem in these terms in 34 D.L.R. (3d) at p. 156, [1973] 4 W.W.R. at p. 11:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the lands as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the good-will of the Sovereign".
>
> It was the opinion of the British Columbia Courts that this right, if it ever existed, had been lawfully extinguished, that with two societies in competition for land — the white settlers demanding orderly settlement and the Indians demanding to be let alone — the proper authorities deliberately chose to set apart reserves for Indians in various parts of the territory and open up the rest for settlements. They held that this had been done when British Columbia entered Confederation in 1871 and that the Terms of Union recognized this fact.

Mr. Justice Judson then went on to review the historical background and legislative background of Ordinances and Proclamations, concluding with the Ordinance of June 1, 1870. His Lordship then said at pp. 159-60 D.L.R., p. 15 W.W.R.:

> The result of these Proclamations and Ordinances was stated by Gould, J., at the trial in the following terms [8 D.L.R. (3d) at p. 81]. I accept his statement, as did the Court of Appeal:
>
> "The various pieces of legislation referred to above are connected, and in many instances contain references *inter se*, especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty

> over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to 'aboriginal title, otherwise known as the Indian title', to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands."

Mr. Justice Judson continued with a further review of historical materials and legislation and went on to a consideration of American authorities. There is no useful purpose to be served in my attempting a summary of what was said by Mr. Justice Judson because in my view his conclusion is plain enough. One of the American cases considered was *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, 75 S.Ct. 313, 99 L. Ed. 314. At p. 167 D.L.R., 23 W.W.R., Judson, J., cites the following passage from *Tee-Hit-Ton*, dealing with the nature of aboriginal Indian title, as follows:

> "This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

Mr. Justice Judson then, shortly and succinctly, in my respectful view put his conclusion in these words:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

The decision of the Court of Appeal for British Columbia in *Calder* stands; it has not been reversed. In short, and again using the words of Maclean, J.A., in 13 D.L.R. (3d) at p. 110, 74 W.W.R. at p. 535, the Court decided this:

> . . . if there ever was an "Indian title" it was extinguished by the pre-Confederation legislation of the Colony.

I have reviewed Mr. Justice Judson's reasons at some length because it was suggested in argument by counsel for the appellant that Mr. Justice Judson was not wholly in agreement with the Court of Appeal. I can only say that having considered Mr. Justice Judson's reasons carefully I am respectfully of the opinion that that learned Judge, Justices Martland and Ritchie concurring, held, as the Court of Appeal did, that such rights of occupancy as the Nishgas enjoyed had been wholly extinguished.

There is no factor which distinguishes the Okanagan Indian

people and the territory they occupied, encompassing Peachland Creek, from the Nishga people and the Nishga tribal land. The *Royal Proclamation, 1763* does not apply to Nishga land or to Okanagan land. It is common ground that, as with the Nishgas, there is no treaty affecting the Okanagan Indian people or their territory. It follows from *Calder*, assuming that the Okanagan Indians had aboriginal title to the land which includes Peachland Creek and, running with, or as a consequence of that title, had an unrestricted right to fish in Peachland Creek, that that title and that right have been wholly extinguished. Thus it follows that the appellant, an Okanagan and a member of the Westbank Band, is subject to the *Fisheries Act* and the *British Columbia Fishery Regulations* made thereunder, which are laws of general application in the Province of British Columbia. No protection is afforded the appellant by s. 88 of the *Indian Act, supra.*

I should add that I have not thought it necessary to refer to other authorities given me by counsel because, in my view, *Calder* is decisive.

For convenience I reproduce the first question posed by the stated case:

> 1. Was I correct in holding that Noll Derriksan as an Okanagan Indian has no aboriginal right to fish for food for his own use on ancient tribal territory, namely, at or near Peachland Creek, known to him as Deep Creek?

For the reasons which I have given I am of the opinion that the first question must be answered in the affirmative.

I have already answered the second question in the affirmative.

The third question reads as follows:

> 3. Was I correct in holding that it would only be if the Royal Proclamation of 1763 were applicable to Okanagan Indians, that pursuant to the provisions of Section 88 of the Indian Act, the accused, Noll Derriksan could have lawfully done the acts complained of?

On considering the third question in conjunction with my affirmative answer to the second question I am of the opinion that for the purposes of the present appeal the third question does not require an answer. Because I have held that the *Royal Proclamation, 1763* has no application to the Okanagan Indian people or the territory encompassing Peachland Creek, it is unnecessary to decide what the position would have been had the Proclamation been applicable.

The convictions must be affirmed and the appeal dismissed.

Appeal dismissed.

144

missed.

Appeal dismissed.

R. v. DERRIKSAN

Provincial Court of British Columbia
Collver, J.
August 30, 1971.

COUNSEL:
B.F. FRASER, for the defendant, Noll Derriksan,
F.H. HERBERT, for the Crown.

The judgment of the British Columbia Provincial Court was delivered by COLLVER, J. at Penticton, British Columbia, on August 30, 1971.

COLLVER, J.: The defendant, who is an Okanagan Indian, and a member of the Westbank Indian Band, is alleged to have violated three regulations made pursuant to the *Fisheries Act* of Canada. Rather than quoting from the various regulations in question, I propose to outline the pertinent portions of the three counts contained in the Information, which counts of course utilize the terminology contained in the relevant sections of the regulations. The three counts all arise out of one incident which took place on the 4th day of October, 1970, near Peachland, in the County of Yale and Province of British Columbia. Count # 1 alleges that at the time and place in question, the defendant "did catch Kokanee in a stream, to wit, Peachland Creek, up which such fish go to spawn". Count # 2 alleges that the defendant "did catch a fish by impaling it on a hook through some part of its mouth, as in angling". Count # 3 alleges that the defendant "did take a game fish, to wit, Kokanee, in non-tidal waters, in a manner other than by angling".

These facts are not in issue. Indeed, Counsel for the Crown and Counsel for the defendant filed admissions of fact at the commencement of the hearing. Aside from those admissions which dealt with identification, jurisdiction, and the manner in which the fish in question were caught, the only other facts which might be mentioned are that the defendant caught the fish in question for food, and not for sale, and did not at any material time have a permit issued to him under the aforesaid regulations made pursuant to the provi-

sions of the *Fisheries Act*.

145

48 After the above facts had been admitted, the brief testimony of three witnesses was received. A Provincial Conservation Officer described the manner in which the Provincial Fish and Wildlife Branch attempts to enforce the provisions of the *Fisheries Act* in non-tidal waters such as Peachland Creek. He described Peachland Creek as being one of the most important spawning creeks for Kokanee. I then heard the testimony of two elderly Okanagan Indians, one of whom described catching Kokanee in the Creek as early as 1910, while the second, who is 85 years of age, recalled fishing in Peachland Creek during his childhood days, when nets were used to catch the spawning Kokanee. I have no difficulty in satisfying myself that generations of Okanagan Indians have fished for Kokanee salmon in Peachland Creek during the spawning season. Although pesticides and other environmental impediments may have dimished [sic] the numbers of fish in later years, while the development of new occupational pursuits similarly reduced the dependance of the Okanagan Indians upon the fall Kokanee run, Peachland Creek, or Deep Creek as it is known to the Okanagan Indians, must still be considered as a traditional fishing ground for the Indians of the Okanagan Valley.

49 Three defences have been advanced by the defendant. First, he submits that as an Okanagan Indian, he has an aboriginal right to fish for food for his own use on ancient tribal territory, namely at or near Peachland Creek, known to him as Deep Creek. The defendant's second argument is that the Royal Proclamation of 1763 clothes this aboriginal right with an Imperial guarantee. Finally, the defendant argues that Section 88 of the *Indian Act*, does not operate to make the *Fisheries Act*, and the regulations passed pursuant thereto, applicable to the defendant.

50 A perusal of the considerable volume of case law which was quoted at the hearing provides one with a comprehensive review of the fascinating but sometimes sorry history of our dealings with the native people of this country. However, in attempting to determine the three issues raised by the defendant, it is not appropriate for me to do anything more than apply the principles which I feel are binding upon me. Although those remarks may explain the necessary brevity of the reasons for my decision which will now follow, I feel that I should also state that I have no intention whatsoever of commenting upon that portion of Crown Counsel's submission which purported to deal with the responsibilities of the na-

146

tive people.

31 The defendant first contends that his aboriginal right to fish for food is founded on immemorial occupation, and does not originate from any statute, treaty or provision. He further contends that the Crown cannot point to any act of Parliament that has deprived Indians of their aboriginal right to fish in Peachland Creek. He describes this right as one which is a legal right, having never been surrendered, and in doing so he quotes Lord Denning's judgment in *Oyekan v. Adele*, [1957] 2 A.E.R. 785, "in inquiring, however, what rights are recognized, there is one guiding principle. It is this: the Courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected".

32 It is common ground that no treaty or contract has ever existed between the Okanagan Indians and the Government of British Columbia, that is, of the old Colony of British Columbia or the present Province. Similarly, there has never been any treaty or contract between the Dominion Government and the Okanagan Indians with regard to the matter of native fishing rights, aside from the proclamation of George III to which I will refer in a few moments. Without legal recognition being accorded to the claimed fishing rights, do those alleged aboriginal rights afford to the Okanagan Indians a claim capable of being recognized by this Court? For the reasons advanced by Schultz, Co. Ct. J. in *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, and the British Columbia Court of Appeal in *Calder v. Attorney General of British Columbia* (1970), 74 W.W.R. 481, I must conclude that no aboriginal right can be so recognized. There is neither treaty nor statutory reservation of aboriginal rights in favour of the Okanagan Indians. Notwithstanding the fact that the *Calder* case was dealing with claims to the title of land, and the *Discon and Baker* case was expressly limited to the Squamish Indians, I find that the principles enunciated therein are binding upon me.

33 In reading the judgment of the Court in the *Calder* case, a discussion of the Royal Proclamation of 1763 immediately follows those portions of the judgment dealing with the rights of natives. In this regard, the members of the Court are unanimous in holding that the Proclamation did not in 1763 and never did thereafter apply to the area of territory inhabited by the Indians in question. Tysoe, J.A., applies the reasoning of Sheppard, J.A., in *R. v. White and Bob* (1965),

52 W.W.R. 193, with which Schultz, Co. Ct. J. agreed in *R. v. Discon and Baker, supra.* He stated "in 1763 the existence of that territory was unknown to the British Crown, for how far to the westward and the north the land mass of North America extended had not been determined. Whether whatever land existed was a barren waste or was inhabited and by whom, was also unknown. Between the years 1792 and 1794, Captain George Vancouver was in the coastal waters of the mainland of what is now British Columbia and Vancouver Island acting under instructions from the British Admiralty to examine the coastline in an endeavour to determine whether there was a northwest passage there." And he continues "I do not think the Crown could have had in contemplation the Nishga territory when it made the Proclamation of 1763. It had not then been discovered by the British and, not having been discovered, it could not be said it was claimed by and was part of the dominions and territories of the British Crown. Nor can I give the Royal Proclamation a prospective operation so that it applies to later discovered land on the North American continent which might turn out to be inhabited by Indian tribes rather than by Eskimos or people of some other race and whose mode of living, nature, character, intelligence and state of culture was quite unknown." In the *Calder* case the Court advances very strong reasons for denying the application of the Royal Proclamation of 1763 and I am compelled to conclude that those reasons require me to find that the Proclamation did not clothe the alleged aboriginal right to fish for Kokanee in Peachland Creek with an Imperial guarantee.

54 Having decided that there is neither treaty nor statutory reservation of aboriginal fishing rights in favour of the Okanagan Indians and having further decided that the Royal Proclamation of 1763 is not applicable to Okanagan Indians, the last submission made by the defendant automatically fails. However, for the interest of Counsel, I would add to the authorities which they cited to me a decision of the late County Court Judge Gordon Lindsay, *R. v. Charles Williams*, (unreported) which was handed down at Salmon Arm on November 27th, 1959, and also dealt with a violation under the *Fisheries Act* regulations with respect to spear fishing in the Salmon River. In that particular case, the Court was concerned with the submission that Clause 13 of the Terms of Union of 1871 required that British Columbia Indians should continue to be dealt with in a manner as liberal as that earlier pursued by the British Columbia Government. Aside from the fact that the Court could not conclude that there was evidence before it which would satisfactorily

148

compare the present treatment of Indian fishermen to that of their forefathers who fished before 1871, the Court stated that even if Clause 13 could be regarded as a treaty conferring rights on British Columbia Indians, it does not follow that thereby Parliament is deprived of the right to legislate in matters within its exclusive jurisdiction, even if such legislation conflicts with existing treaty rights. This is, of course, the reasoning applied in *R. v. Francis* (1969), 10 D.L.R. (3d) 189, as well as some of the other cases cited by Counsel during their lengthy submissions.

55 For the reasons which I have stated, the *Fisheries Act* regulations in question are applicable to the defendant, and he must therefore be convicted on all three counts contained in the Information. I would be remiss if I did not agree with Crown Counsel that the provisions of Section 32 of the regulations are calculated to ensure that any Okanagan Indian "may at any time under permit issued by the Regional Director catch food for himself and his family". Hopefully permits will continue to issue under the provisions of Section 32 in a manner which is liberal enough to provide Okanagan Indians with food, at the same time allowing Fisheries Branch authorities an opportunity to ensure that the annual Kokanee run will not be completely depleted.

56 I am, of course, prepared to entertain submissions from Counsel with respect to the imposition of penalties which are appropriate in light of the very special circumstances which brought this matter before me.

Accused convicted.

I am left with the only available but very obvious alternative, namely, the collision. In my view it was the *causa causans* of the damage.

In the result I agree with the decision of the learned trial Judge. I would accordingly dismiss the appeal with costs.

Appeal dismissed.

REGINA v. DISCON AND BAKER

Vancouver County Court, British Columbia, Schultz, Co.Ct.J.
February 19, 1968.

Indians — Hunting rights — Shooting of deer by Indians for food, contrary to Wildlife Act (B.C.) — Aboriginal rights of Indians not reserved in any written treaty or statute — Indian Act (Can.) making all laws of general application in force in Province applicable to Indians but subject to terms of any "treaty" or other Act of the Parliament of Canada — Whether provincial Act applies.

The accused, both Squamish Indians, residing on the Squamish Indian Reserve, situate in North Vancouver, B.C., were convicted of hunting deer at a time not within the open season. Each accused testified that his intention was to kill deer for use as food for himself and his family. The land upon which they were hunting was unoccupied, reforested bushland not within an Indian Reserve. On appeal from their conviction, *held*, the appeal should be dismissed. While it was reasonable to assume that prior to 1778, the arrival of the first white man to the coast of Vancouver Island, Squamish Indians did hunt and fish in the Squamish Valley and elsewhere for food for themselves and their families for physical survival, the exercise of such fundamental functions must be distinguished from so-called aboriginal right to do so under the sanction of some undefined communal tribal law. Aboriginal rights have been recognized in Canada where the reservation of such rights is contained in a written treaty or statute. There is neither treaty nor statutory reservation of such aboriginal right in favour of the Squamish Indians. Nor could reliance be placed on the *Royal Proclamation of 1763* since it did not apply to Squamish Valley, which was then unknown to the Crown. There being neither "treaty" nor "any other Act of the Parliament of Canada" [*Indian Act*, R.S.C. 1952, c. 149, s. 87] applicable to Squamish Indians, the *Wildlife Act*, 1966 (B.C.), c. 55, being a law of general application in the Province of British Columbia, applied to the accused.

[*R. v. Daniels* (1966), 49 C.R. 1, 57 D.L.R. (2d) 365, 56 W.W.R. 234; *Reference re Ownership of Off-shore Mineral Rights* (1967), 65 D.L.R. (2d) 353, 62 W.W.R. 21; *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Sikyea v. The Queen*, [1964] 2 C.C.C. 325, 43 C.R. 83, 43 D.L.R. (2d) 150, 46 W.W.R. 65; affd [1965] 2 C.C.C. 129, 44 C.R. 266, 50 D.L.R. (2d) 80, [1964] S.C.R. 642, 49 W.W.R. 306; *R. v. George*, [1966] 3 C.C.C. 137, 47 C.R. 382, 55 D.L.R. (2d) 386, [1966] S.C.R. 267; *R. v. Wesley*, 58 C.C.C. 269, [1932] 4 D.L.R. 744,

26 Alta. L.R. 433, [1932] 2 W.W.R. 337; *R. v. Prince*, [1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234; revd [1964] 3 C.C.C. 2, 41 C.R. 403, [1964] S.C.R. 81 *sub nom. Prince and Myron v. The Queen*; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi, distd]

APPEAL by the accused by way of trial *de novo* from their conviction, by C. I. Walker, Magistrate, on a charge of hunting game out of season, contrary to s. 4(1)(*c*) of the *Wildlife Act* (B.C.).

T. R. Berger, for accused, appellants.
F. A. Melvin, for the Crown, respondent.

SCHULTZ, CO.CT.J.:—The appellants appeal the convictions made by Magistrate Walker at Squamish, B.C., on June 29, 1967, upon the charge contained in the information, reading as follows:

> that Kenneth DISCON and Lawrence BAKER, on or about the 18th day of February, A.D. 1967, at or near Culliton Creek, in the County of Vancouver, Province of British Columbia, being then and there together, then not being holders of permits issued by the Director of the Fish and Wildlife Branch, unlawfully did hunt game, to wit: deer, at a time not within the open season on game.
> Contrary to the form of statute in such case made and provided.

Section 4(1)(*c*) of the *Wildlife Act*, 1966 (B.C.), c. 55, reads as follows:

> 4(1) No person shall hunt, trap, wound, or kill game
> (*c*) at any time not within the open season;

Section 26(1) of the *Wildlife Act* provides that

> 26(1) The Director or his authorized representative may, . . . by the issuance of a permit, authorize any person to do anything . . . that he is prohibited from doing by this Act . . ., subject to and in accordance with whatever conditions, limits, and period or periods (if any) are prescribed by the Director or his authorized representative and set forth in the permit, . . .

The *Wildlife Act* replaced [by s. 81] the *Game Act*, R.S.B.C. 1960, c. 160.

The facts relating to the essential elements of the charge were not in dispute.

On Saturday, February 18, 1967, which was a date within the closed season, in the vicinity of Culliton Creek, in the County and Province aforesaid, the appellants were hunting deer. Baker shot and killed a doe and a buck. Neither Discon nor Baker had a permit.

Briefly stated, the defence is that the appellants are Indians entitled to hunt on ancient tribal territory without restriction, and that the *Wildlife Act* does not apply to them.

The appellants are Squamish Indians, registered under the *Indian Act*, R.S.C. 1952, c. 149, residing on the Squamish Indian Reserve situate in North Vancouver, B.C. Each testified that his intention was to kill deer for use as food for himself and his family. Each stated he was raised on an Indian Reserve situate at Squamish, B.C. Each said that he had hunted in the past in the same area which is approximately 20 miles from Squamish. Baker testified he hunted in the area over a period of 25 yrs. with his father, who died in 1959, aged 85 to 90 yrs.

The land upon which the appellants were hunting was described as unoccupied, reforested, bushland. The land is not within an Indian Reserve. The evidence did not disclose the legal title of this land.

I accept the evidence, as set forth above.

Lest an erroneous impression be conveyed by the foregoing statement of facts, it should be revealed that Baker has been employed as a millworker for the past five years, while Discon's occupation is that of a millwright. Each of the appellants lied to the police at the scene by stating that each had a permit which, in fact, neither had. Each had obtained permits on previous occasions. To utilize the language of Monnin, J.A., in *R. v. Daniels* (1966), 49 C.R. 1, 57 D.L.R. (2d) 365, 56 W.W.R. 234 (Man. C.A.) at p. 5:

> . . . hunting for food no longer means the difference between life and death for the Indian and his family, especially nowadays, with all the social security measures available for all Canadian citizens, as well as others available only to Indians.

Professor Wilson Duff was called as a witness by the appellants. He was graduated with a B.A. degree from the University of British Columbia in 1949 and obtained an M.A. degree from the University of Washington. He served as curator of anthropology at the provincial museum in Victoria, B.C., for 15 yrs. and thereafter for 2½ yrs. has been associate professor of anthropology at the University of British Columbia. Professor Duff testified that, prior to the arrival of the first white man, who was Captain Cook, who landed at Nootka on Vancouver Island in 1778, the Squamish band or tribe of Indians occupied territory on the mainland of British Columbia, including the Squamish River Valley, wherein Culliton Creek is situate, and that the Squamish Indians were "entitled" to hunt for food in Squamish Valley as tribal territory. Professor Duff, in cross-examination, admitted that his knowledge of the Squamish Indians was derived solely from his studies of books

and material written since 1900, and that his evidence involved "a small degree of conjecture".

Counsel for the appellants submits as follows:

1. The appellants, being Squamish Indians, have an aboriginal *right* to hunt for food for their own use on ancient tribal territory; namely, at or near Culliton Creek, in the Squamish Valley.
2. The *Royal Proclamation of 1763* clothed the aboriginal right with an Imperial *guarantee.*
3. Section 87 of the *Indian Act* does not operate to make the *Wildlife Act* applicable to the appellants.

Counsel for the respondent submits as follows:

1. The onus of proving that an exception or exemption prescribed by law operates in favour of the appellants is upon the appellants, under s. 68 of the *Summary Convictions Act*, R.S.B.C. 1960, c. 373, and that the appellants have failed to show that the *Wildlife Act* does not apply to them.
2. The *Royal Proclamation* does not apply to the appellants.
3. The *Wildlife Act* applies to the appellants by virtue of s. 87 of the *Indian Act*, thereby extinguishing the aboriginal right, assuming the same to have existed.

Each counsel prepared a written summary of his argument, but the essence of the respective submissions is as stated above.

Counsel have cited numerous cases and have referred to the statements, opinions and views of eminent jurists expressed therein. It is well to bear in mind the admonition of Halsbury, L.C., in *Quinn v. Leathem*, [1901] A.C. 495 at p. 506:

> . . . , there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowlege that the law is not always logical at all.

and that of Haldane, L.C., in *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.*, [1914] A.C. 25 at p. 40:

> To look for anything except the principle established or recognized by previous decisions is really to weaken and not to strengthen the

> importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance.

and that of Atkinson, J., in *Lorentzen v. Lydden & Co., Ltd.*, [1942] 2 K.B. 202 at p. 210:

> Ag[illegible] and again judges have been told by the Court of Appeal and th[illegible]use of Lords that words used in previous cases must be in[illegible]eted with reference to the facts before the court and the is[illegible]with which it was dealing.

The appeal herein is distinguishable from *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.); affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi. The distinction is that the dominant fact upon which the majority judgment of the Court of Appeal is founded, and upheld by the Supreme Court of Canada, was the *treaty*, ex. 8, reserving the aboriginal right of the Nanaimo Indians, whereas counsel for the appellants concedes there is neither treaty nor statutory reservation of the aboriginal right in this appeal.

The reasons for judgment [unreported] of my brother Swencisky, Co.Ct.J., in *R. v. White and Bob* contain the following:

> When the Hudson's Bay Company was negotiating with various Indian Tribes on Vancouver Island, by virtue of the conveyance to it from the Crown to it on January 13, 1849, the said Company was the owner of Vancouver Island. The title was conveyed to the Hudson's Bay Company subject to the right of the Crown to have the lands reconveyed at the end of 21 years. The Company set about obtaining a surrender of the possessory title which the Indians had. *By way of consideration, for the surrender of the possessory rights, the Indians received certain goods and a binding covenant that the Indians would be entitled to hunt over unoccupied lands.* They thereby acquired a vested interest in the said lands. Such deeds were duly registered of record in the Register of Land Purchases from Indians, which was the only way in which it could be registered in that period of our history. When the Hudson's Bay Company later reconveyed to the Crown, such reconveyance would be subject to the rights which had been granted to the Nanaimo Indian Tribes, and remains in them today, . . .

(the italics are added) and

> Briefly, to summarize the effect of my judgment, I hold that the document filed as ex. 8 . . . is . . . a treaty and, as a result, the two accused are entitled to the benefit of the exception contained in s. 87, of the *Indian Act*.

The appeal to the Court of Appeal was dismissed, Sheppard and Lord, JJ.A., dissenting.

The judgment of Davey, J.A., now C.J.B.C., concludes at p. 619:

> In the result, the right of the respondents to hunt over the lands in question reserved to them by ex. 8 are preserved by s. 87, and remain unimpaired by the *Game Act*, and it follows that the respondents were rightfully in possession of the carcasses. It becomes unnecessary to consider other aspects of a far-reaching argument addressed to us by the respondents' counsel.

Sullivan, J.A., at p. 666, concurred with the reasons of Davey, J.A. (as he then was).

The judgment of Norris, J.A., reads at p. 629:

> Substantially for the reasons given by my brother Davey, which I have had the privilege of reading, I am of the opinion that ex. 8 is a "Treaty" within the meaning of s. 87 of the *Indian Act*. However, in view of the argument of counsel for the Crown, I think it is proper to add something further on that matter and to deal specifically with the matter of aboriginal rights and the applicability of the *Royal Proclamation of 1763*.

Norris, J.A., discusses aboriginal rights and the *Royal Proclamation* commencing at p. 630 and at p. 636, respectively, and his opinion is summarized (1) to (11), inclusive, on pp. 663-4.

The brief judgment of the Supreme Court of Canada, dismissing the appeal, reads, in relevant part, as follows [p. 481]:

> We are all of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, Exhibit 8, was a "treaty" within the meaning of that term as used in s. 87 of the *Indian Act* [R.S.C. 1952, c. 149]. We therefore think that in the circumstances of the case, the operation of s. 25 of the *Game Act* [R.S.B.C. 1960, c. 160] was excluded by reason of the existence of that treaty.

Adverting to submission 1 of the appellants, the substance of the argument is that, prior to the arrival of the white man to the coast of Vancouver Island in 1778, Squamish Indians had the *right* to hunt in Squamish Valley as tribal territory and that this *right* has continued and remains unimpaired.

Professor Duff purported to give *opinion* evidence as an "expert" witness. Counsel for the respondent did not object to the admissibility of this evidence.

The "opinion" of Professor Duff as to the aboriginal right of the Squamish Indians to hunt in Squamish Valley as tribal territory is not based upon *any fact personally* known to the witness. It is obvious that Professor Duff, like Discon and Baker, could not have any *personal* knowledge of the condition of affairs in the Squamish Valley at any time before 1778. Similarly, the "opinion" of Professor Duff as to this aboriginal right does not emanate from a hypothetical

155

question predicated upon *any fact adduced in evidence* which the expert witness is asked to assume to be true.

The weight of the evidence is to be determined by the tribunal of fact which, in this appeal, is the trial Judge. I conclude that the "opinion" of Professor Duff is "really a matter of conjecture".

It is reasonable to *assume* that, prior to 1778, Squamish Indians did hunt and fish in the Squamish Valley and elsewhere for food for themselves and their families for physical survival, but the exercise of this fundamental function is to be distinguished from the so-called aboriginal *right* to do so under the sanction of some undefined communal tribal *law*. It may be assumed further that right was dependent upon might and, having regard to the nature of man, that the ancestors of the appellants were inclined to hunt at large, according to the exigencies of the situation. However, these observations are merely idle speculation on my part.

Submission 1 is untenable for another reason.

The following are well-known historical facts: The Colony of Vancouver Island was formed in 1849 and James Douglas became Governor thereof in 1851. The Colony of British Columbia, comprising the mainland of British Columbia, was formed in 1858 with James Douglas as Governor. The two Crown Colonies united in 1866 under the name "British Columbia". The Colony of British Columbia entered Confederation in 1871 and became the Province of British Columbia.

The foregoing serves to indicate that Squamish Valley received Imperial recognition in 1858. Sovereignty was asserted and title to the land known as British Columbia was taken by the Crown. This included tribal territory in Squamish Valley.

Reference re Ownership of Off-shore Mineral Rights (1967), 65 D.L.R. (2d) 353, 62 W.W.R. 21 (S.C.C. from B.C.), contains an "Historical outline" at p. 357. The following is reproduced from p. 357:

> On November 19, 1858, a proclamation by the then Governor, Sir James Douglas, introduced into the Colony of British Columbia the law of England as of November 19, 1858 (Vancouver Island and British Columbia Statutes, 1858-71).
>
> On December 2, 1858, Sir James Douglas issued a proclamation making it lawful for the Governor of the colony
>
> > "by any instrument in print or in writing, or partly in print and partly in writing, under his hand and seal to grant to any person or persons any land belonging to the Crown in the said Colony;"

and providing that

> "every such Instrument shall be valid as against Her Majesty, Her Heirs and Successors for all the estate and interest expressed to be conveyed by such instrument in the land therein described. (Vancouver Island and British Columbia Statutes, 1858-1871)"

On February 14, 1859, Sir James Douglas issued a proclamation the first paragraph of which read as follows:

> "1. All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee. (Vancouver Island and British Columbia Statutes 1858-1871.)"

and from p. 360:

> This historical survey shows that:
>
> 1. Before Confederation all unalienated lands in British Columbia including minerals belonged to the Crown in right of the Colony of British Columbia;
> 2. After union with Canada such lands remained vested in the Crown in right of the Province of British Columbia.

Upon British Columbia entering Confederation, the Parliament of Canada became vested with the exclusive legislative authority with respect to "Indians, and Lands reserved for the Indians" in the Province, under s. 91(24) of the *B.N.A. Act, 1867*.

The "Terms of Union" under which the Colony of British Columbia was admitted to Confederation are set forth in the schedule, R.S.C. 1952, vol. VI, app. III, at pp. 137 *et seq.* Term 13 of the schedule at p. 140 commences:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, . . .

Aboriginal rights have been recognized in Canada where the reservation of aboriginal rights is contained in a *written* treaty or statute.

For example, there is a *treaty* reservation of aboriginal rights referred to in:

(1) *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.) at pp. 51-2;

(2) *Sikyea v. The Queen*, [1964] 2 C.C.C. 325 at p. 328, 43 C.R. 83, 43 D.L.R. (2d) 150 (N.W.T.C.A.); affd [1965] 2 C.C.C. 129 at p. 130, 44 C.R. 266, 50 D.L.R. (2d) 80;

(3) *R. v. White and Bob, supra*, and

(4) *R. v. George*, [1966] 3 C.C.C. 137 at p. 140, 47 C.R. 382, 55 D.L.R. (2d) 386 (S.C.C.),

while there is a *statutory* reservation of aboriginal rights referred to in:

(5) *R. v. Wesley*, 58 C.C.C. 269 at p. 275, [1932] 4 D.L.R. 744, 26 Alta. L.R. 433 (Alta. S.C., A.D.), and

(6) *R. v. Prince*, [1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234 (Man. C.A.); revd [1964] 3 C.C.C. 2, 41 C.R. 403, [1964] S.C.R. 81 *sub nom. Prince and Myron v. The Queen.*

Aboriginal rights "from time immemorial" have been proclaimed by Norris, J.A., in *R. v. White and Bob* but, with respect, his opinion on this subject is *obiter dicta.*

To retiterate, it is admitted that there is neither treaty nor statutory reservation of aboriginal rights in favour of the Squamish Indians.

The appellants fail in submission 1.

Submission 2 of counsel for the appellants concerns the *Royal Proclamation*, reproduced in R.S.C. 1952, vol. VI, p. 6127 (app. III at pp. 3-7 incl.).

The historical circumstances which brought forth the *Royal Proclamation* were stated by Lord Watson in *St. Catherine's Milling & Lumber Co. v. The Queen* at p. 53:

> The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A royal proclamation was issued on the 7th of October, 1763, shortly after the date of the Treaty of Paris, by which His Majesty King George erected four distinct and separate Governments, styled respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each of them.

The following paragraphs of the *Royal Proclamation*, p. 6, are relevant to the appeal herein:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, *that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection*, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved *to them or any of them*, as their Hunting Grounds — We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the

> Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to *the said Indians, or any of them.*
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of *the said Indians*, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid:

(The italics are mine.)

The nature of the reservation in favour of *said* Indians expressed by the words ". . . in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds — " was defined by Lord Watson in *St. Catherine's Milling & Lumber Co. v. The Queen* at pp. 54-5:

> It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that *the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.* The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point.

(Italics are added.)

"Usufruct" is defined in the Dictionary of English Law by Lord Jowitt, published 1959, at p. 1818 as "the right of reaping the fruits (*fructus*) of things belonging to others, without destroying or wasting the subject over which such right extended (Civil Law)".

At the date of the *Royal Proclamation of 1763*, the whole of the Province of British Columbia, including Squamish Valley, was *terra incognita.*

Squamish Indians were not one of "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection", as defined by the words of the *Royal Proclamation.*

My view on the *Royal Proclamation* is in accord with that of Sheppard, J.A., in *R. v. White and Bob* for the reasons expressed on pp. 620 and 621, substituting the words, "Squamish Valley" for the words, "Vancouver Island", as the context requires. Lord, J.A., at p. 664, concurred with the reasons of Sheppard, J.A.

Accordingly, submission 2 fails.

Submission 3 of counsel for the appellants concerns s. 87 of the *Indian Act*, which reads as follows:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Counsel for the appellants concedes that there is neither "treaty" nor "any other Act of the Parliament of Canada", specified in the introductory words of s. 87, applicable to the Squamish Indians, and that none of the exceptions in the latter portion of s. 87 applies to this appeal.

Stripped of the extraneous, the relevant portion of s. 87 reads:

> . . . , all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, . . .

Section 87 was examined and considered in *R. v. George*. The majority judgment was delivered by Martland, J., who, referring to s. 87, said, at p. 150:

> I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *B.N.A. Act*, subject to provincial laws of general application.

The language of the relevant portion of s. 87 is clear and precise. The *Wildlife Act* is a law of general application in the Province of British Columbia and, by virtue of s. 87, is "applicable to and in respect of Indians in the province".

Accordingly, submission 3 falls.

The result is that the appellants are subject to the provisions of the *Wildlife Act*.

This judgment relates only to the appellants, who are Squamish Indians, and is not to be interpreted as declaratory of the legal status of members of other tribes of Indians in the Province of British Columbia.

For the reasons expressed above, this Court finds each of the appellants guilty, as charged. The appeal of each appellant against conviction is dismissed. There are no costs of the appeals.

Appeal dismissed.

PROPP et al. v. FLEMING

British Columbia Court of Appeal, Davey, C.J.B.C., Norris and Maclean, JJ.A. March 14, 1968.

Solicitors — Retainer — Implied authority to compromise — Client alleging solicitor's authority to settle action qualified — No qualification of authority communicated to opposite party — Whether settlement agreed to by solicitor binding.

Agency — Implied or usual authority — Solicitor retained to conduct litigation — Whether implied authority to compromise.

Where a client, contemplating legal action for personal injuries, is advised by her solicitor that on the available evidence of her damages an offer of settlement made by the other side is fair and reasonable (as in fact it was), does not instruct him not to accept the offer, but continues on her own initiative (unknown to her solicitor) to seek better evidence, a compromise concluded by her solicitor with the solicitors for the other side is binding upon her. Even if the solicitor exceeded the authority to settle impliedly granted to him upon the retainer to conduct the litigation, it would not avail the client as there was no suggestion that the other side had notice of the limitation.

[*Scherer v. Paletta*, 57 D.L.R. (2d) 532, [1966] 2 O.R. 524, folld]

APPEAL by defendant from an order of Tyrwhitt-Drake, Co.Ct.J., sitting as Local Judge of the Supreme Court, dismissing an application to stay proceedings in the action and to enforce a settlement alleged to have been agreed to between the parties.

D. Owen-Flood, for appellant.
A. N. Patterson, for respondents.

DAVEY, C.J.B.C.:—I would allow this appeal for the reasons given by my brother Maclean.

NORRIS, J.A.:—This is an appeal from a judgment of Tyrwhitt-Drake, Local Judge of the Supreme Court of British Columbia pronounced at Victoria on May 23, 1967, whereby he dismissed a motion of the appellant that further proceedings in this action be stayed except for the purpose of carrying into effect the terms of settlement alleged by the appellant

REGINA v. FRANCIS

New Brunswick Supreme Court, Appeal Division, Bridges, C.J.N.B., Limerick and Hughes, JJ.A. November 14, 1969.

Indians — Treaty rights — Indian fishing without licence — Licence required by legislation — Pre-Confederation treaties establishing special rights for Indians — Whether treaties override legislation — Fisheries Act (Can.), s. 34 — Fisheries Regulations (N.B.), s. 17(2) — Indian Act (Can.), s. 87.

Constitutional law — Fisheries legislation — Indian fishing without licence — Licence required by legislation — Pre-Confederation treaties establishing special rights for Indians — Whether treaties override legislation — Fisheries Act (Can), s. 34 — Fisheries Regulations (N.B.), s. 17(2) — Indian Act (Can.), s. 87.

Even if it can be established that an Indian has a right to fish at a particular place and that right has been conferred by treaty, such right does not exclude the applicability of federal fisheries legislation to that Indian. Thus where an Indian fishes without a licence as required by federal legislation a conviction resulting therefrom will be upheld.

[*Simon v. The Queen*, 124 C.C.C. 110, 43 M.P.R. 101; *R. v. George*, 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, [1966] S.C.R. 267, 47 C.R. 382; *Sikyea v. The Queen*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306, folld]

APPEAL by the accused from his conviction by Leger, Co.Ct.J., 1 N.B.R. 886, on a charge of fishing for salmon without a licence contrary to s. 34 of the *Fisheries Act*, R.S.C. 1952, c. 119, and s. 17(2) of the Fishery Regulations, P.C. 1965-484 (N.B.).

R. Dwight Mitton, Q.C., for defendant, appellant.
Guy A. Richard, for the Crown, respondent.

The judgment of the Court was delivered by

HUGHES, J.A.:—The appellant who is an Indian registered as a member of the Micmac band and residing on the Indian reservation on the north bank of the Richibucto River at Big Cove in the County of Kent, was convicted in the County Magistrate's Court for the County of Kent for that he

> on or about the 22nd day of September, A.D., 1966, did fish for salmon with a net, in the Main Richibucto River, without a license, contrary to and in violation of Section 17(2) of the New Brunswick Fishery Regulations P.C. 1965-484, and amendments thereto, made pursuant to section 34 of the Fisheries Act of Canada Chapter 119 R.S.C. 1952 and amendments thereto.

The appellant appealed against his conviction to the Kent County Court, where, following a trial *de novo*, the learned Judge dismissed the appeal and affirmed the conviction without

costs. On the trial *de novo* the taking of oral evidence was dispensed with and counsel agreed that the appeal should be decided upon certain admissions made by the appellant and on the documentary evidence introduced by his counsel to which I shall hereafter refer. The present appeal is provided for by s. 743 of the *Criminal Code*. That section limits the grounds of appeal to those that involve a question of law alone. As the appeal only lies with leave of the Court, I am treating this proceeding as including an application for such leave, and I would grant the same.

The appellant having admitted that he fished for salmon with a net in the Richibucto River on the date charged without having a licence to do so and that his fishing was contrary to s. 17(2) of the New Brunswick Fishery Regulations, P.C. 1965-484, which reads in part:

> 17(2) No person shall fish for, catch or kill salmon with a net of any kind, . . . except under a licence.

The sole question which we have to determine on this appeal is whether the appellant enjoys immunity from the prohibition imposed by s. 17(2) of the Regulations by reason of any special rights or privileges enjoyed by Indians of the Micmac tribe who reside at the Big Cove Indian Reserve or elsewhere.

The appellant based his claim to immunity on three treaties, all of which were duly proved and received in evidence on the trial *de novo*, and may be identified and referred to as follows:

> (a) The submission and agreement of the Delegates of the Eastern Indians, dated at Boston, December 15, 1725 entered into between His Majesty's Government of Massachusetts Bay, New Hampshire and Nova Scotia on the one part and Sauguaarum alias Loron Arexus, Francois Xavier and Meganumbe, of the other part, acting as delegates on behalf of several tribes of Eastern Indians, viz: The Penobscot, Narlogwalk, St. Johns, Cape Sables and other tribes inhabiting within His Majesty's territories of New England and Nova Scotia. I shall hereafter refer to this agreement as the Treaty of 1725;
>
> (b) The treaty or Articles of Peace and Friendship dated November 22, 1752, entered into at Halifax, Nova Scotia, between Peregrine Thomas Hopson, Captain General and Governor in Chief of Nova Scotia of the first part and Major Jean Baptiste Cope chief Sachem of the Tribe of Mick Mack Indians inhabiting the Eastern Coast of the said Province, and others, of the second part. I shall hereafter refer to this treaty as the Treaty of 1752; and
>
> (c) A Treaty or agreement dated September 22, 1779, entered into at Windsor, Nova Scotia, between Michael Francklin, Superintendent of Indian Affairs in the Province of Nova Scotia on the one part and ten Indians representing a number of tribes of Mickmack Indians between Cape Tormentine and the Bay DeChaleurs in the

Gulph of St. Lawrence inclusive, of the other part. I shall hereafter refer to this treaty or agreement as the Treaty of 1779.

Both the Treaty of 1725 and the Treaty of 1752, which were alleged as defences by the appellant, were considered by this Court in *Simon v. The Queen* (1958), 124 C.C.C. 110, 43 M.P.R. 101. The Court found neither treaty afforded a defence to the accused who, like the appellant in the present case, was an Indian of the Micmac tribe residing at the Big Cove Indian Reservation in Kent County, had been charged with an offence against the New Brunswick Fishery Regulations. In delivering the judgment of the Court, McNair, C.J.N.B., held that it had not been shown that the Treaty of 1725 applied to the band of Micmacs of which the appellant was a member. With reference to the Treaty of 1752 the Court adopted the view of Patterson, Co.Ct.J., who heard the appeal in *R. v. Syliboy*, [1929] 1 D.L.R. 307, 50 C.C.C. 389, that the treaty was made, not with the Micmac nation or tribe as a whole, but, only with a small group of Micmac Indians inhabiting the eastern part of what is now the Province of Nova Scotia with their habitat in or about the Shubenacadie area.

Counsel for the appellant has caused diligent searches to be made at the archives in several places in Canada and elsewhere for material tending to establish the applicability of these treaties to the present case, but nothing has been placed before us which was not before the Court in the *Simon* case except the Treaty of 1779. In my opinion the conclusions reached by the Court in that case with reference to the application of the treaties of 1725 and 1752 were fully justified and I can find nothing in the material before us upon which I could reach a different conclusion. In consequence I must hold that these treaties provide no basis, either legal or moral, for a defence in the present case.

The Treaty of 1779 has not been considered in any previous case and I shall therefore set it out verbatim. It reads as follows:

Whereas in May and July last a number of Indians at the Instigation of the Kings disaffected subjects did Plunder stok Mr. John Cort and several other of the English Inhabitants at Mirimichy of the principal part of their effects in which transaction, we the undersigned Indians had no concern, but nevertheless do blame ourselves, for not having exerted our Abilitys more Effectually than we did to prevent it, being now greatly distressed and at a loss for the necessary supplys to keep us from the Inclemency of the Approaching winter and to Enable us to Subsist our familys, And Whereas Captain Augustus Hervey Commander of His Majestys Sloop Niper did in July last (to prevent further Mischeif) Seize upon (in

Mirimichy River) Sixteen of the said Indians one of which was killed, three released and Twelve of the most Atrocious have been carried to Quebec, to be dealt with, as His Majesty's Government of this Province, shall in future Direct, which measure we hope will tend to restore Peace and good Order in that Neighbourhood.

Be it Known to all men, that we John Julien, Chief, Antoine Arneau Captain, Francis Julien and Thomas Demagonishe Councillors of Mirimichy, and also Representatives of, and Authorized by, the Indians of Pogmousche and Restigousche, Augustine Michel Chief, Louis Augustine Cobaise, Francis Joseph Arimph Captains, Antoines, and Guiaume Gabelier Councillors of Richebouctou, and Thomas Tanas Son and Representative of the Chief of Iedyac, do for ourselves and in behalf of the several Tribes of Mickmack Indians before-mentioned and all others residing between Cape Tormentine and the Bay DeChaleurs in the Gulph of St. Lawrence inclusive, Solemnly Promise and Engage to and with Michael Francklin Esq., the King's Superintendant of Indian Affairs in Nova Scotia.

That we will behave Quietly and Peaceably towards all his Majesty King George's good Subjects treating them upon every occasion in an honest friendly and Brotherly manner.

That we will at the Hazard of our Lives defend and Protect to the utmost of our power, the Traders and Inhabitants and their Merchandize and Effects who are or may be settled on the Rivers Bays and Sea Coasts within the forementioned Districts against all the Enemys of His Majesty King George whether French, Rebells or Indians.

That we will whenever it shall be required apprehend and deliver into the Hands of the said Mr. Francklin, to be dealt with according to his Deserts, any Indian or other person who shall attempt to Disturb the Peace and Tranquillity of the said District.

That we will not hold any correspondance or Intercourse with John Allen, or any other Rebell or Enemy to King George. Let his Nation or Country be what it will.

That we will use our best Endeavours to prevail with all other our Mickmack Brethern throughout the other parts of the Province, to come into the like measures with us for their several Districts.

And we do also by these presents for ourselves, and in behalf of our several Constituents hereby Renew, Ratify and Confirm all former Treatys, entered into by us, or any of us, or them heretofore with the late Governor Lawrence, and others His Majesty King George's Governors, who have succeeded him in the Command of this Province.

In Consideration of the true performance of the foregoing Articles, on the part of the Indians, the said Mr. Francklin as the King's Superintendant of Indian Affairs doth hereby Promise in behalf of Government.

That the said Indians and their Constituents shall remain in the Districts beforementioned Quiet and Free from any molestation of any of His Majestys Troops or other his good Subjects in their Hunting and Fishing.

That immediate measures shall be taken to cause Traders to supply them with Ammunition, clothing and other necessary stores in exchange for their Furrs and other Commoditys. In Witness whereof

we the abovementioned have Interchangeably set our hands and Seals at Windsor in Nova Scotia this Twenty Second day of September 1779.

Done in presence of us	his John Julien X (L.S.) 1st Chief	) of Mirimichy
Allen McDonald Capt. 84th Regt. Commanding Fort Edward	mark Francis Julien X (L.S.) 2 Do Antoine Arneau X (L.S.) Captain	) and acting for) Pogmosche and) Restigousche
Lauchl McLean) Lieut. 84 Regt.)	Thomas Demagonische X (L.S.) Councillor	)
Hector McLean) Adjt. of 84 Regt.)	Augustine Michel X (L.S.) 1st Chief Francs. Joseph Arimph X (L.S.) 2 Do	))) of
Joseph Pemette) J.P. George Deshamps)	Augustine Cobaise X (L.S.) Captain Antoines X (L.S.) Councillor Guiaume Gabelier X (L.S.) Do	) Richebouctou)))
A true copy Michl Francklin Superintendant of Indian Affairs in Nova Scotia.	Thomas Tanas X (L.S.) Son and Representative of the Chief of Iedyiec Michl Francklin (L.S.) Superintendant of Indian Affairs in the Province of Nova Scotia	

I entertain no doubt that the Treaty of 1779 unlike the treaties of 1725 and 1752 was intended to apply to the several tribes of Micmac Indians residing in the Richibucto area but I find it impossible to construe the treaty as conferring, either expressly or impliedly, any right of hunting and fishing. At most there was a promise on the part of the Superintendent of Indian Affairs that in consideration of the performance of the promises of the Indian delegates, the Indians might remain in their districts free from molestation by British troops or other British subjects, in their hunting and fishing, which I think we may assume provided the principal source of food supply and was their way of life. In my opinion the Indian delegates were bargaining for protection against a recurrence of such incidents as are referred to in the recital to the treaty, and were seeking to obtain ammunition, clothing and other commodities rather than irrevocable rights for their people to hunt and fish at will to be enjoyed in perpetuity.

Even if the Treaty of 1779 should be interpreted as an agreement to recognize for all time a right of the Micmac Indians to hunt and fish, there still remains the question

whether such right was suspended or abridged by s. 17(1) of the New Brunswick Fishery Regulations, passed under the authority of the *Fisheries Act*, R.S.C. 1952, c. 119. The Regulation embodies a general prohibition against fishing salmon with a net, without a licence, which prohibition is made applicable by s. 3 thereof in respect of the seacoast and inland fisheries of the Province of New Brunswick except as thereinafter expressly otherwise limited. No exception affects the present case.

Counsel for the appellant urged that rights acquired under Indian treaties are protected by s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, which reads:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

This section was first enacted by the *Indian Act*, 1951 (Can.), c. 29. Its purpose and effect was decided by the Supreme Court of Canada in *R. v. George*, 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, [1966] S.C.R. 267. Martland, J., who delivered the judgment of the majority, said at p. 397 D.L.R., p. 150 C.C.C.:

> In my opinion, it was not the purpose of s. 87 to make any legislation of the Parliament of Canada subject to the terms of any treaty. I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *British North America Act, 1867*, subject to provincial laws of general application.

and at p. 398 D.L.R., p. 151 C.C.C.:

> This section (s. 87) was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.
>
> Accordingly, in my opinion, the provisions of s. 87 do not prevent the application to Indians of the provisions of the *Migratory Birds Convention Act*.

The New Brunswick Fishery Regulations were passed, not under authority of provincial legislation but, under s. 34 of the *Fisheries Act*, of Canada a federal statute. It is clear therefore that the Regulations are in no way affected by s. 87 of the *Indian Act*.

There can be no doubt that since the decisions of the Supreme Court of Canada in *Sikyea v. The Queen*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642, and *R. v. George, supra*, legislation of the Parliament of Canada and Regulations made thereunder, properly within s. 91 of the *B.N.A. Act, 1867*, are not qualified or in any way made unenforceable because of the existence of rights acquired by Indians pursuant to treaty. It follows that even if the appellant had established that a right to fish salmon in the Richibucto River had been conferred by an Indian treaty, the benefit of which he was entitled to claim, such right could afford no defence to the charge on which he was convicted.

The appeal must, therefore, be dismissed, but in the circumstances, without costs.

Appeal dismissed.

REGINA v. VOGELLE AND REID

Manitoba Court of Appeal, Smith, C.J.M., Freedman and Dickson, JJ.A. October 10, 1969.

Possession of stolen goods — Elements of offence — Failure of Crown to prove goods were stolen — Failure to prove ownership — Whether essential to charge — Cr. Code, s. 269(1)(a), s. 296(a).

A security officer at a department store observed the accused V obtain a shopping bag from within a store and later meet the accused R outside the store. After walking along the street for several blocks R removed cloth material from under his jacket and handed it to V who placed it in the shopping bag. The accused then observed the officer and ran down a lane. Both accused were apprehended and gave statements to the police to the effect that V had purchased the cloth material from a girl called Sandy at a park. V stated that he "figured [the goods were] 'hot'" and guessed it was a good buy so he gave her five dollars for it. R stated that "because of the price that had been paid for the cloth it had to be stolen from some place". There was no evidence to prove either ownership of the goods or that they were stolen goods. The accused were convicted of being in possession of property knowing it to have been obtained by theft contrary to the *Criminal Code*. *Held*, Freedman, J.A., dissenting, the appeal should be allowed and the conviction quashed.

Per Dickson, J.A., Smith, C.J.M., concurring: In order for the accused to be guilty of receiving stolen goods the Crown must prove that the goods are stolen goods; that they are the property of some person, known or unknown, other than the accused; that the accused received the goods; and that at the time of receiving them the accused knew the goods to be stolen goods. The failure to prove theft and to prove that the goods were the property of any person other than V was fatal to the conviction. The statements of the accused showed guilty knowledge which is not of concern until the theft is first established. If circumstantial evidence were

FRANCIS v. THE QUEEN

Kent County Court
Leger, Co. Ct. J.
June 19, 1969

CONSTITUTIONAL LAW - WHETHER PRE-CONFEDERATION TREATIES PREVAIL OVER STATUTES OF CANADA REQUIRING A FISHING LICENSE.

INDIANS - WHETHER PRE-CONFEDERATION TREATIES PREVAIL OVER STATUTES OF CANADA REQUIRING A FISHING LICENSE.

County Court affirmed judgment of Provincial Court and dismissed the appeal by the accused who was convicted of fishing without a license.

County Court held that the Canadian Parliament and the Federal *Fisheries Act* are not affected by pre-Confederation treaties which granted fishing rights to Indians.

CASES JUDICIALLY NOTICED:
R. v. *Sikyea*, 43 C.R. 87, affirmed by [1964] S.C.R. 692 folld.

STATUTES JUDICIALLY NOTICED:
Fisheries Act of Canada, R.S.C. 1952, c. 119, s. 34,
Indian Act, R.S.C. 1952, c. 149, s. 87,
N. B. Fishery Regulations, S.O.R. 65-484, s. 17(2).

APPEAL from conviction by judge of Provincial Court for fishing without a license contrary to New Brunswick *Fishery Regulations*.

R. D. Mitton, Q.C., for the Appellant,
Guy A. Richard, for the Crown.

LEGER, CO. CT. J.: This matter is an appeal by way of a trial de novo from a decision of Eric T. Richard, Judge of the Magistrates Court for the County of Kent, who convicted the appellant of the following charge:-

> " That Martin Francis of Big Cove, Kent County, N. B., on or about the 22nd day of

"September, A.D. 1966, did fish for salmon with a net in the main Richibucto River without a license, contrary to and in violation of Section 17(2) of the New Brunswick *Fishery Regulations* P.C. 1965-484, and amendments thereto, made pursuant to section 34 of the *Fisheries Act of Canada*, Chapter 119 R.S.C. 1952 and amendments thereto."

Upon being arraigned the accused pleaded not guilty. Counsel for the accused and for the Crown at the trial admitted the following facts:

"1. That on September 22nd, 1966, Martin Francis, the identified defendant, did fish for salmon with a net in the main Richibucto River.

"2. That the said Martin Francis did not on said occasion possess a license.

"3. That the said Martin Francis was a Micmac Indian residing at Big Cove, Kent County, New Brunswick, on said date, registered as an Indian as provided by the *Indian Act*.

"4. That the said fishing was contrary to section 17(2) of the New Brunswick *Fishery Regulations* P.C. 1965-484 and amendments thereto, made pursuant to section 34 of the *Fisheries Act of Canada*, Chapter 119, R.S.C. 1952 and amendments thereto."

Application was made to proceed to the hearing of this matter upon the evidence heard before the summary conviction court, as provided for by section 727 of the Code.

Section 34, Chapter 119 R.S.C. 1952, reads as follows:-

"34. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

(a) for the proper management and control

" of the sea coast and inland fisheries;

(b) respecting the conservation and protection of fish;

(c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish."

Section 17(2) of the New Brunswick *Fishery Regulations*, P.C. 1965-484, reads as follows:

"17.(2) No person shall fish for, catch or kill salmon with a net of any kind, or leave any port or place in Canada to engage in such fishing either inside or outside the territorial waters of Canada adjacent to the Province, except under a license."

This appeal is based upon the argument that the accused appellant, being an Indian, is exempt from the provisions of the fisheries laws of New Brunswick and Canada by virtue of certain peace treaties which have been made between the Crown of Great Britain and his ancestors.... [Note: The text of treaties referred to as exhibits are omitted.]...

...

Section 87 of the *Indian Act*, Chapter 149, R.S.C. 1952, reads as follows:

"87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

It is obvious after reading the above Exhibits that certain treaties have been made with some Indians of this province. When one reads the proclamation of the Honourable Jonathan Belcher, the Lieutenant Governor of the Province of Nova Scotia,

Exhibit D-2 above, dated May 4th, 1762, in describing the area to which his proclamation was to be effective we find "Thence to Cape Rommentin" (now Cape Tormentine); "From thence the Mirimichy" (now Miramichi). This included the Indians of the Richibucto area. At the time the proclamation was made the Province of Nova Scotia included the territory presently known as New Brunswick. Furthermore, Exhibit D-3 sets out an agreement made between Michael Francklin Esq., the King's Superintendent of Indian Affairs in Nova Scotia, dated September 22, 1779, and Augustine Michel, Chief, Francis Arimph, Chief, Augustine Cobaise, Captain, Antoines Councillor and Giaume Gabelier Councillor, all of Richibucto, and other tribes. The Exhibit recites "do for ourselves and in behalf of the several Tribes of Mickmack Indians before mentioned and all others residing between Cape Tormentine and the Bay De Chaleur in the Gulf of Saint Lawrence inclusive". There can be no question this agreement included the Indians of Big Cove reserve. The document reads that Mr. Francklin on behalf of the Government promises the following:- "That the said Indians and their Constituents shall remain in the Districts beforementioned Quiet and Free from any molestation of any of His Majestys Troops or other his good subjects in their Hunting and Fishing". From the foregoing I cannot help but conclude that the Indians of Eastern New Brunswick, including those residing in the Richibucto area, were solemnly guaranteed by treaty or proclamation the right to hunt and to fish. No evidence was advanced to support the proposition that the Micmac Indians of Big Cove are descendants of the Tribes who have negotiated these treaties. But this can be inferred from all the evidence and admissions which are before us. The accused, being a registered Indian residing in this area, would be a person upon whom these rights would devolve.

All of these treaties, agreements or proclamations were made before Confederation and are valid unless changed by legislation properly enacted under the powers granted to the Government of Canada by Section 91 of the *British North America Act*. Parliament has the legal authority to enact legislation which infringes on the treaty rights granted to the Indians. This was decided by the Supreme Court of

172

Canada in the case of *R.* v. *Sikyea* 43 C.R. at page 87, [and affirmed at [1964] S.C.R. 642] where Johnson J.A. stated the following:-

> " It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This 'promise and agreement', like any other, can, of course, be breached and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the B.N.A. Act, from doing so."

Further, Mr. Justice Johnson states at page 91 the following:-

> " It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations."

On appeal to the Supreme Court of Canada, as reported in [1964] S.C.R. 642, at 646 Mr. Justice Hall, who delivered the judgment of the Court, agreed with the reasons for the judgment and conclusion of Johnson J.A. in the following terms:-

> " On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.
>
> " The appeal must, therefore, be dismissed."

In enacting the provisions of the *Fisheries Act* and the Regulations made thereunder, the Parliament of Canada was acting within the legislative authority granted to it by section 91 of the B.N.A. Act. Parliament is a superior authority and by the provisions of the *Fisheries Act* has annulled any right obtained by the Indians in the proclamation and treaties outlined above. The Courts, as above quoted, have decided Parliament had the right under the powers granted to them to legislate as

it did. Therefore, the defence raised that the accused, being an Indian, has a right to hunt and fish by reason of the existence of treaties is of no avail.

The appeal for the reasons given is therefore dismissed and the judgment of the Court below affirmed but without costs.

Appeal dismissed.

NEVERS v. KELLY

New Brunswick Supreme Court
Queen's Bench Division, Robichaud, J.
October 14, 1969.

REAL PROPERTY - AGREEMENT FOR SALE - ACTION FOR SPECIFIC PERFORMANCE - WHETHER RECEIPT GIVEN BY DEFENDANT CONSTITUTES A "MEMORANDUM" WITHIN THE MEANING OF SECTION 1 OF THE *Statute of Frauds*.

CONTRACT - AGREEMENT FOR SALE - ACTION FOR SPECIFIC PERFORMANCE - WHETHER RECEIPT GIVEN BY DEFENDANT CONSTITUTES A "MEMORANDUM" WITHIN THE MEANING OF SECTION 1 OF THE *Statute of Frauds*.

Court found in favour of the plaintiff/purchaser of a 30-acre lot of land and ordered that the Defendant/seller execute a proper conveyance of the lands to the plaintiff. The defendant/seller refused to honour the terms of an agreement for sale evidenced by a receipt, which receipt the Court held met the requirements of section 1 of the *Statute of Frauds*.

STATUTES JUDICIALLY NOTICED:
Statute of Frauds, R.S.N.B., 1952, c. 218, s.1(d).

ACTION for specific performance of an agreement for sale of land.

C. Allison Mills, for the Plaintiff,
J. Edward Murphy, Q.C., for the Defendant.

ROBICHAUD, J.: On the 9th of October 1968 the

Alex Frank *Appellant*;

and

Her Majesty The Queen *Respondent*.

1977: May 10; 1977: May 31.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Indians — Treaty Indian resident in Saskatchewan — Right to kill wildlife for food in Alberta — The Wildlife Act, R.S.A. 1970, c. 391, s. 16 — Alberta Natural Resources Transfer Agreement, 1930, para. 12 — Indian Act, R.S.C. 1970, c. I-6, s. 88.

The appellant, a treaty Indian resident in Saskatchewan, was found in possession of a moose, which he had hunted and killed for food in Alberta. He was charged with unlawfully having in his possession moose meat contrary to s. 16 of the *Wildlife Act*, R.S.A. 1970, c. 391. The charge was dismissed by the Provincial Court judge. On an appeal by the Crown by stated case, the Supreme Court of Alberta, Appellate Division, directed that a conviction be recorded. An appeal by the accused was then brought to this Court.

The appellant was hunting on Treaty No. 6 lands. This treaty was concluded in 1876 between the Queen and various tribes of Indians inhabiting the area. The tract covers roughly the central one third of the present Provinces of Alberta and Saskatchewan. The treaty secured to the Indians the right to pursue their avocations of hunting and fishing subject to any regulations made by the Government of Canada.

The Alberta Natural Resources Transfer Agreement (approved by 1930 (Can.), c. 3, and 1930 (Alta.), c. 21, and thereafter confirmed by the *British North America Act*, 1930 (U.K.) c. 26) transferred from Canada to Alberta the interest of the Crown in all Crown lands, mines and minerals within Alberta. Paragraph 12 of this Agreement provides that "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing

Alex Frank *Appelant*;

et

Sa Majesté La Reine *Intimée*.

174

1977: 10 mai; 1977: 31 mai.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA DIVISION D'APPEL DE LA COUR SUPRÊME DE L'ALBERTA

Indiens — Indien visé par un traité résidant en Saskatchewan — Droit en Alberta de tuer du gibier pour se nourrir — The Wildlife Act, R.S.A. 1970, c. 391, art. 16 — Convention sur les ressources naturelles de l'Alberta, 1930, par. 12 — Loi sur les Indiens, S.R.C. 1970, c. I-6, art. 88.

L'appelant, un Indien visé par un traité résidant en Saskatchewan a été trouvé en possession d'un orignal, qu'il avait chassé et tué en Alberta pour se nourrir. Il fut accusé de possession illégale de viande d'orignal, en contravention de l'art. 16 de *The Wildlife Act* de l'Alberta, R.S.A. 1970, c. 391. Le juge de la Cour provinciale a rejeté l'accusation. Dans un appel par voie d'exposé de cause, la Division d'appel de la Cour suprême de l'Alberta a ordonné que soit enregistrée une déclaration de culpabilité. L'accusé a alors introduit un pourvoi devant cette Cour.

L'appelant chassait sur le territoire régi par le traité n° 6. Ce traité a été conclu en 1876 entre La Reine et diverses tribus d'Indiens habitant le territoire. Ce dernier couvre à peu près le tiers médian des provinces de l'Alberta et de la Saskatchewan. Le traité assurait aux Indiens le droit de continuer à chasser et à pêcher, sous réserve des règlements édictés par le gouvernement du Canada.

La Convention sur les ressources naturelles de l'Alberta (approuvée par 1930 (Can.), c. 3 et 1930 (Alta), c. 21, confirmée par la suite par l'*Acte de l'Amérique du Nord britannique*, 1930 (U.K.) c. 26) a transféré du Canada à l'Alberta les droits de la Couronne sur toutes les terres fédérales, mines et minéraux de l'Alberta. L'article 12 de cette convention dispose que «Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de

game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Held: The appeal should be allowed and the verdict of acquittal restored.

The effect of s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, is to make applicable to Indians, except as stated, all laws of general application from time to time in force in any province, including provincial game laws, but subject to the terms of any treaty and subject also to any other act of the Parliament of Canada. Thus, the appellant is protected from the application of the *Wildlife Act* of Alberta to the extent that he can call in aid Treaty No. 6 and para. 12 of the Alberta Natural Resources Transfer Agreement. The essential differences, for present purposes, between the Treaty and the Agreement are (i) under the former the hunting rights were at large while under the latter the right is limited to hunting for food and (ii) under the former the rights were limited to about one-third of the Province of Alberta, while under the latter they extend to the entire province. In the present case these differences were unimportant because the appellant was hunting for food and upon land touched by both Treaty and Agreement.

The phrases "Indians of the Province" and "Indians within the boundaries thereof" in para. 12 of the Agreement do not refer to the same group. The use of different language suggests different groups. "Indians of the Province" means Alberta Indians. The words "Indians within the boundaries", on the other hand, refer to a larger group, namely, Indians who, at any particular moment, happen to be found within the boundaries of the Province of Alberta, irrespective of normal residence. All persons forming part of this latter group are subject to the game laws in force at any given time in that Province but with the right of hunting, trapping and fishing game and fish for food at all seasons of the year on unoccupied Crown lands and on any other lands to which the Indians may have a right of access. The words "Indians within the boundaries" mean *all* Indians within the boundaries of Alberta, and not just *some* of the Indians within such boundaries.

Shepherd's Trustees v. Shepherd, [1945] S.C. 60, applied; *R. v. Wesley*, [1932] 2 W.W.R. 337; *R. v. Smith*, [1935] 2 W.W.R. 433; *R. v. Strongquill*, [1953]

chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.»

Arrêt: Le pourvoi doit être accueilli et le verdict d'acquittement rétabli.

L'effet de l'art. 88 de la *Loi sur les Indiens*, S.R.C. 1970, c. I-6, est de rendre applicable aux Indiens, sauf les exceptions prévues, toutes les lois d'application générale en vigueur à l'occasion dans une province, y compris les lois provinciales sur la protection de la faune, sous réserve toutefois des dispositions des traités ou de toute autre loi du Parlement du Canada. En conséquence, l'appelant n'est pas assujetti aux dispositions de *The Wildlife Act* de l'Alberta, s'il peut se prévaloir du traité n° 6 et de l'art. 12 de la Convention sur les ressources naturelles de l'Alberta. Aux fins de ce litige, les différences essentielles entre le traité et la Convention, se résument comme suit: (i) en vertu du traité, les droits de chasse ne sont pas définis alors qu'en vertu de la Convention, ils sont limités à la chasse de subsistance et (ii) en vertu du traité, ces droits sont limités à environ un tiers de la province de l'Alberta, alors qu'en vertu de la Convention ils s'étendent à toute la province. En l'espèce, ces différences ne sont pas importantes parce que l'appelant chassait pour se nourrir sur un territoire couvert à la fois par le traité et la Convention.

Les expressions «Indiens de la province» et «Indiens dans les limites de la province» à l'art. 12 de la Convention ne se réfèrent pas au même groupe. L'emploi d'expressions différentes laisse à entendre que des groupes distincts sont visés. L'expression «Indiens de la province» vise les Indiens de l'Alberta. En revanche, les mots «Indiens dans les limites de la province» visent un groupe plus large, à savoir les Indiens, qui, à un moment donné, se trouvent dans les limites de la province de l'Alberta, indépendamment de leur province de résidence habituelle. Toutes les personnes comprises dans ce groupe sont assujetties aux lois sur la protection de la faune en vigueur dans cette province, sous réserve toutefois de leurs droits de chasser, de piéger le gibier et de pêcher pour se nourrir, et ce, en toute saison et sur toutes les terres inoccupées de la Couronne ou sur toutes les autres terres auxquelles ils ont un droit d'accès. Les mots «Indiens dans les limites de la province» visent *tous* les Indiens dans les limites de la province de l'Alberta et pas seulement *certains* indiens se trouvant dans les limites de cette province.

Arrêt appliqué: *Shepherd's Trustees v. Shepherd*, [1945] S.C. 60. Arrêts mentionnés: *R. v. Wesley*, [1932] 2 W.W.R. 337; *R. v. Smith*, [1935] 2 W.W.R. 433; *R.*

8 W.W.R. 247; *Prince and Myron v. R.*, [1964] S.C.R. 81, referred to.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal by the Crown by way of stated case from the acquittal of the accused on a charge of unlawfully having in his possession moose meat contrary to s. 16 of the *Wildlife Act*, R.S.A. 1970, c. 391. Appeal allowed.

R. A. M. Young and *J. Shaw*, for the appellant.

W. Henkel, Q.C., and *H. Kushner*, for the respondent.

P. Burnet and *J. Wyatt*, for the intervenant, National Indian Brotherhood.

The judgment of the Court was delivered by

DICKSON J.—The appellant, Alex Frank, is a treaty Indian, who resides on the Little Pine Reserve, near North Battleford, in the Province of Saskatchewan. On January 13, 1974; he was found in possession of a moose, which he had hunted and killed for food the preceding day, near the Town of Nordegg, in the Province of Alberta. He was charged with unlawfully having in his possession moose meat contrary to s. 16 of *The Wildlife Act* of Alberta R.S.A. 1970, c. 391. The charge was dismissed by the Provincial Court judge. On an appeal by the Crown by stated case, the Supreme Court of Alberta directed that a conviction be recorded.

The appeal raises a question as to the effect of the Alberta Natural Resources Transfer Agreement, as confirmed by the *British North America Act*, 1930 (U.K.), c. 26, upon the right of Indians not resident in Alberta to kill wildlife for food in Alberta. The decision of the Appellate Division imposes provincial boundaries on native hunting rights, the exercise of such rights would require residency in the Province.

The appellant was hunting on Treaty No. 6 lands. This treaty was concluded in 1876 between

[1] [1975] W.W.D. 156, 61 D.L.R. (3d) 327.

v. Strongquill, [1953] 8 W.W.R. 247; *Prince et Myron c. R.*, [1964] R.C.S. 81.

POURVOI interjeté à l'encontre d'un arrêt de la Division d'appel de la Cour suprême de l'Alberta[1] accueillant un appel du ministère public par voie d'exposé de cause contre l'acquittement du prévenu, accusé de possession illégale de viande d'orignal, en contravention de l'art. 16 de *The Wildlife Act*, R.S.A. 1970, c. 391. Pourvoi accueilli.

R. A. M. Young et *J. Shaw*, pour l'appelant.

W. Henkel, c.r., et *H. Kushner*, pour l'intimée.

P. Burnet et *J. Wyatt*, pour l'intervenante, National Indian Brotherhood.

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—L'appelant, Alex Frank, est un Indien visé par un traité, résidant dans la réserve indienne de Little Pine près de North Battleford dans la province de la Saskatchewan. Le 13 janvier 1974, on l'a trouvé en possession d'un orignal que, la veille, il avait chassé et tué pour se nourrir près de la ville de Nordegg dans la province de l'Alberta. Il fut accusé de possession illégale de viande d'orignal, en contravention de l'art. 16 de *The Wildlife Act* de l'Alberta, R.S.A. 1970, c. 391. Le juge de la Cour provinciale a rejeté l'accusation. Dans un appel par voie d'exposé de cause, la Cour suprême de l'Alberta a ordonné que soit enregistré une déclaration de culpabilité.

Ce pourvoi porte sur l'effet de la Convention sur les ressources naturelles de l'Alberta, confirmée par l'*Acte de l'Amérique du Nord britannique*, 1930 (U.K.), c. 26, sur le droit des Indiens ne résidant pas dans la province de l'Alberta de tuer du gibier pour se nourrir dans cette province. Selon l'arrêt de la Division d'appel, les droits de chasse des Indiens s'arrêtent aux limites territoriales des provinces; les Indiens ne peuvent exercer leur droit de chasse que dans la province où ils résident.

L'appelant chassait sur le territoire régi par le traité n° 6. Ce traité de 1876 a été conclu entre la

[1] [1975] W.W.D. 156, 61 D.L.R. (3d) 327.

the Queen and the Plain and Wood Cree Tribes of Indians and other Tribes inhabiting the area therein described. That area embraced 121,000 square miles extending from near what is now the Manitoba-Saskatchewan border on the east to the Rocky Mountains on the west. The tract covers roughly the central one-third of the present Provinces of Alberta and Saskatchewan. In consideration of the surrender to the Government of Canada of their rights, titles and privileges to the included lands the Indians inhabiting those lands were given a number of undertakings, including the following:

Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefor, by the said Government;

The treaty secured to the Indians the right to pursue their avocations of hunting and fishing subject to any regulations made by the Government of Canada.

In 1905 the Provinces of Alberta and Saskatchewan were created by the *Alberta Act*, 1905 (Can.), c. 3, and the *Saskatchewan Act* 1905 (Can.), c. 42. By the Acts Crown lands continued under federal control. The right of Indians to hunt on Treaty No. 6 lands in either Province was unaffected.

On December 14, 1929, an agreement between the Government of Canada and the Government of Alberta (the Natural Resources Transfer Agreement) transferred from Canada to Alberta the interest of the Crown in all Crown lands, mines and minerals within Alberta. The agreement was approved by the Parliament of Canada (1930 (Can.), c. 3) and by the Legislature of Alberta (1930 (Alta.), c. 21) and thereafter it was confirmed by the Imperial Parliament by the *British North America Act, 1930*. This last Act confirmed at the same time agreements of a similar nature

Reine et les tribus indiennes des Cris de la prairie et des Cris des bois ainsi que d'autres tribus habitant le territoire décrit dans le traité. Ce territoire de 121,000 milles carrés s'étend à l'est approximativement jusqu'à la frontière actuelle du Manitoba et de la Saskatchewan et à l'ouest jusqu'aux Rocheuses, couvrant à peu près le tiers médian des provinces de l'Alberta et de la Saskatchewan. En contrepartie de la cession au gouvernement du Canada de leurs droits, titres et privilèges relatifs à ce territoire, les Indiens habitant sur ces terres ont reçu certaines promesses, dont la suivante:

[TRADUCTION] Sa Majesté consent en outre à ce que lesdits Indiens aient le droit de continuer à chasser et à pêcher sur tous les territoires cédés, décrits ci-dessus, sous réserve toutefois des règlements que peut établir à l'occasion le gouvernement du Dominion du Canada, et à l'exception des parcelles de terrain qui peuvent à l'occasion être requises à des fins de colonisation, d'exploitation minière, forestière ou autres, par le gouvernement du Canada, ou par l'un quelconque de ses sujets, dûment autorisé par ledit gouvernement.

Le traité assurait donc aux Indiens le droit de continuer à chasser et à pêcher, sous réserve des règlements édictés par le gouvernement du Canada.

Les provinces de l'Alberta et de la Saskatchewan ont été constituées en 1905 par l'*Acte de l'Alberta*, 1905 (Can.), c. 3, et l'*Acte de la Saskatchewan*, 1905 (Can.), c. 42. Ces lois prévoyaient que les terres de la Couronne continueraient de relever du pouvoir fédéral. Le droit de chasse des Indiens dans ces provinces, accordé par le traité nº 6, n'y était pas modifié.

Le 14 décembre 1929, une convention a été conclue entre le gouvernement du Canada et l gouvernement de l'Alberta (la Convention sur le ressources naturelles) en vue du transfert par l Canada à l'Alberta des droits de la Couronne s toutes les terres fédérales, mines et minéraux d l'Alberta. La Convention a été approuvée par Parlement du Canada (1930 (Can.), c. 3) et par Législature de la province de l'Alberta (19 (Alta.), c. 21). Elle a par la suite été confirmée p le Parlement impérial par l'*Acte de l'Amérique Nord britannique, 1930*. Cet Acte confirmait

between the Government of Canada and the Governments of Manitoba, British Columbia and Saskatchewan. The Act provided that the agreements would have the force of law notwithstanding anything in the *British North America Act, 1867* or any Act amending the same or any act of the Parliament of Canada.

Paragraph 12 of the Alberta Natural Resources Transfer Agreement falls to be considered in the present appeal. It reads as follows:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which said Indians may have a right of access.

An identically worded paragraph appears in each of the agreements entered into with the Provinces of Manitoba and Saskatchewan.

In 1951, Parliament enacted s. 87 of the *Indian Act* (now s. 88 of R.S.C. 1970, c. I-6) which reads:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The effect of this section is to make applicable to Indians, except as stated, all laws of general application from time to time in force in any province, including provincial game laws, but subject to the terms of any treaty and subject also to any other Act of the Parliament of Canada.

même temps des conventions semblables conclues entre le gouvernement du Canada et les gouvernements du Manitoba, de la Colombie-Britannique et de la Saskatchewan. Il prévoyait que les conventions auraient force de loi nonobstant les dispositions de l'*Acte de l'Amérique du Nord britannique, 1867* ou ses modifications ou toute loi du Parlement du Canada.

L'article 12 de la Convention sur les ressources naturelles de l'Alberta doit être analysé dans le présent pourvoi; il prévoit:

12. Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leur support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

Les conventions conclues avec les provinces du Manitoba et de la Saskatchewan contiennent un article identique.

En 1951, le Parlement a adopté l'art. 87 de la *Loi sur les Indiens* (maintenant l'art. 88 des S.R.C. 1970, c. I-6); en voici le texte:

Sous réserve des dispositions de quelque traité et de quelque autre loi du Parlement du Canada, toutes lois d'application générale et en vigueur, à l'occasion, dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où lesdites lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou statut administratif établi sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou y ressortissant.

Cet article a pour effet de rendre applicables aux Indiens, sauf les exceptions prévues, toutes les lois d'application générale en vigueur à l'occasion dans une province, y compris les lois provinciales sur la protection de la faune, sous réserve toutefois des dispositions des traités ou de toute autre loi du Parlement du Canada.

Thus, the present appellant is protected from the application of the *Wildlife Act* of Alberta, to the extent that he can call in aid Treaty No. 6 and para. 12 of the Alberta Natural Resources Transfer Agreement. The essential differences, for present purposes, between the Treaty and the Agreement are (i) under the former the hunting rights were at large while under the latter the right is limited to hunting for food and (ii) under the former the rights were limited to about one-third of the Province of Alberta, while under the latter they extend to the entire province. In the present case these differences are unimportant because the appellant was hunting for food and upon land touched by both Treaty and Agreement. The Crown concedes that the hunt took place on land to which Indians as contemplated by para. 12 of the Agreement have right of access.

It would appear that the overall purpose of para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food. See *R. v. Wesley*[2]; *R. v. Smith*[3]; *R. v. Strongquill*[4].

The debate in the Courts below centred upon the interpretation of para. 12 of the Natural Resources Transfer Agreement. The Crown contended that the phrases "Indians of the Province" and "Indians within the boundaries thereof" meant one and the same thing, namely, "Indians resident in the Province," for whom, according to the words of the paragraph, it was sought to secure "continuance of the supply of game and fish for their support and maintenance." It was contended that the words "the said Indians" related to resident Indians only and it was to such Indians that the rights of hunting were accorded. Provincial Court Judge Shamchuk rejected that argument. He held that "Indians within the boundaries" should not be restricted to resident Alberta Indians

[2] [1932] 2 W.W.R. 337.
[3] [1935] 2 W.W.R. 433.
[4] [1953] 8 W.W.R. 247.

En conséquence, l'appelant n'est pas assujetti aux dispositions de *The Wildlife Act* de l'Alberta, s'il peut se prévaloir du traité n° 6 et de l'art. 12 de la Convention sur les ressources naturelles de l'Alberta. Aux fins de ce litige, les différences essentielles entre le traité et la Convention se résument comme suit: (i) en vertu du traité, les droits de chasse ne sont pas définis alors qu'en vertu de la Convention, ils sont limités à la chasse de subsistance et (ii) en vertu du traité, ces droits sont limités à environ un tiers de la province de l'Alberta alors qu'en vertu de la Convention ils s'étendent à toute la province. En l'espèce, ces différences ne sont pas importantes parce que l'appelant chassait pour se nourrir sur un territoire couvert à la fois par le traité et la Convention. La Couronne admet que la chasse a eu lieu sur des terres auxquelles les Indiens ont un droit d'accès, au sens de l'art. 12 de la Convention.

Il semble que le but essentiel de l'art. 12 de la Convention sur les ressources naturelles était d'unifier et de codifier les droits reconnus aux Indiens dans les traités, mais également de réaffirmer et de garantir aux Indiens visés par les traités le droit de chasser et de pêcher pour leur subsistance. Voir les arrêts *R. v. Wesley*[2]; *R. v. Smith*[3]; *R. v. Strongquill*[4].

Devant les tribunaux d'instance inférieure, le débat a surtout porté sur l'interprétation de l'art. 12 de la Convention sur les ressources naturelles. La Couronne a prétendu que les expressions «Indiens de la province» et «Indiens dans les limites de la province» signifiaient la même chose, soit les «Indiens résidant dans la province» auxquels on voulait assurer, selon les termes mêmes de l'article, «la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance». On a prétendu que l'expression «lesdits Indiens» vise seulement les Indiens résidant dans la province et que c'est à eux exclusivement qu'étaient accordés les droits de chasse. Le juge Shamchuk de la Cour provinciale a rejeté cet argument. Il a jugé que l'expression «Indiens dans les limites

[2] [1932] 2 W.W.R. 337.
[3] [1935] 2 W.W.R. 433.
[4] [1953] 8 W.W.R. 247.

but must extend to any Indian physically within the boundaries of Alberta no matter where his residence.

The Appellate Division, in reversing, held that para. 12 of the Natural Resources Transfer Agreements of Alberta and Saskatchewan did two things: (i) it enlarged the areas in which Alberta and Saskatchewan Indians could respectively hunt and fish for food; (ii) it limited their rights to hunt and fish otherwise than for food by making those rights subject to provincial game laws. I would agree that such is the effect of para. 12. See *R. v. Wesley, supra, Prince and Myron v. The Queen*[5].

The Appellate Division held further, however, that to open up the right to hunt and fish for food to *all* Indians, wherever they might normally reside, could operate to defeat the expressed purpose of the paragraph, *i.e.* to secure to the Indians of the Province the continuance of the supply of game and fish. Therefore the section must be read as denying the appellant the right to hunt as he did in Alberta. With respect, I find it impossible to accept such a construction. On this interpretation, para. 12 of the Agreement would have the effect of depriving the appellant of both his treaty right to hunt on Treaty No. 6 lands in Alberta and the protection of the proviso contained in the paragraph while in Alberta.

I do not think "Indians of the Province" and "Indians within the boundaries thereof" refer to the same group. The use of different language suggests different groups. In my view, "Indians of the Province" means Alberta Indians. The words, "Indians within the boundaries," on the other hand, refer to a larger group, namely, Indians who, at any particular moment, happen to be found within the boundaries of the Province of Alberta, irrespective of normal residence. All persons forming part of this latter group are subject to the game laws in force at any given time in that

[5] [1964] S.C.R. 81.

de la province» ne vise pas seulement les Indiens résidant en Alberta, mais aussi tout Indien se trouvant physiquement dans les limites de l'Alberta, quelle que soit sa province de résidence.

La Division d'appel a infirmé ce jugement et conclu que l'art. 12 des Conventions sur les ressources naturelles de l'Alberta et de la Saskatchewan avait un double effet: (i) agrandir le territoire sur lequel les Indiens de l'Alberta et de la Saskatchewan pouvaient respectivement chasser et pêcher pour leur nourriture et (ii) restreindre leurs droits de chasse et de pêche dans un autre but que leur subsistance, en assujettissant l'exercice de ces droits aux lois provinciales sur la protection de la faune. Je pense que cela résume bien l'effet de l'art 12. Voir *R. v. Wesley*, précité, *Prince et Myron c. La Reine*[5].

La Division d'appel a toutefois ajouté qu'accorder à *tous* les Indiens le droit de chasser et de pêcher pour leur nourriture, sans égard à l'endroit où ils résident habituellement, irait à l'encontre du but explicite de l'article, c.-à-d. assurer aux Indiens de la province la continuation de leur approvisionnement en gibier et en poisson. En conséquence, l'article doit être interprété comme interdisant à l'appelant de chasser comme il l'a fait dans la province de l'Alberta. Avec égards, je ne puis souscrire à une telle interprétation de l'art. 12 de la Convention car elle retirerait à l'appelant ses droits de chasse sur les terres de l'Alberta que lui accorde le traité n° 6 et la protection que lui assure la restriction contenue audit article pendant qu'il est en Alberta.

Je ne pense pas que les expressions «Indiens de la province» et «Indiens dans les limites de la province» se réfèrent au même groupe. L'emploi d'expressions différentes laisse à entendre que des groupes distincts sont visés. A mon avis, l'expression «Indiens de la province» vise les Indiens de l'Alberta. En revanche, les mots «Indiens dans les limites de la province» visent un groupe plus large, à savoir les Indiens, qui, à un moment donné, se trouvent dans les limites de la province de l'Alberta, indépendamment de leur province de résidence habituelle. Toutes les personnes comprises

[5] [1964] R.C.S. 81.

Province but with the right of hunting, trapping and fishing game and fish for food at all seasons of the year on unoccupied Crown lands and on any other lands to which the Indians may have a right of access. The words "Indians within the boundaries" mean *all* Indians within the boundaries of Alberta, and not just *some* of the Indians within such boundaries.

One of the rules of grammar one learns at an early age is that a relative should refer to the last antecedent. Such rule, of course, must yield if the result makes nonsense but I find no such result when one relates back the relative "the said Indians" to the last antecedent "Indians within the boundaries." There is no need to place the clause of reference out of juxtaposition by jumping over the nearest antecedent.

I think what was said by the Lord President (Normand) in *Shepherd's Trustees v. Shepherd*[6], at p. 65, is apt:

> In following as you read it the meaning of any document, when you come upon a word such as the "said" or "such" containing a reference to an earlier part of the document and to some person or thing already mentioned, you do not begin by re-reading the document from the beginning; you look backwards, and you take the nearest sensible antecedent as the appropriate antecedent for the word of reference. It was not denied that that was the natural and ordinary way of reading a document, whether it be a will or anything else, but there was some demur to its being called a rule of interpretation or a rule of law, and it was suggested that it might prefcrably be called a rule of grammar. I think the name does not matter. What matters is that we should follow, in construing the document, the ordinary natural sequence of thought which the testatrix followed in writing it and which the reader follows automatically as he reads it currently.

It seems to me that the construction I support avoids a situation in which a non-resident Indian entering Alberta would be subjected to the application of the game laws but denied the rights

[6] [1945] S.C. 60 (Scot.).

dans ce groupe sont assujetties aux lois sur la protection de la faune en vigueur dans cette province, sous réserve toutefois de leurs droits de chasser, de piéger le gibier et de pêcher pour se nourrir, et ce, en toute saison et sur toutes les terres inoccupées de la Couronne ou sur toutes les autres terres auxquelles ils ont un droit d'accès. Les mots «Indiens dans les limites de la province» visent *tous* les Indiens dans les limites de la province de l'Alberta et pas seulement *certains* Indiens se trouvant dans les limites de cette province.

Selon une règle de grammaire que l'on apprend tout jeune, le démonstratif reprend ce qu'on vient de nommer. Bien entendu, cette règle ne vaut plus lorsque son résultat n'a aucun sens, mais ce n'est à mon avis pas le cas si l'on considère que l'expression «lesdits Indiens» renvoie à l'expression qui la précède immédiatement, «Indiens dans les limites de la province». Il n'y a aucune raison d'annuler l'effet de la juxtaposition en sautant par-dessus l'expression qui précède immédiatement.

A cet égard, ce que disait le lord président (Normand) dans l'arrêt *Shepherd's Trustees c. Shepherd*[6], à la p. 65, est pertinent:

> [TRADUCTION] Pour suivre à la lecture le sens d'un document et pour déterminer à quelle partie du document, ou à quelle personne ou chose déjà mentionnée se réfèrent des mots comme «ledit» ou «lequel», on ne reprend pas tout le document à partir du début; on le reprend en sens inverse et l'on s'arrête au mot le plus proche qui peut, en toute logique, être ainsi désigné. On n'a pas nié que c'était là la façon naturelle et ordinaire de lire un document, qu'il s'agisse d'un testament ou d'autre chose; on s'est cependant opposé à ce que cette règle soit qualifiée de règle d'interprétation ou de règle de droit et l'on a suggéré qu'il serait peut-être préférable de la qualifier de règle de grammaire. A mon avis, le nom importe peu. Ce qui importe, c'est qu'il faut, en interprétant le document, respecter le raisonnement que la testatrice a suivi en l'écrivant et cela vient tout naturellement si on lit le document d'une façon ordinaire.

Il me semble que mon interprétation a le mérite d'écarter la possibilité qu'un Indien non résident qui entre en Alberta soit assujetti aux lois visant la protection de la faune sans pouvoir bénéficier des

[6] [1945] S.C. 60 (Scot.).

accorded by the proviso. It was also suggested during argument that if the application of the paragraph is confined to resident Indians, then non-resident treaty Indians would not be subjected thereto and would be free to exercise in Alberta the hunting privileges assured them by Treaty No. 6. This would place non-resident Indians in a more favoured position than resident Indians, the activities of the latter being confined to hunting for food.

I do not believe that para. 12 was ever intended to place Indians resident in Alberta in a position of advantage, or of disadvantage, *vis-à-vis* Indians normally resident elsewhere, or to fragment treaty areas by provincial boundaries. Nothing but the most compelling language would justify such a construction. It is perhaps of interest that of the eleven numbered treaties which were entered into by the Government of Canada with the Indians, virtually all cross provincial boundaries.

I would allow the appeal, set aside the judgment of the Appellate Division of the Supreme Court of Alberta, and restore the verdict of acquittal on the charge brought against the appellant.

Appeal allowed.

Solicitors for the appellant: Walsh & Co., Calgary.

Solicitor for the respondent: Attorney General of Alberta.

Solicitors for the intervenant, National Indian Brotherhood: Wyatt, Menczer & Burnet, Ottawa.

droits que lui accorde la restriction. On a également plaidé que si l'article ne s'applique qu'aux Indiens résidents, les Indiens non résidents mais visés par les traités ne seraient pas assujettis à la Convention et pourraient librement exercer les droits de chasse reconnus au traité n° 6. Une telle interprétation avantagerait les Indiens non résidents par rapport aux Indiens résidents, ces derniers ne pouvant chasser que pour leur subsistance.

Je ne pense pas que l'art. 12 vise à avantager ou à désavantager les Indiens résidant en Alberta par rapport aux Indiens résidant habituellement ailleurs, ni à diviser les territoires visés par les traités selon les frontières provinciales. Seule une disposition très explicite justifierait une telle interprétation. Il n'est pas sans intérêt de souligner que les onze traités conclus entre le gouvernement du Canada et les Indiens débordent presque tous les frontières provinciales.

En conséquence, le pourvoi doit être accueilli, l'arrêt de la Division d'appel de la Cour suprême de l'Alberta est infirmé et le verdict d'acquittement sur l'accusation portée contre l'appelant est rétabli.

Pourvoi accueilli.

Procureurs de l'appelant: Walsh & Co., Calgary.

Procureur de l'intimée: Le procureur général de l'Alberta.

Procureurs de la National Indian Brotherhood: Wyatt, Menczer & Burnet, Ottawa.

REGINA v. FRANK

Alberta Supreme Court, Appellate Division, Allen, Prowse, and Haddad, JJ.A. August 14, 1975.

Indians — Treaty Indian living in Saskatchewan killing moose for food in Alberta — Whether liable for prosecution under Wildlife Act (Alta.), s. 16 — British North America Act, 1867, s. 91(24) — Indian Act (Can.), s. 88 — Indian Treaty No. 6, 1876 — Alberta Natural Resources Act, 1930 (Can.) — Alberta Natural Resources Agreement, s. 12.

Constitutional law — Distribution of legislative authority — Indians — Treaty Indian living in Saskatchewan killing moose for food in Alberta — Whether liable for prosecution under Wildlife Act (Alta.), s. 16 — British North America Act, 1867, s. 91(24) — Indian Act (Can.), s. 88 — Indian Treaty No. 6, 1876 — Alberta Natural Resources Act, 1930 (Can.) — Alberta Natural Resources Agreement, s. 12.

The respondent, a treaty Indian living on treaty land in Saskatchewan, while hunting in Alberta, killed a moose for food. He was charged and acquitted of unlawfully having possession of wildlife contrary to s. 16 of the *Wildlife Act*, R.S.A. 1970, c. 391. On appeal by the Crown by way of stated case, *held*, the appeal should be allowed and a conviction recorded.

The area the respondent was hunting in was within a tract of land included in Treaty No. 6, a treaty negotiated between the Queen and various tribes of Indians in 1876, and covering a large area of land running across what is now Alberta and Saskatchewan. Treaty No. 6 gave the Indians a right to hunt and fish throughout the tract of land subject to, *inter alia*, "such regulations as may from time to time be made by the Government of her Dominion of Canada".

In 1930, under the Alberta Natural Resources Agreement (confirmed by the *Alberta Natural Resources Act*, 1930 (Can.), c. 3), Canada transferred to Alberta, subject to certain exceptions, all public lands in that Province owned by Canada. Section 12 of the Agreement provided that: "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food".

Section 91 of the *British North America Act, 1867*, lists among the things and matters exclusively assigned to the legislative authority of the Parliament of Canada: "Indians and lands reserved for the Indians". Prior to the enactment of what is now s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, provincial laws and Regulations with respect to the hunting and fishing rights of the Indians were treated as *ultra vires* or inapplicable to Indians. The effect of s. 88 of the *Indian Act* in so far as it relates to hunting and fishing rights of Indians in a Province, is to make it clear that any provincial law of general application applies to Indians as well as others in the Province, subject to the terms of any treaty, of which Treaty No. 6 is one, and any other Act of the Parliament of Canada, of which the *Alberta Natural Resources Act, 1930*, and the Agreement confirmed thereby, are others. Hence, Treaty No. 6

and s. 12 of the Alberta Natural Resources Agreement qualify the application of provincial game laws to Indians, and thus, when the purpose of their hunting and fishing is for the provision of food for them, the exceptions provided for therein, except, in the case of the Treaty as altered by Parliament from time to time, must apply.

Provincial game and wildlife laws do not apply and cannot be made so as to apply to affect or reduce the rights granted to Indians under the provisions of s. 12 of the Alberta National Resources Agreement. However, s. 12 must properly be construed as providing that the game laws of the Province will apply to all Indians within the boundaries of the Province, with the exception that "Indians of the Province", *i.e.*, ordinarily resident there, have the right, denied to others, of hunting, trapping and fishing game and fish for food notwithstanding provincial game laws. Since the respondent was not ordinarily resident in the Province, he was guilty of an offence under the *Wildlife Act*, and should have been convicted.

[*R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, 26 Alta. L.R. 433, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403, 46 W.W.R. 121; revd; [1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234; *Myran et al. v. The Queen* (1975), 23 C.C.C. (2d) 73, 58 D.L.R. (3d) 1, 5 N.R. 551 *sub nom. R. v. Myran*; *Sikyea v. The Queen*, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306; affd [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, 43 C.R. 83, 46 W.W.R. 65; *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267, 47 C.R. 382; *Daniels v. The Queen*, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1, [1968] S.C.R. 520, 4 C.R.N.S. 176, 64 W.W.R. 385, refd to]

APPEAL by the Crown by way of stated case from an acquittal of the respondent on a charge under the *Wildlife Act* (Alta.).

W. Henkel, Q.C., for the Crown, appellant.
R. A. M. Young, for accused, respondent.

The judgment of the Court was delivered by

ALLEN, J.A.:—This is an appeal by the Crown by way of stated case from the acquittal of the respondent by Provincial Judge Alex Shamchuk, on a charge that he did on or about January 13, 1974, at or near Viking, Alberta, "unlawfully have in his possession Wildlife, to wit: Moose, other than is expressly permitted by the Wildlife Act or the Regulations thereunder".

Section 16 of the *Wildlife Act*, R.S.A. 1970, c. 391, reads as follows:

> 16. No person shall be in possession of any wildlife unless expressly permitted by this Act, the regulations or by *The Fur Farms Act* or the regulations thereunder.

By s. 2, para. 33 of the said Act, wildlife is defined so as to include big game and the heads, hides or other parts thereof.

On June 28, 1974, the matter came on for trial at Vegreville, Alberta, on an agreed statement of facts reading as follows:

1. THAT the accused, Alex Frank, is a Treaty Indian.
2. THAT the accused did hunt and kill wildlife, to wit: Moose, near the Town of Nordegg, in the Province of Alberta, on or about the 12th day of January, A.D. 1974.
3. THAT the accused did hunt and kill the said wildlife for food.
4. THAT the accused was in possession of the said wildlife at or near the Town of Viking, in the Province of Alberta, on the 13th day of January, A.D. 1974.
5. THAT the possession of the said wildlife was not expressly permitted by the provisions of *The Wildlife Act*, R.S.A. 1970, Chapter 391 or regulations thereunder, or by *The Fur Farms Act*, R.S.A. 1970, Chapter 154 or regulations thereunder.
6. THAT the said hunt took place on the land to which Indians as contemplated by Section 12 of the Memorandum of Agreement cited as No. 2 entitled Alberta of the British North America Act 1930, 20-21 George V C-26 (U.K.) have right of access.
7. THAT the area that the accused was hunting in was part of the tract included in Treaty No. 6.
8. THAT the said accused at all material times to this case lived in the Little Pine Reserve, near North Battleford, in the Province of Saskatchewan, which is within the tract included in Treaty No. 6 and that he is listed in the Band List for the said Reserve.

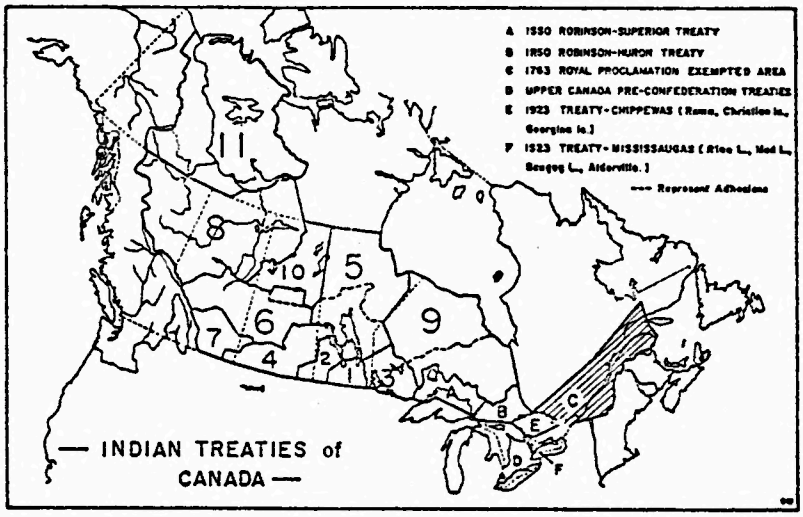
The agreement referred to in para. 6 of the above statement is the agreement between the Government of Canada and the Government of Alberta known as the Natural Resources Transfer Agreement of 1930, ratified and confirmed by the Parliament of Canada, *Alberta Natural Resources Act*, 1930 (Can.), c. 3, and the Legislature of Alberta, 1930 (Alta.), c. 21, and confirmed and given full effect by the *British North America Act, 1930*, whereby Canada transferred to Alberta an interest of Canada in lands, mines and minerals in Alberta, which had been reserved by Canada under the terms of the *Alberta Act*; see now R.S.C. 1970, App., c. 19, by which the Province was established. Similar agreements were made by Canada with Saskatchewan and Manitoba at the same time. The agreement with Alberta will be hereinafter referred to as the "Alberta Resources Agreement".

Treaty No. 6 referred to in para. 7 of the statement of facts is the treaty negotiated and concluded near Carleton on August 23, 1876, and on August 27, 1876, and near Fort Pitt on September 2, 1876, between the Queen and the Plain and Wood Cree tribes of Indians and the other tribes of Indians who inhabited the area therein described.

Treaty No. 6 provided for the surrender by the Indians to

the Queen, of a tract of about 121,000 square miles of land running across Alberta and Saskatchewan, delineated on the sketch annexed as App. A hereto.

APPENDIX A



The Treaty contained, *inter alia*, the following provision:

> Her Majesty further agrees with her said Indians that they, the said Indians, shall have the right to pursue their avocation of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by the Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada or by any of the subjects thereof duly authorized therefor by the said Government.

The Alberta Natural Resources Agreement provided for the transfer by Canada to Alberta of, generally, all public lands in the Province owned by Canada, excepting national parks and Indian reservations, and contained the following section:

> 12. In order to secure to the *Indians of the Province* the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply *to the Indians within the boundaries thereof*, provided, however, that *the said Indians*

> shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food . . .

(Emphasis added.)

The learned Provincial Judge dismissed the charge against the respondent and, at the request of the Crown, stated a case for the opinion of this Division as follows:

> 1. THAT I erred in law in holding that the words "Indians within the Province" as contained in Section 12 of the Natural Resources Transfer Agreement of 1930 set forth in the Alberta Natural Resources Act, 1930, Ch. 21, should not be restricted to resident Alberta Indians but must extend to any Indian physically within the boundaries of Alberta, no matter where his residence.
>
> 2. THAT I erred in law in failing to give effect to the wording in Section 12 of the Natural Resources Tranfer Agreement of 1930 set forth in the Alberta Natural Resources Act, 1930, Ch. 21, namely, "in order to secure to the Indians of the Province" as being the governing provision with respect to the designation of the Indian within the meaning of the said Section.

Section 91 of the *B.N.A. Act, 1867*, listed among the things and matters exclusively assigned to the legislative authority of the Parliament of Canada [para. 24]:

> 24. Indians and lands reserved for the Indians.

and it appears that prior to the enactment in 1951, of what is now s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, provincial laws and Regulations with respect to the hunting and fishing rights of the Indians were treated as *ultra vires* or inapplicable to Indians.

However, s. 88 reads as follows:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any mater for which provisions is made by or under this Act.

The effect of s. 88 of the *Indian Act* in so far as it relates to hunting and fishing rights of Indians in a Province, is to make it clear that any provincial law of general application applies to Indians as well as others in the Province, but subject to the terms of any treaty, of which No. 6 is one, and any other Act of the Parliament of Canada, of which the *Alberta Natural Resources Act, 1930*, and the terms of the agreement ratified and approved and given statutory authority thereby are others, so that Treaty No. 6 and s. 12 of the Alberta Natural Resources Agreement must qualify the application of provincial game laws to Indians, and, thus, when

the purpose of their hunting and fishing is for the provision of food for them, the exceptions provided for therein, except, in the case of the treaty, as altered by Parliament from time to time must apply.

I do not think it is necessary for the purposes of this judgment for me to deal extensively with the numerous cases which have come before the Courts involving Indians' hunting rights since the Alberta Resources Agreement and similar agreements between the Government of Canada and other Provinces became effective.

I think perhaps it is sufficient for me to say that it is clear enough on the authorities that provincial game and wildlife laws do not apply and cannot be made so as to apply to affect or reduce the rights granted to Indians under the provisions of s. 12 of the Alberta Resources Agreement: see *R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337, in which McGillivray, J.A., delivering the majority judgment of this Division held that Indians in Alberta, entitled to the benefits of treaties with the Crown such as Treaty No. 6, may regardless of provincial game laws, kill for food any kind of wild animals or birds out of season on unoccupied Crown lands or land to which they have a right of access and, *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403, in which Hall, J., delivering the judgment of the Court, expressly agreed with and approved the dissenting judgment of Freedman, J.A. (as he then was, [1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234), in which Freedman, J.A., had agreed with the decision in *R. v. Wesley, supra*, and Hall, J., also agreed with the statement of McGillivray, J.A., in *R. v. Wesley*, when he said [at p. 276 C.C.C., p. 781 D.L.R., p. 344 W.W.R.]:

> If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the Province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.

(The foregoing must now be read subject to the qualifica-

tion introduced by the judgment of the Supreme Court of Canada in the case of *Myran et al. v. The Queen*, delivered on June 26, 1975 but as yet unreported [since reported (1975), 23 C.C.C. (2d) 73, 58 D.L.R. (3d) 1, 5 N.R. 551 *sub nom. R. v. Myran*] from which it appears that provisions of provincial wildlife legislation designed to prevent endangering the lives of others would apply to Indians exercising their special hunting privileges.)

It seems equally clear that the Government of Canada can alter, restrict or even abrogate the rights of Indians under the Treaties by appropriate legislation enacted by Parliament. See *Sikuea v. The Queen*, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642, affirming the judgment of this Division delivered by Johnson, J.A. [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, 46 W.W.R. 65, in which it was held that the *Migratory Birds Convention Act*, 1917 (Can.), c. 18, abrogated the full hunting rights of Indians which had theretofore been honoured and observed. See also *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267, and *Daniels v. The Queen*, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1, [1968] S.C.R. 520.

We have seen that under the provisions of Treaty No. 6, and up to the time of the Alberta Natural Resources Agreement and the similar agreements made with Saskatchewan and Manitoba, the Indians who lived in the area covered by the treaty appeared to enjoy full hunting and fishing rights on all lands comprised therein not taken for settlement, mining, lumbering or other purposes except for the restriction imposed by the *Migratory Birds Convention Act* passed in 1917.

But the Alberta Resources Agreement clearly restricted this unfettered right to hunting and fishing for *food*, and the Indians were otherwise made expressly subject to provincial game laws.

When Treaty No. 6 was negotiated, the Provinces of Alberta and Saskatchewan did not exist but large portions of the areas subsequently embodied in those Provinces under the *Alberta Act* and the *Saskatchewan Act* (both passed in 1905) [see now R.S.C. 1970, App., c. 20] consisted of lands ceded or surrendered by the Indians to the Crown by Treaty No. 6, and up to that time all Indians in that tract of land enjoyed hunting rights at least on the treaty lands subject only to the restrictions imposed by the Treaty itself or by subsequent legislation of Canada.

No special provisions with respect to Indians appear in

either the *Alberta Act* or the *Saskatchewan Act*, and as all Crown lands within the Provinces continued to be vested in and administered by the Government of Canada it seems that it may be fairly assumed that the hunting and fishing rights of the Indians under Treaty No. 6 continued without distinction between Indians resident on former treaty lands in Alberta, and those resident on former treaty lands in Saskatchewan until the enactment (so far as Alberta is concerned) of the Alberta Resources Agreement in 1930.

Thus, it seems to me that the only question I have to deal with in this judgment is whether s. 12 of the Alberta Resources Agreement given statutory authority and thus properly classified as legislation passed by the Parliament of Canada, and which, as indicated above, limits and restricts the hunting and fishing rights of Indians, who are not engaging in these activities for food, also eliminates or abrogates the right of Indians residing on lands described in Treaty No. 6 but outside the boundaries of the Province of Alberta, to hunt and fish for food upon treaty lands in Alberta.

In this connection it will again be noted that Treaty No. 6 only purported to assure to the Indians residing in the surrendered tract the preservation of "their avocation of hunting and fishing *throughout the tract surrendered*" (emphasis added), not over the whole of the area now embraced in the Provinces of Alberta and Saskatchewan. So that in one respect the provisions of s. 12 of the Alberta Resources Agreement (as the similar provision in the agreement with Saskatchewan) might be said to have extended the areas in which Alberta and Saskatchewan Indians might respectively hunt and fish for food while, at the same time, limiting their rights to hunt and fish otherwise than for food by making these rights subject to provincial game laws.

It seems to me that the mere carving out of the Northwest Territories or Rupert's Land of the Provinces of Alberta and Saskatchewan had no adverse effect on the rights of Indians living on the tract of land described in Treaty No. 6, to hunt and fish on Crown lands not taken for settlement, mining, lumbering or other purposes "whether those lands were in Alberta or Saskatchewan and whether the Indians ordinarily resided in either one of those provinces".

So we come to the Alberta Natural Resources Agreement and s. 12 thereof, quoted, *supra*. The Crown argues that its proviso with respect to hunting for food applies only to "Indians of Alberta" meaning Indians resident in the Province and does not exempt Indians residing outside the Province

but temporarily within its boundaries from the general application of the provincial game laws, in other words, that the effect of the section is to deprive Frank, a treaty Indian residing on treaty land in Saskatchewan from enjoying the right to hunt for food in Alberta, whereas the respondent contends that it does not deprive him of the right which he would have had to do so on treaty lands in Alberta prior to its enactment, subject, however, to the restrictions of that right to hunting (and fishing) for *food* only.

I think it may fairly be said to be settled law that legislation which encroaches on the rights of the subject whether as regards person or property, is subject to a strict construction in the same way as penal statutes.

In *Maxwell on Interpretation of Statutes*, 12th ed., p. 251, the learned author says "It is a recognized rule that they (such statutes) should be interpreted, if possible so as to respect such rights" (citing *Walsh v. Secretary of State for India* (1863), 10 H.L.C. 367, *per* Lord Westbury, L.C., and *Hough v. Windus* (1884), 12 Q.B.D. 224, *per* Bowen, L.J.); and the author goes on to say that if there be any ambiguity, the construction which is in favor of the individual should be adopted (*David v. Da Silva*, [1934] A.C. 106).

At p. 252, the author quotes the following statement by Ungoed, Thomas J. in *Re Metropolitan Film Studios Application*, [1962] 1 W.L.R. 1315 at p. 1323, "The well-established presumption is that the legislature does not intend to limit vested rights further than clearly appears from the enactment," but of course, as is the case of other presumptions, may be rebutted.

See also Odgers' *Construction of Deeds and Statutes*, 5th ed. p. 394 *et seq.*, and *Craies on Statute Law*, 7th ed. p. 118 *et seq.*

Accepting these principles of construction, can it be said that s. 12 of the Alberta Natural Resources Agreement clearly takes away the right of a Saskatchewan Indian to hunt on unoccupied Crown lands or lands to which Indians have a right of access in Alberta, which he seems to have had before its enactment into law, or is there ambiguity in its wording which would warrant its construction in favor of that individual?

Looking at the expressed purpose of the section appearing in what might be termed its preamble, namely, "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence", it would seem that to open up the rights to hunt and fish for

food, as set out in the proviso to "all Indians within the boundaries of the Province", wherever they might normally reside, in other words whether they live in British Columbia, Saskatchewan, Manitoba, Ontario or elsewhere in Canada, could operate to defeat the purpose of the section, whereas if the words "the said Indians" as used in the proviso are related back to the reference to "Indians of the Province" this could not occur. It might be contended that the proviso might be construed as applicable only to those Indians temporarily within Alberta's boundaries who reside within the tract of land described in Treaty No. 6, but this would seem to involve engrafting words into the section which do not appear therein and which would still, although to a more limited extent, open the door to the encroachment by "outside" Indians upon the game resources apparently intended to be preserved for Alberta Indians.

In view of the foregoing, I think the section must properly be construed as intending to provide and in fact providing that the game laws of the Province will apply to all Indians within the boundaries of the Province, being the only Indians to which they would apply in any event, just the same as they would apply to anyone else "within the boundaries of the Province", with the exception that "Indians of the Province", *i.e.*, ordinarily resident here, have the right, denied to others, of hunting, trapping and fishing game and fish for food notwithstanding provincial game laws, at all seasons of the year on all unoccupied Crown land and other lands (*e.g.*, reserves) to which the *said Indians* may have a right of access.

I think this construction may also be bolstered by the use of the word "the" preceding the words "Indians within the boundaries thereof" which, it seems to me, operates to relate this phraseology back to the words "the Indians of the Province" appearing earlier in the section.

I would therefore answer both questions in the affirmative and direct that a conviction be recorded and the case be remitted to the learned provincial Judge for the imposition of an appropriate sentence.

Appeal allowed.

1966

THE QUEEN v. RANDOLPH et al.

Cartwright J.

was made, to deliver the mail accumulated during the period mentioned would have been to disobey the order.

The second subsidiary question is whether the corporate respondent is entitled to damages for the detention of its mail during the six day period. The claim for such damages is against Her Majesty and would seem to be precluded by the terms of s. 40 of the *Post Office Act* which reads as follows:

> 40. Neither Her Majesty nor the Postmaster General is liable to any person for any claim arising from the loss, delay or mishandling of anything deposited in a post office, except as provided in this Act or the regulations.

This is a special statutory provision which would constitute an exception to the general terms of the *Crown Liability Act*. For this reason I am of opinion that this claim for damages cannot be sustained.

I would allow the appeal with costs, set aside the judgment of the Exchequer Court and direct that judgment be entered dismissing the Petition of Right with costs.

Appeal allowed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitor for the respondents: J. P. Ste.-Marie, Montreal.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

CALVIN WILLIAM GEORGE .....RESPONDENT.

1965

*Nov. 12

1966

Jan. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Indians—Hunting for food on Reserve out of season—Treaty rights—Whether exempt from provisions of the Migratory Birds Convention Act, R.S.C. 1952, c. 179—Indian Act, R.S.C. 1952, c. 149, s. 87.

The respondent, an Indian, shot two migratory wild ducks on a Reserve at a time not during the open season for such birds. They were to be used for food and were not to be sold. He was acquitted at trial on a charge of unlawfully hunting laid pursuant to s. 12(1) of the

* PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.

1966

THE QUEEN
v.
GEOAGE

Migratory Birds Convention Act, R.S.C. 1952, c. 179, on the ground that the Act did not apply to him. On appeal by the Crown to the Supreme Court of Ontario, the dismissal of the charge was affirmed and a further appeal to the Court of Appeal was dismissed by a majority judgment. The Crown was granted leave to appeal to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed and a verdict of guilty should be entered.

Per Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.: The object and intent of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, is to make Indians, who are under the exclusive legislative jurisdiction of Parliament by virtue of s. 91(24) of the *B.N.A. Act*, 1867, subject to provincial laws of general application.

Section 87 was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation. The provisions of s. 87 do not prevent the application to Indians of the *Migratory Birds Convention Act*. There was no valid distinction between the present case and that of *Sikyea v. The Queen*, [1964] S.C.R. 642, which should be followed.

Per Cartwright J., *dissenting:* The Treaty of 1827 was a treaty within the meaning of that word as used in s. 87 of the *Indian Act*. That Treaty assured to the Indians the right to hunt and fish on the Reserve. That right has not been effectively destroyed by the *Migratory Birds Convention Act* and the Migratory Birds Regulations so far as wild ducks are concerned. The *Migratory Birds Convention Act* is a law of general application in force in Ontario and applicable to the respondent, but by s. 87 its application to him is made subject to the terms of the Treaty of 1827. Section 87 of the *Indian Act* shows that Parliament was careful to preserve the rights solemnly assured to the Indians by the Treaty of 1827. Section 87 makes the Indians subject to the laws of general application in force in the province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in a case of conflict between the provisions of the laws and the terms of the treaty the latter shall prevail. The question as to whether the right assured by the Treaty of 1827 has been destroyed by the *Migratory Birds Convention Act* has not been decided in favour of the Crown by the decision of this Court in *Sikyea v. The Queen*, *supra*.

Droit criminel—Indiens—Chasse pour nourriture dans la Réserve en temps prohibé—Droits en vertu des Traités—Sont-ils exempts des dispositions de la Loi sur la Convention concernant les oiseaux migrateurs, S.R.C. 1952, c. 179—Loi sur les Indiens, S.R.C. 1952, c. 149, art. 87.

L'intimé, un Indien, tira et tua deux canards sauvages migrateurs dans une Réserve alors que la chasse de ces oiseaux était prohibée. Les oiseaux devaient servir de nourriture et ne devaient pas être vendus. Lors de son procès, il fut acquitté d'avoir chassé illégalement, contrairement à l'art. 12(1) de la *Loi sur la Convention concernant les oiseaux*

migrateurs, S.R.C. 1952, c. 179, pour le motif que la loi ne s'appliquait pas à lui. Sur appel par la Couronne à la Cour suprême de l'Ontario, le renvoi de l'acte d'accusation fut confirmé et un appel subséquent à la Cour d'Appel fut rejeté par un jugement majoritaire. La Couronne a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être maintenu et une déclaration de culpabilité doit être enregistrée, le Juge Cartwright étant dissident.

Les Juges Fauteux, Abbott, Martland, Judson, Ritchie et Hall: L'article 87 de la *Loi sur les Indiens*, S.R.C. 1952, c. 149, a pour objet et but d'assujettir aux lois provinciales d'application générale les Indiens qui tombent sous la juridiction législative exclusive du Parlement en vertu de l'art. 91(24) de l'*Acte de l'Amérique du Nord britannique*, 1867.

Ce n'était pas le but de l'art. 87 de déclarer la prééminence des traités sur la législation fédérale. La référence aux traités a été incorporée dans un article dont le but était de rendre les lois provinciales applicables aux Indiens, pour empêcher toute interférence avec les droits donnés par traités résultant d'une collision avec la législation provinciale. Les dispositions de l'art. 87 n'empêchent pas l'application aux Indiens de la *Loi sur la Convention concernant les oiseaux migrateurs*. On ne peut faire aucune distinction valide entre le cas présent et celui de *Sikyea v. The Queen*, [1964] S.C.R. 642, qui doit être suivi.

Le Juge Cartwright, *dissident:* Le Traité de 1827 était un traité dans le sens de ce mot tel qu'employé dans l'art. 87 de la *Loi sur les Indiens*. Ce Traité assurait aux Indiens le droit de chasser et de faire la pêche dans la Réserve. Ce droit n'a pas été effectivement détruit par la *Loi sur la Convention concernant les oiseaux migrateurs* et les règlements concernant les oiseaux migrateurs en autant que les canards sauvages sont concernés. La *Loi sur la Convention concernant les oiseaux migrateurs* est une loi d'application générale en vigueur dans l'Ontario et applicable à l'intimé, mais par le jeu de l'art. 87 l'application de cette loi à l'intimé est sujette aux dispositions du Traité de 1827. L'art. 87 de la *Loi sur les Indiens* démontre que le Parlement a pris soin de conserver les droits assurés solennellement aux Indiens par le Traité de 1827. L'art. 87 rend les Indiens sujets aux lois d'application générale en vigueur dans la province où ils résident, mais en même temps l'article conserve inviolés aux Indiens tous les droits qu'ils ont en vertu des dispositions de tout traité, de telle sorte qu'en cas de conflit entre la loi et le traité, ce dernier aura préséance. La question de savoir si le droit assuré par le Traité de 1827 a été détruit par la *Loi sur la Convention concernant les oiseaux migrateurs* n'a pas été décidée en faveur de la Couronne par la décision de cette Cour dans *Sikyea v. The Queen, supra.*

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], rejetant un appel de la Couronne. Appel maintenu, le Juge Cartwright étant dissident.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal by the Crown. Appeal allowed, Cartwright J. dissenting.

[1] [1964] 2 O.R. 429, 45 D.L.R. (2d) 709.

1966

THE QUEEN v. GEORGE

D. H. Christie, Q.C., for the appellant.

B. J. MacKinnon, Q.C., and *Hugh D. Garrett, Q.C.*, for the respondent.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from an order of McRuer C.J.H.C. which dismissed an appeal from an order of Magistrate Dunlap acquitting the respondent on a charge that he did on the 5th day of September 1962, at Kettle Point Indian Reserve unlawfully hunt a migratory bird at a time not during the open season specified for that bird in violation of s. 5(1)(*a*) of the Migratory Bird Regulations thereby committing an offence contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. Gibson J.A., dissenting, would have allowed the appeal.

There is no dispute as to the facts. The respondent is an Indian within the meaning of the *Indian Act*, R.S.C. 1952, c. 149. He is a member of the Chippewa Band residing on the Kettle Point Reserve. On the date stated in the charge he shot two ducks, which were migratory birds, as defined in the *Migratory Birds Convention Act* and the Regulations made thereunder, in an area described in Schedule A of the Regulations at a time not during the open season for such birds. The ducks were to be used for food and were not to be sold.

On these facts it would appear that the respondent was guilty of the offence charged unless, because he is an Indian and shot the ducks for food on the reserve on which he resided, he is exempt from the provisions of the *Migratory Birds Convention Act* and *Migratory Bird Regulations* under which he was charged.

The learned Magistrate was of opinion that s. 87 of the *Indian Act* made laws of general application applicable to Indians, subject to the terms of any treaty, that the *Migratory Birds Convention Act* was such a law, that the treaty of July 10, 1827, with the Chippewa Indians to be referred to hereafter reserved to them the right to hunt at any time on the lands reserved in that treaty and, conse-

[1] [1964] 2 O.R. 429, 45 D.L.R. (2d) 709.

quently, that the *Migratory Birds Convention Act* did not apply to the respondent.

McRuer C.J.H.C. agreed with the view of the learned Magistrate and was further of opinion that the right of the respondent to hunt for food on Kettle Point Reserve was preserved not only by the treaty of 1827 but also by the proclamation of 1763 and that if it is within the power of Parliament to abrogate that right, a point which the learned Chief Justice left open, that power could be exercised only by legislation expressly and directly extinguishing the right and that it certainly could not be extinguished by order-in-council.

After discussing the case of *Dominion of Canada v. Province of Ontario*[1], the learned Chief Justice said:

> This case clearly recognizes that the 'overlying Indian interest' in the lands reserved to the Indians is not something to be disposed of by any general Act of Parliament applicable to all citizens.

He also said:

> I wish to make it quite clear that I am not called upon to decide, nor do I decide, whether the Parliament of Canada by legislation specifically applicable to Indians could take away their rights to hunt for food on the Kettle Point Reserve. There is much to support an argument that Parliament does not have such power. There may be cases where such legislation, properly framed, might be considered necessary in the public interest but a very strong case would have to be made out that would not be a breach of our national honour.

The judgment of the majority in the Court of Appeal was delivered by Roach J.A., with whom McLennan J.A. agreed. The learned Justice of Appeal construed the treaty of 1827, in the light of its historical background including the terms of the Proclamation of 1763, as preserving and confirming to the Indians their right to the use of the lands reserved including those in the Kettle Point Reserve as their "Hunting Grounds". He held that the *Migratory Birds Convention Act* is a law of general application in force in the Province within the meaning of s. 87 of the *Indian Act* so that its application to the respondent is subject to the terms of the treaty. The reasons of Roach J.A. conclude as follows:

> The treaty does not refer to the Proclamation in terms but historical implication impels the conclusion that what was surrendered and conveyed to the Crown by the treaty were the rights granted to them by the Proclamation to and in respect of the lands described in the treaty as

[1] [1910] A.C. 637, 103 L.T. 331.

1966

THE QUEEN v. GEORGE

Cartwright J.

being intended to be thereby conveyed. What was preserved and confirmed to them were those same rights to and in respect of the lands reserved by the treaty and without any time limitation thereon.

Since the *Migratory Birds Convention Act* is subject to the treaty and since the treaty preserved and confirmed to the Indians the *use* of lands, including those in the Kettle Point Reserve, as their 'Hunting Grounds', giving to those words their wide historical significance, it follows that an Indian while hunting on those lands for food is not subject to the restrictions or prohibitions contained in that Act or the regulations.

The essential difference of opinion between Gibson J.A. and the majority was as to the construction of the treaty of 1827. As to this, after quoting s. 87 of the *Indian Act*, Gibson J.A. says:

> On behalf of the accused it is argued that the Treaty of 1827 reserved to the Indians the land of the reserve for their 'exclusive use and enjoyment', and that by implication that included the perpetual right to fish and hunt on the lands. As I have stated before, nothing contained in the Treaty indicates that questions of hunting and fishing were ever dealt with or considered when the Treaty was entered into.

With the greatest respect to Gibson J.A. I am unable to accept this view. For the reasons given by Roach J.A. I agree with his interpretation of the terms of the treaty. I find it impossible to suppose that any of the signatories to the treaty would have understood that what was reserved to the Indians and their posterity was the right merely to occupy the reserved lands and not the right to hunt and fish thereon which they had enjoyed from time immemorial.

The question to be decided is whether the right to hunt on the reserve assured by the treaty to the band of which the respondent is a member has been effectively destroyed by the *Migratory Birds Convention Act* and the *Migratory Bird Regulations* so far as wild ducks are concerned.

Counsel for the appellants submits that this question should be answered in the affirmative on three main grounds, (i) that the point has been decided in favour of the appellant by the decision of this Court in *Sikyea v. The Queen*[1], (ii) that the words "laws of general application from time to time in force in any province" in s. 87 of the *Indian Act* mean provincial laws and not federal laws and (iii) that the treaty of July 10, 1827, did not reserve to the Indians the right to hunt and fish on the reserve. I will deal with these three grounds in reverse order.

[1] [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80.

As to the third ground, counsel for the appellant concedes that the document of July 10, 1827, is a treaty within the meaning of that word as used in s. 87 of the *Indian Act*. I think he was clearly right in making this concession. In my opinion it is the very sort of treaty contemplated by the section. On the question of the true construction of the treaty I have already indicated my agreement with the reasons and conclusion of Roach J.A. on this branch of the matter. It follows that I would reject this ground of appeal.

As to the second ground, s. 87 of the *Indian Act* reads as follows:

> 87. Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The laws of general application in force in the Province of Ontario are made up of the common law, pre-confederation statutes which have not been repealed, Acts of Parliament and Acts of the Legislature. I can find nothing in the words of the section to permit the meaning of the phrase "laws of general application from time to time in force in any province" being restricted to provincial statutes or to laws in relation to matters coming within the classes of subjects assigned to the Legislature by s. 92 of the *British North America Act*. To determine whether any particular law is applicable to an Indian in Ontario only two questions need be answered, (i) is it a law of general application? and (ii) is it in force in the Province? If the answer to both of these questions is in the affirmative the source of the law is of no importance. In my opinion the *Migratory Birds Convention Act* is a law of general application in force in Ontario and applicable to the respondent but by s. 87 its application to him is made subject to the terms of the treaty of July 10, 1827. I would reject this ground of appeal.

The first ground presents more difficulty. In *Sikyea's* case, the judgment of Sissons J. acquitting Sikyea after a trial de novo was pronounced on November 1, 1962, and written reasons for that judgment were delivered on November 8, 1962. The unanimous judgment of the Court of

1966

THE QUEEN v. GEORGE

Cartwright J.

Appeal of the Northwest Territories was delivered on January 24, 1964. The reasons of the Court were written by Johnson J.A. The unanimous judgment of this Court upholding that of the Court of Appeal was delivered on October 6, 1964.

In the case at bar the judgment of McRuer C.J.H.C. was delivered on May 29, 1963. The learned Chief Justice referred to the judgment of Sissons J., which had not then been reversed, as follows:

> In *Reg. v. Sikyea*, 40 W.W.R. 494, Sissons J.T.C. held that the *Migratory Birds Convention Act* did not apply to Indians hunting for food in the Northwest Territories. At page 504 he said:
>
> > There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act*, abrogating, abridging, or infringing upon the hunting rights of the Indians.
>
> With this I agree but I would go further. Since the Proclamation of 1763 has the force of a statute, I am satisfied that whatever power the Parliament of Canada may have to interfere with the treaty rights of the Indians, the rights conferred on them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an order-in-council passed under the *Migratory Birds Convention Act*.

The appeal to the Court of Appeal in the case at bar was argued on October 15, 1963, prior to the delivery of judgment by the Court of Appeal in *Sikyea's* case, but judgment was not delivered until June 24, 1964. The reasons delivered in the Court of Appeal contain no reference to the judgments in *Sikyea's* case.

In order to ascertain whether the question to be decided in the case at bar has been determined in *Sikyea's* case it is necessary to examine the reasons delivered in that case in some detail but before doing so it will be convenient to state in summary form the grounds on which Mr. Mackinnon submits that the cases are distinguishable. These are, (i) In *Sikyea* the question was as to the right of Indians to hunt on lands which they had surrendered while in the present case it is as to their right to hunt on lands which they reserved and have never surrendered, (ii) In *Sikyea* the treaty in question was entered into four years after the *Migratory Birds Convention Act* came into force while that in the present case was almost one hundred years earlier, and (iii) the reasons in *Sikyea* give no consideration to the effect of s. 87 of the *Indian Act* which in the

present case was held by the Court of Appeal to be decisive. It is to the last of these three grounds of distinction that Mr. Mackinnon attaches particular importance.

Sissons J. in the course of his reasons reviewed the legislation which he regarded as applicable. He said in part:

By Sections 1 and 2 of Chapter 20 of the Statutes of Canada, 1960, assented to 9th June, 1960 the *Northwest Territories Act* was amended to provide that Ordinances by the Commissioner in Council in relation to the preservation of game in the Territories are applicable to and in respect of Indians and Eskimos; that this should not be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, other than game declared by the Governor in Council to be game in danger of becoming extinct, that from the day on which this Act comes into force the provisions of the various game ordinances including Chapter 42 R.O. 1956 and Chapter 2 of the Ordinances of 1960, Second Session, have the same force and effect in relations to Indians and Eskimos as if on that day they had been re-enacted in the same terms; that all laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.

Section 1(3) of Chapter 20 reads as follows:

> 1(3) Nothing in Subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

The following Order in Council, P.C. 1960-1256, was passed the 14th day of September, 1960:

> His Excellency the Governor General in Council, on the recommendation of the Minister of Northern Affairs and National Resources, pursuant to subsection (3) of Section 14 of the *Northwest Territories Act*, is pleased hereby to declare musk-ox, barren-ground caribou and polar bear as game in danger of becoming extinct.

It is only necessary for the Governor in Council to 'declare' that game is in danger of becoming extinct. This may be fact or fiction, and may well be fiction.

There is here a recognition and a preservation by Parliament of the hunting rights of Indians and Eskimos, unrestricted except as to game in danger of becoming extinct. There is no mention of the *Migratory Birds Convention Act* or migratory birds.

This has the effect of nullifying any application of the *Migratory Birds Convention Act* to Indians and Eskimos.

Section 2 of Chapter 20 reads:

> 17(2) All laws of general application in force in the Territories, are, except where otherwise provided applicable to and in respect of Eskimos in the Territories.

It is 'otherwise provided', so far as Indians are concerned, by Section 87 of the *Indian Act*.

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to

1966

THE QUEEN v. GEORGE

CartwrightJ.

time in force in any province are applicable to and in respect of Indians in the province...

I dealt with these amendments to the *Northwest Territories Act* in the case of *Re Noah Estate*, (1961) 36 W.W.R. 577:

The learned Judge does not make any other reference to s. 87 of the *Indian Act* and does not appear to found his judgment on its terms. The true ratio of his decision is found later in the following passage with which his reasons conclude:

The real defence and the important issue in this case is that the *Migratory Birds Convention Act* has no application to Indians engaged in the pursuit of their ancient right to hunt, trap and fish game and fish for food at all seasons of the year, on all unoccupied Crown lands.

Reference was made to the Royal Proclamation of October 7, 1763, cited in the Revised Statutes of Canada, Vol. VI, 6127, as the first of Canada's Constitutional Acts and Documents, and commonly spoken of as the Charter of Indian Rights; and to Treaty No. 11, made and concluded in 1921 between His Most Gracious Majesty George V, and the Slave, Dogrib, Loucheux, Hare and other Indians, inhabitants of the Territory; and to *Rex v. Wesley*, (1932) 58 C.C.C. 269, *Regina v. Kogogoluk* (1959) 28 WWR 376 and other cases.

Indians still have their ancient hunting rights unless, adopting the words used by the Honourable Mr. Justice Gwynne of the Supreme Court of Canada, in the *Ontario Mining Company v. Seybold*, (1902) 32 S.C.R. 1, 'unless the proclamation of 1763 and the pledge of the Crown therein are considered now to be a dead letter; and unless the grave and solemn proceedings which ever since the issue of the proclamation until the present time have been pursued in practice upon the Crown entering into treaties with the Indians are to be regarded now as a delusive mockery'.

The solemn proceedings surrounding Treaty No. 11 and the pledge given by the Crown and incorporated in the Treaty would indeed be delusive mockeries and deceitful in the highest degree if the *Migratory Bird Convention*, made just five years previously, had curtailed the hunting rights of the Indians.

There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging, or infringing upon the hunting rights of the Indians.

The various references in the Convention and in the *Migratory Birds Convention Act* and in the Regulations to Indians and Eskimos and their hunting rights indicate recognition of these hunting rights.

The fact that Indians and Eskimos are particularly entitled to take certain migratory game birds and migratory nongame birds does not indicate an intention to abrogate, abridge or infringe the hunting rights of these Indians and Eskimos.

I find that the *Migratory Birds Convention Act* has no application to Indians hunting for food, and does not curtail their hunting rights.

I find the accused Not Guilty. The Appeal is allowed.

On a consideration of the whole of the reasons of the learned Judge it appears to me that the ground of his decision is that the general words of the *Migratory Birds*

Convention Act and *Regulations* should not be construed to take away the special rights to hunt enjoyed by the Indians from time immemorial and assured to them by the Proclamation of 1763 and by treaty. He does not say that the provisions of the *Migratory Birds Convention Act* and *Regulations* are, by force of s. 87 of the *Indian Act*, in respect of Indians made subject to the terms of any treaty. In other words, the learned Judge did not find it necessary to deal with the argument based on s. 87 which was addressed to us in the case at bar.

In the Court of Appeal Johnson J.A. makes no reference to s. 87. He differs from Sissons J. as to the true construction of the *Migratory Birds Convention Act*. He says:

> Sissons J. in his reasons for judgment says:
>
> There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging or infringing upon the hunting rights of the Indians.
>
> I have quoted section 5(1) of the regulations which says that 'no person shall...kill...a migratory bird at any time except during an open season...'. It is difficult to see how this language admits of any exceptions. When, however, we find that reference in both the Convention and in the regulations to what kind of birds an Indian and Eskimo may 'take' at any time for food, it is impossible for me to say that the hunting rights of the Indians as to these migratory birds, have not been abrogated, abridged or infringed upon.
>
> It is, I think, quite clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its regulations. How are we to explain this apparent breach of faith on the part of the government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked—a case of the left hand having forgotten what the right hand had done.
>
> * * *
>
> I can come to no other conclusion than that the Indians, notwithstanding the rights given to them by their treaties, are prohibited by this Act and its regulations from shooting migratory birds out of season.

The questions of law decided by Johnson J.A. (and therefore by this Court since it adopted his reasons as well as his conclusion) in so far as they are relevant to the case at bar were (i) that it is within the power of Parliament to abrogate the rights of Indians to hunt whether arising from treaty or under the Proclamation of 1763 or from user from time immemorial and (ii) that on its true construction the

1966

THE QUEEN v. GEORGE

Cartwright J.

Migratory Birds Convention Act shews that it was the intention of Parliament to prohibit Indians from hunting during the closed seasons subject only to the exceptions in their favour set out in the Act as, for example, the right to take scoters for food. I think it clear from reading the whole of the reasons of Johnson J.A. that he did not direct his mind to the question, so fully argued before us in the case at bar, whether accepting his decision on these two questions the effect of s. 87 of the *Indian Act* was to preserve the Indian's right to hunt notwithstanding the provisions of the *Migratory Birds Convention Act* in so far as that right was assured to them by "any treaty". I think that if the view of the effect of s. 87 which appears to me to be decisive in the case at bar had been considered in the Court of Appeal or in this Court in *Sikyea's* case it would have been examined and dealt with in the reasons delivered. I do not propose to enter on the question, which since 1949 has been raised from time to time by authors, whether this Court now that it has become the final Court of Appeal for Canada is, as in the case of the House of Lords, bound by its own previous decisions on questions of law or whether, as in the case of the Judicial Committee or the Supreme Court of the United States, it is free under certain circumstance to reconsider them. I find it unnecessary to do this. Assuming for the purposes of this appeal that we are governed by the rule of *stare decisis*, it appears to me that the judgment in *Sikyea* falls within one of the exceptions to that rule in that it was given *per incuriam*.

In *Young v. Bristol Aeroplane Co. Ltd.*[1], Lord Greene M.R., giving the unanimous judgment of the full Court, said at pages 728 and 729:

> It remains to consider the recent case of *Lancaster Motor Co. (London) v. Bremith Ld.*, in which a court consisting of the present Master of the Rolls, Clauson L.J. and Goddard L.J. declined to follow an earlier decision of a court consisting of Slesser L.J. and Romer L.J. in *Gerard v. Worth of Paris Ld.* This was clearly a case where the earlier decision was given per incuriam. It depended on the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier

[1] [1944] K.B. 718, 2 All E.R. 293.

decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.

I do not suggest that in *Sikyea's* case either the Court of Appeal or this Court was ignorant of the existence of s. 87 of the *Indian Act* but, to use the words of Lord Greene, I am satisfied that that section was not present to the mind of either Court when rendering judgment, although it does appear to have been dealt with in the argument of counsel.

Having reached this conclusion it is not necessary for me to consider the other grounds on which Mr. Mackinnon argued that *Sikyea's* case could be distinguished.

In *St. Saviour's Southwark (Churchwardens)*[1] case, Lord Coke said:

> If two constructions may be made of the King's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may according to the rule of law be adjudged good, and by another it shall by law be adjudged bad; then for the King's honour, and for the benefit of the subject, such construction shall be made that the King's charter shall take effect, for it was not the King's intent to make a void grant, and therewith agrees *Sir J. Moleyn's* case in the sixth part of my reports.

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty. Johnson J.A., with obvious regret, felt bound to hold that Parliament had taken away those rights, but I am now satisfied that on its true construction s. 87 of the *Indian Act* shews that Parliament was careful to preserve them. At the risk of repetition I think it clear that the effect of s. 87 is two-fold. It makes Indians subject to the laws of general application in force in the province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in a case of conflict between the provisions of the laws and the terms of the treaty the latter shall prevail.

[1] (1613), 10 Co. Rep. 366 at 66b and 67b, 77 E.R. 1025 at 1027.

1966

THE QUEEN v. GEORGE

Cartwright J.

For the reasons given by Roach J.A. and those stated above I would dismiss this appeal with costs.

The judgment of Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ. was delivered by

MARTLAND J.:—I have had the opportunity to read the reasons stated by my brother Cartwright. The facts giving rise to this appeal are there reviewed and it is unnecessary to repeat them here. With great respect, I am unable to agree with his interpretation of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, which provides as follows:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

I cannot construe this section as making the provisions of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179, subordinate to the treaty of July 10, 1827. In my opinion, it was not the purpose of s. 87 to make any legislation of the Parliament of Canada subject to the terms of any treaty. I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *British North America Act, 1867*, subject to provincial laws of general application.

The application of provincial laws to Indians was, however, made subject to "the terms of any treaty *and any other Act of the Parliament of Canada*" (the italics are mine). In addition, provincial laws inconsistent with the *Indian Act*, or any order, rule, regulation or by-law made thereunder, or making provision for any matter for which provision is made under that *Act*, do not apply.

The incorporation in the section of the words italicized to me makes it clear that when the section refers to "laws of general application from time to time in force in any province" it did not include in that expression the statute law of Canada. If it did, the section, in so far as federal legislation is concerned, would provide that the statute law of Canada applies to Indians, subject to the terms of any *Act* of the Parliament of Canada, other than the *Indian*

1966

THE QUEEN v. GEORGE

Martland J.

207

Act. This would be a rather unusual provision, particularly in view of the fact that it did not require any express provision in the *Indian Act* to make Indians subject to the provisions of federal statutes. In my view the expression refers only to those rules of law in a province which are provincial in scope, and would include provincial legislation and any laws which were made a part of the law of a province, as, for example, in the provinces of Alberta and Saskatchewan, the laws of England as they existed on July 15, 1870.

This section was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.

Accordingly, in my opinion, the provisions of s. 87 do not prevent the application to Indians of the provisions of the *Migratory Birds Convention Act*. I can see no valid distinction between the present case and that of *Sikyea v. The Queen*[1] and, for the reasons given in that case, I think that this appeal should be allowed. The judgment of the learned magistrate should be reversed and a fine of ten dollars be imposed upon the respondent. The Attorney-General of Canada does not ask for costs, and accordingly there should be no costs in this Court or in the Courts below.

Appeal allowed, CARTWRIGHT J. *dissenting; no order as to costs.*

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitor for the respondent: H. D. Garrett, Sarnia.

[1] [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80.

ATTORNEY-GENERAL OF CANADA v. GEORGE

Ontario Court of Appeal, Roach, Gibson and McLennan, JJ.A.
June 24, 1964.

Indians — Whether subject to Migratory Birds Convention Act and Regulations — Indian Act (Can.) making such Act and Regulations applicable to Indians as laws of general application but "subject to the terms of any treaty" — Effect of Indian Treaty of July 10, 1827 — Shooting of ducks for food on Indian reservation — Not an offence.

The *Migratory Birds Convention Act*, R.S.C. 1952, c. 179, and Regulations thereunder do not apply, in respect of their prohibition of the shooting of certain birds outside specified open seasons in certain areas, to an Indian who shoots ducks for food on reservation lands whose use as well as possession was reserved to him under a treaty of July 10, 1827 between the Crown and "Chiefs and Principal Men" of the Chippewa Nation of Indians inhabiting the lands dealt with by the treaty and which were largely surrendered thereunder. Although Parliament has legislative jurisdiction in relation to Indians and lands reserved to the Indians, and although by virtue of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, the *Migratory Birds Convention Act* and Regulations *prima facie* apply to Indians in a Province because they are laws of general application in force in the Provinces, none the less s. 87 stipulates that their application is subject not only to inconsistent terms of the *Indian Act* itself but "Subject to the terms of any treaty and any other Act of the Parliament of Canada". The treaty of 1827 preserved and confirmed to the Indians the use of lands (including those in question here) as their "hunting grounds" (words which must be given their historical significance), and hence it qualified the application of the *Migratory Birds Convention Act* and Regulations.

Per Gibson, J.A., dissenting: The question of hunting and fishing rights was not dealt with or considered under the treaty of 1827, and except as to limitations in the Act itself or in the Regulations, the *Migratory Birds Convention Act* and Regulations were applicable to Indians, and there was no exemption under the *Indian Act* from obedience to the closed season respecting the shooting of birds in specified areas.

EDITOR'S NOTE: On October 6, 1964, the Supreme Court of Canada in *Sikyea v. The Queen* (to be reported) reached a conclusion contrary to this decision.

APPEAL from a judgment of McRuer, C.J.H.C., 41 D.L.R. (2d) 31, [1963] 3 C.C.C. 109, [1964] 1 O.R. 24, dismissing an appeal by way of stated case from an acquittal of an Indian of a charge under the *Migratory Bird Regulations*.

J. W. Swackhamer, Q.C., for A.-G. Can., appellant.
H. D. Garrett, Q.C., for respondent.

ROACH, J.A.:—The respondent was acquitted by Magistrate J. C. Dunlap, Q.C., on September 5, 1962, on a charge that he did on or about September 5, 1962, at Kettle Point Indian Reserve unlawfully hunt a migratory bird at a time not during

the open season specified for that bird in violation of s. 5(1)(*a*) of the *Migratory Bird Regulations*, P.C. 1958-1070, SOR/58-308, thereby committing an offence contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

At the request of counsel representing the appellant the learned Magistrate stated a case in accordance with s. 734 of the *Criminal Code*. The facts as set out in the stated case show:

(1) That the respondent is an Indian — a member of the Chippewa Indian Band — within the meaning of the *Indian Act*, R.S.C. 1952, c. 149;

(2) That he shot and killed a duck on the Kettle Point Indian Reserve on or about the alleged date: which was a date without the open season for that class of bird in that area;

(3) The duck was killed for food and not for sale.

The learned Magistrate held that, by virtue of the terms of a treaty made on July 10, 1827, between the Crown and the "Chiefs and Principal Men of that part of the Chippewa Nation of Indians" inhabiting and claiming the territory or tract of land therein described, which included the lands contained in the Kettle Point Reserve, the *Migratory Birds Convention Act* and the Regulations passed thereunder did not apply to an Indian when hunting on that Reserve. The question stated by him was whether he was right in so holding.

The appeal by way of the case thus stated was heard by McRuer, C.J.H.C.; and dismissed by his order dated May 29, 1963 [41 D.L.R. (2d) 31, [1963] 3 C.C.C. 109, [1964] 1 O.R. 24].

This is an application for leave to appeal and if leave be granted by way of appeal from that order. The application for leave and the appeal were argued together and judgment reserved.

By the *B.N.A. Act*, s. 91(24) exclusive legislative authority with respect to Indians and lands reserved for Indians became and is vested in the Parliament of Canada.

Section 87 of the *Indian Act*, is as follows:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The *Migratory Birds Convention Act* is an Act of general application in this and other Provinces but by virtue of s. 87 it is subject to the terms of any treaty and, in addition to the *Indian Act*, to any other Act of the Parliament of Canada.

I know of no other Act of the Parliament of Canada that would make the *Migratory Birds Convention Act* inapplicable to the facts of this case so that in the final analysis the issue for determination is whether the terms of the treaty dated July 10, 1827, make it inapplicable. It is so far as I know the only relevant treaty.

Although that is the issue it becomes necessary, as will later appear as I develop these reasons, to consider not only that treaty but also the Royal Proclamation dated October 7, 1763, which may be found in R.S.C. 1952, vol. 6, App. III, p. 3. That Proclamation had the force of a statute passed in a jurisdiction, *viz.*, the Parliament of Great Britain, having legislative competence to deal with Indians and Indian lands in Canada. As already related, it was followed by the treaty. Section 129 of the *B.N.A. Act* is in part as follows:

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union . . . shall continue in Ontario . . . as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

Jurisdictionally next comes the *Statute of Westminster, 1931* [R.S.C. 1952, vol. 6, App. III, p. 266]. Section 2(2) is as follows:

> 2(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

Section 87 of the *Indian Act* was first enacted in 1951 (Can.), c. 29, s. 87. It is perhaps unnecessary to note in passing that as of that date Parliament, by virtue of the *Statute of Westminster*, had full constitutional power to enact legislation with respect to Indians and Indian lands regardless of any Imperial Law theretofore passed concerning them. Therefore since s. 87 is subject only to the terms of any treaty, — there being no "other Act of the Parliament of Canada" —

we can start with that treaty and ignore the Proclamation except in so far as it may assist in construing the terms of the treaty. In pursuing this approach, while it may seem at first to be out of order, I think it will be helpful for the purposes that I have stated to first look at the Proclamation.

I pass over the earlier portion of that Proclamation and come to the recital which reads as follows [p. 6]:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds.

There follows that recital provisions designed to secure to the Indians possession of the lands reserved to them and in that possession they were not to be molested or disturbed. It is clear that what was thus reserved to them was not mere possession but also the use of the lands. All our Indian lore tells us of the use to which the Indians had been accustomed to put those lands. They used them primarily—to adopt the language in the recital—"as their Hunting Grounds". They lived by hunting and foraging. The wild life inhabiting the forests, the lakes and rivers to a large extent was the source of their food supplemented only by what, in accordance with their primitive knowledge they were able to grow on the land. These were the essentials that were secured to them, not alone for their security but also as being essential to the "Interest" of the Crown. This use was not peculiar to the Indians in this part of Canada. It was common among the Indians throughout the whole Dominion. It was recognized by the Federal Government in the 1930 agreement between it and the Prairie Provinces by which the Dominion ceded to those Provinces certain natural resources. That agreement may be found as a schedule to the *Alberta Natural Resources Act*, 1930 (Alta.), c. 21. Paragraph 12 thereof is as follows:

> 12. In order to secure to the Indians of the Province the *continuance of the supply of game and fish for their support and subsistence*, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assumes to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

I cite it merely for the purpose of indicating the recognition by the Federal Government of the rights of Indians which

was exercised by them since time immemorial to hunt game for food in all seasons in those Provinces which rights have been similarly exercised by Indians wherever they lived throughout the Dominion.

Against the background provided by the terms of that Proclamation I now consider the terms of the treaty. It may conveniently be found in *Indian Treaties and Surrenders*, vol. 1, p. 71.

By that treaty an area containing 2,182,049 acres was surrendered to the Crown for the consideration therein expressed. In describing that area a larger area containing 2,200,000 acres is described by metes and bounds and there is reserved therefrom certain smaller areas also described by metes and bounds containing in all 17,951. The lands contained in the Kettle Point Reserve constitute one of those smaller areas. Attached to the treaty is a plan of survey showing the larger area and the smaller areas reserved therefrom. Those descriptions follow a recital which reads as follows:

> And whereas, the tract of land intended and agreed to be surrendered as aforesaid has been since accurately surveyed, so that the same, as well as certain small reservations expressed to be made by the said Indians from and out of the said tract for the use of themselves and their posterity, can now be certainly defined.

The treaty concludes with these words:

> And it is further by these presents declared that the diagram or map to this deed annexed shall be considered as exhibiting the tract or parcel of land intended to be hereby surrendered, with the several tracts hereinbefore described as reserved from the same to the use of the said Indians and their posterity.

The treaty does not refer to the Proclamation in terms but historical implication impels the conclusion that what was surrendered and conveyed to the Crown by the treaty were the rights granted to them by the Proclamation to and in respect of the lands described in the treaty as being intended to be thereby conveyed. What was preserved and confirmed to them were those same rights to and in respect of the lands reserved by the treaty and without any time limitation thereon.

Since the *Migratory Birds Convention Act* is subject to the treaty and since the treaty preserved and confirmed to the Indians the *use* of lands, including those in the Kettle Point Reserve, as their "Hunting Grounds", giving to those words their wide historical significance, it follows that an Indian while hunting on those lands for food is not subject to the restrictions or prohibitions contained in that Act or the Regulations.

The appeal should therefore be dismissed with costs.

213

GIBSON, J.A. (dissenting):—This is an appeal by the Attorney-General of Canada from the order of the Honourable the Chief Justice of the High Court [41 D.L.R. (2d) 31, [1963] 3 C.C.C. 109, [1964] 1 O.R. 24] dismissing an appeal by way of a stated case from the decision of Magistrate J. C. Dunlap, Q.C., acquitting the accused George on a charge that he did on September 5, 1962, at Kettle Point Indian Reserve unlawfully hunt a migratory bird at a time not during the open season specified for that bird in violation of s. 5(1) (*a*) of the *Migratory Bird Regulations*, P.C. 1958-1070, SOR/58-308, thereby committing an offence contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

The stated case shows that, (1) the accused is an Indian within the meaning of the *Indian Act*, R.S.C. 1952, c. 149; (2) on or about September 5, 1962, he shot two ducks which were migratory birds within the definition of the *Migratory Birds Convention Act*; (3) the ducks were shot on the reserve in an area purported to be prohibited by the Act at a time that was not an open season as prescribed by the Regulations published under the Act; and (4) the ducks were to be used for food and were not to be sold.

The learned Magistrate held that s. 87 of the *Indian Act* made laws of general application applicable to Indians, subject to the terms of any treaties and that the treaty with the Chippewa Indians reserved to them the right to hunt at any time on lands reserved under the treaty. The learned Magistrate held that the *Migratory Birds Convention Act* did not apply to the accused, an Indian hunting on the Kettle Point Reservation, and therefore dismissed the charge.

On the appeal the learned Chief Justice considered the rights acquired by Indians living on a reserve known as Kettle Point Indian Reserve under the provisions of the Royal Proclamation of October 7, 1763, which is to be found in R.S.C. 1952, vol. 6, App. III, p. 3, and also under a treaty made in 1827 between the "Chiefs and Principal Men of that part of the Chippewa Nation of Indians" inhabiting and claiming the territory or tract of land described in the treaty, and King George IV, set out in the *Indian Treaties and Surrenders*, vol. 1, p. 7. In his judgment he stated [p. 36 D.L.R., pp. 115-6 C.C.C., p. 29 O.R.]:

> I think this case leaves it open to argue that since there was no reservation of a power of revocation of the rights given to the Indians in the Proclamation of 1763, those rights cannot now be taken away even by legislation. Whether this be true or not this much seems clear — that the Indians' rights to hunt for food on the lands reserved to them in the Treaty of 1827 cannot now be

taken away by the Parliament of Canada short of legislation which expressly and directly extinguishes those rights.

He further states [p. 37 D.L.R., p. 117 C.C.C., p. 30 O.R.]:

> I wish to make it quite clear that I am not called upon to decide, nor do I decide, whether the Parliament of Canada by legislation specifically applicable to Indians could take away their rights to hunt for food on the Kettle Point Reserve. There is much to support an argument that Parliament does not have such power. There may be cases where such legislation, properly framed, might be considered necessary in the public interest but a very strong case would have to be made out that would not be a breach of our national honour.

In his concluding paragraph the learned Chief Justice stated [pp. 37-8 D.L.R., p. 117 C.C.C., pp. 30-1 O.R.]:

> . . . I am satisfied that whatever power the Parliament of Canada may have to interfere with the treaty rights of the Indians, the rights conferred on them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an Order in Council passed under the Migratory Birds Convention Act.

And he dismissed the appeal with costs.

Consideration must be given as to the rights conferred upon the Indians by the Proclamation and by the said treaty and as to the powers of the Government of Canada to interfere with any such rights.

In considering the Proclamation of 1763, it is apparent that four distinct and separate Governments were to be set up in Quebec, East Florida, West Florida and Grenada, and that the Proclamation was a preliminary step taken in order to contribute to the speedy settling of the new Governments and to inform his subjects that express power and direction had been given to the Governors of the said colonies that, as soon as circumstances would admit, General Assemblies were to be called within the respective Governments with powers to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of the said colonies and of the people and inhabitants thereof.

In the meantime, until such Assemblies could be called, the laws of England were to be applied. The Proclamation also provided that the Governors and Councils of the three colonies upon the continent should have full power and authority to settle and agree with the inhabitants of such colonies "for such Lands, Tenements and Hereditaments, as are now or hereafter shall be in our Power to dispose of". The Proclamation further makes special provision for the Indians as follows:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live

215

under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds — We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

The lands of the Kettle Point Indian Reserve do not come within the boundaries described in the Proclamation as "Quebec", but form part of the lands referred to as "not having been ceded to or purchased by Us" and " reserved to them or any of them, as their Hunting Grounds".

It will be noticed that throughout the Proclamation the words "for the present" and "in the meantime" appear to indicate that the provisions in the Proclamation were intended to be subject to change.

The treaty previously referred to, made between the "Chiefs and Principal Men of that part of the Chippewa Nation of Indians inhabiting and claiming the territory or tract of land" (therein described) and King George IV provided for the surrender by the Indians of certain lands "and the right of possession heretofore enjoyed by them in the same" for such recompense as should be agreed upon.

The treaty of purchase and sale of the large area described therein excluded the land at Kettle Point and expressly reserved to the said nation of Indians and their posterity at all times thereafter, for their own exclusive use and enjoyment, the part or parcel of land particularly described.

The whole treaty deals with the ownership and transfer of land and the payment therefor and nothing throughout the

treaty provides for hunting rights or provision for loss of any such hunting rights.

Counsel for the Crown submits that the Proclamation of 1763 is neither a treaty nor an Act of the Parliament of Canada but has the effect of a statute of the Parliament of Great Britain and is subject to legislation of the Parliament of Canada by virtue of the *Statute of Westminster, 1931* (see R.S.C. 1952, vol. 6, p. 265), s. 2(2).

It is further submitted by the Crown that the *Indian Act* constitutes a complete code governing the rights and privileges of Indians and, except to the extent that immunity from laws of Canada, such as the *Migratory Birds Convention Act*, is to be found in the *Indian Act*, the terms of such general legislation apply to Indians equally with other citizens of Canada.

In the case of *Sero v. Gault* (1921), 64 D.L.R. 327 at p. 331, 50 O.L.R. 27 at pp. 32-3, it was stated by Riddell, J.:

> "I can find no justification for the supposition that any Indians in the Province are exempt from the general law — or ever were."

In *Francis v. The Queen*, 3 D.L.R. (2d) 641 at pp. 649-50, [1956] S.C.R. 618 at p. 628, Rand, J., after considering various statutes and treaties concerning the Indians, stated:

> These considerations seem to justify the conclusion that both the Crown and Parliament of this country have treated the provisional accommodation as having been replaced by an exclusive code of new and special rights and privileges.

Kellock, J., in his judgment also stated [p. 652 D.L.R., p. 631 S.C.R.]:

> In my opinion the provisions of the *Indian Act* constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the *Customs Act* or the *Customs Tariff Act* is to be found in the *Indian Act*, the terms of such general legislation apply to Indians equally with other citizens of Canada.

It now becomes important to consider the provisions of the *Migratory Birds Convention Act*, together with the Regulations made thereunder.

The Convention was made between His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas and the United States of America and dated August 16, 1912. The Convention was sanctioned, ratified and confirmed by the Parliament of Canada and provided that the Governor in Council may make such Regulations as are deemed expedient to protect the migratory game, migratory insectivorous and migratory non-

game birds that inhabit Canada during the whole or any part of the year.

Section 3(*a*) describes "close season" as "the period during which any species of migratory game, migratory insectivorous, or migratory non game bird is protected by this Act or any regulation".

Section 3(*b*)(i) of this Act describes "migratory game birds" as anatidae or waterfowl, including brant, wild ducks, geese and swans.

The *Migratory Bird Regulations* as amended were approved on July 31, 1958, to become effective September 1, 1958, and in para. 5(1) of the Regulations it is provided:

> 5(1) Unless otherwise permitted under these Regulations to do so, no person shall
>
> (*a*) in any area described in Schedule A, kill, hunt, capture, injure, take or molest a migratory bird at any time except during an open season specified for that bird and that area in Schedule A.

In Schedule A, Part VI, of the Regulations, the open season for ducks and various other game birds in different parts of Ontario varies from September 15th to October 4th until December 15th in each year.

Nothing in the Act or Regulations exempts Indians from their provisions, with three exceptions:

Article II(1) of the Schedule to the Act provides that "Indians may take at any time scoters for food but not for sale".

Article II(3) provides that,

> 3. The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres and puffins, and their eggs for food and their skins for clothing. . . .

In the Regulations it is provided in s. 5(2):

> 2. Indians and Eskimos may take auks, auklets, guillemots, murres, puffins and scoters and their eggs at any time for human food or clothing. . . .

From this it is clear that in all other respects it was intended that the provisions of the *Migratory Birds Convention Act* were to apply to Indians, and except as they may be exempt under the provisions of the *Indian Act* they are subject to the provisions of the Act.

I now come to the provisions of the *Indian Act* to find if any of its provisions exempt Indians on the Kettle Point Indian Reserve from the provisions of the *Migratory Birds Convention Act*.

Section 87 of the *Indian Act* states:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time

to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

On behalf of the accused it is argued that the treaty of 1827 reserved to the Indians the land of the reserve for their "exclusive use and enjoyment", and that by implication that included the perpetual right to fish and hunt on the lands. As I have stated before, nothing contained in the treaty indicates that questions of hunting and fishing were ever dealt with or considered when the treaty was entered into.

I have not been referred to any other part of the *Indian Act* or to any other Act which would exempt Indians from the provisions of the *Migratory Birds Convention Act* and the Regulations made thereunder.

Under the circumstances the appeal should be allowed, the order of the learned Chief Justice set aside, and in place thereof, in answer to the question in the stated case which was, "Was I correct in holding that the Migratory Birds Convention Act, Chapter 179, R.S.C. 1952, and the regulations made thereunder were not applicable to this Indian when hunting on the Indian Reservation of Kettle Point", the answer be in the negative and the case remitted to the Magistrate for such sentence as he may see fit to impose.

MCLENNAN, J.A., agrees with ROACH, J.A.

Appeal dismissed.

CANADIAN COMSTOCK CO. LTD. v. 186 KING STREET (LONDON) LTD.

Ontario Court of Appeal, Aylesworth, MacKay and Gale, JJ.A.
January 20, 1964.

Mechanics' liens — Priorities — Mortgagee depositing money into mortgagor's account but by agreement completely controlling disposition thereof — Whether money a "payment or advance" under mortgage — Whether subsequently registered mechanics' liens have priority over mortgagee — Mechanics' Lien Act (Ont.), s. 13(1).

Monies paid by a mortgagee into a trust account in the mortgagor's name but, by virtue of an agreement between the mortgagee and the bank, only payable out to the mortgagor if the mortgagee so authorized, is not a "payment or advance" under the mortgage within the meaning

REGINA v. GEORGE

Ontario High Court, McRuer, C.J.H.C., in Chambers. May 29, 1963.

Indians — Treaty rights to hunt for food on reserve — Whether circumscribed by Migratory Birds Convention Act (Can.).

The rights of Indians to hunt for food on lands reserved to them, granted by the Royal Proclamation of 1763 (R.S.C. 1952, vol. 6, App. III, p. 3) and, in the instant case, confirmed by a treaty of 1827 establishing a reserve known as the Kettle Point Indian Reserve, cannot be taken away by Parliament short of legislation which expressly and directly extinguishes those rights. Indeed, it may be that no legislation can be effective to take away such rights, but in any event they are not affected by a general statute such as the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

In the instant case accused Indian shot ducks for food on the aforesaid Kettle Point Reserve and was charged with hunting out of season contrary to s. 12(1) of the Act. *Held*, that the *Migratory Birds Convention Act* was ineffective to circumscribe the treaty rights of the accused to hunt for food at any time on the reserve and accordingly the charge must be dismissed.

[*R. v. Wesley*, [1932] 4 D.L.R. 774, 58 C.C.C. 269, 26 A.L.R. 433, [1932] 2 W.W.R. 337; *R. v. Sikyea* (1962), 40 W.W.R. 494, aprvd; *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637; *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, consd; *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045; *The King v. Lady McMaster*, [1926] Ex.C.R. 68; *Sammut et al. v. Strickland*, [1933] A.C. 678, refd to]

APPEAL by Crown from decision of J. C. Dunlap, Q.C., P.M., acquitting accused of offence against *Migratory Birds Convention Act* (Can.).

F. C. Dally, for A.-G. Can., appellant.
H. D. Garrett, for accused, respondent.

MCRUER, C.J.H.C.:—This is an appeal by way of stated case from the decision of J. C. Dunlap, Q.C., a Magistrate for the Province of Ontario, acquitting Calvin William George on a charge that he did on September 5, 1962, at Kettle Point Indian Reserve unlawfully hunt a migratory bird at a time not during the open season specified for that bird in violation of s. 5(1)(*a*) of the *Migratory Bird Regulations*, P.C. 1958-1070, SOR/58-308, thereby committing an offence contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

The stated case shows that, (1) the accused is an Indian within the meaning of the *Indian Act*, R.S.C. 1952, c. 149; (2) on or about September 5, 1962, he shot two ducks which

were migratory birds within the definition of the *Migratory Birds Convention Act;* (3) the ducks were shot on the reserve in an area purported to be prohibited by the Act at a time that was not an open season as prescribed by the Regulations published under the Act; and (4) the ducks were to be used for food and were not to be sold.

The learned Magistrate held that s. 87 of the *Indian Act* made laws of general application applicable to Indians, subject to the terms of any treaties and that the treaty with the Chippewa Indians reserved to them the right to hunt at any time on lands reserved under the treaty. The learned Magistrate held that the *Migratory Birds Convention Act* did not apply to the accused, an Indian hunting on the Kettle Point Reservation, and therefore dismissed the charge.

The rights of the accused as an Indian on a reservation have their roots very deep in Canadian history. Article 40 of the Articles of Capitulation signed by General Amherst as Commander in Chief of his Britannic Majesty's troops, and forces in North America and the Marquis de Vaudreuil "Governor and Lieutenant-General for the King in Canada" provides:

> The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chuse to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries. The actual Vicars General, and the Bishop, when the Episcopal see shall be filled, shall have leave to send to them new Missionaries when they shall judge it necessary.—"Granted except the last article, which has been already refused."

Following the Treaty of Paris in 1763 the Royal Proclamation of October 7, 1763, R.S.C. 1952, vol. 6, App. III, p. 3, gave to the Indians certain definite rights that have ever since been judicially recognized. The proclamation reads in part as follows [p. 6]:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their *Hunting Grounds.* (The italics are mine.)

The proclamation forbids any Governor or Commander in Chief to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments or upon any lands which "not having been ceded to or purchased

by Us as aforesaid, are reserved to the said Indians, or any of them". The proclamation further provides that

> . . . all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

Private purchase of lands from the Indians was strictly prohibited. It was further provided [p. 7]:

> . . . We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie . . .

For the purposes of this case the area reserved for the Indians included all that part of Ontario lying west of a line drawn from Lake Nipissing to the westerly head of Lake St. Francis on the St. Lawrence River (see map appended to Part I, Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*).

Trading with the Indians in this area was licensed and regulated. This proclamation has been judicially interpreted in several cases and while I cannot find that the rights of the Indians on reserved land have been precisely defined they were the subject of consideration in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. At pp. 54-5 Lord Watson said:

> It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

"Usufructuary" is defined in Stroud's Judicial Dictionary,

3rd ed., vol. 4, p. 3190, as "One that hath the use and reaps the profit of anything".

In *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637, Lord Loreburn, L.C., in considering a claim made by the Dominion of Canada to be recompensed by the Province of Ontario for compensation paid by the Dominion to the Salteaux tribe of the Ojibway Indians for release of their interest over a tract of land 50,000 square miles in extent, referred at p. 644 to "the overlying Indian interest" and stated that lands which are released from the overlying Indian interest enure to the benefit of the Province within which they are situated and said [pp. 644-5]:

> . . . And the principle sought to be enforced by the present appeal is that Ontario should recoup the Dominion for so much of the burden undertaken by the Dominion toward the Salteaux tribe as may properly be attributed to the lands within Ontario which had been *disencumbered of the Indian interest by virtue of the treaty*. (The italics are mine.)

Throughout the *Dominion of Canada* case and the *St. Catherine's* case it is recognized that the Indians' interest was an interest that attached to the land.

Mr. Ghobashy in his book *The Caughnawaga Indians and the St. Lawrence Seaway*, 1961, says at p. 25: "No case has been found where the Indian title was extinguished on Canadian territory by any process other than that of the revision of an old treaty or the making of a new one." I think that is a correct statement.

By a treaty made in 1827 between the "Chiefs and Principal Men of that part of the Chippewa Nation of Indians inhabiting and claiming the territory or tract of land" described in the treaty, and King George the Fourth (see Indian Treaties & Surrenders, vol. I, p. 71), an area of 2,200,000 acres of land in what is now part of Western Ontario was surrendered to the Crown in consideration of an annuity of £1,100 to be distributed as set out in the agreement. From this agreement certain parcels of land were reserved, totalling 17,951 acres, which include what is now known as the Kettle Point Indian Reserve. The treaty or agreement, as it may be called, recites in part (pp. 71-4):

> Whereas, His Majesty being desirous of appropriating to the purposes of cultivation and settlement a tract of land hereinafter particularly described, lying within the limits of the Western District and District of London, in the Province of Upper Canada and heretofore *possessed and inhabited* by a part of the Chippewa Nation of Indians, it was proposed to the Chiefs and Principal Men of the said Indians at a Council assembled for that purpose at Amherstburg, in the said Western District, on the twenty-sixth

day of April, in the year of Our Lord one thousand eight hundred and twenty-five, that *they should surrender the said tract of land and the possession and the right of possession* heretofore enjoyed by them in the same to His Majesty, His heirs and successors, for such recompense to be made by His Majesty to the said Nation of Indians as should at the said Council be agreed upon.

. . . . .

And whereas, the tract of land intended and agreed to be surrendered as aforesaid has been since accurately surveyed, so that the same, as well as certain small reservations expressed to be made by the said Indians from and out of the said tract *for the use of themselves and their posterity*, can now be certainly defined. Now this Indenture witnesseth that . . . Chiefs and Principal Men of that part of the Chippewa Nation of Indians inhabiting and claiming the territory or tract of land hereinafter described, for and in consideration of . . . to be paid by His Majesty, His heirs and successors to the said Indians and their posterity in each and every year in the manner hereinafter mentioned, have, and each of them hath granted, bargained, sold, surrendered, released and yielded up, and by these presents do, and each of them doth for themselves and on behalf of the said Nation of Indians whom they represent grant, bargain, sell, surrender, release and yield up unto our Sovereign Lord the now King, His heirs and successors, all and singular . . . containing two million two hundred thousand acres, more or less, saving, nevertheless, and expressly reserving to the said Nation of Indians and their posterity at all times hereafter, for their own exclusive use and enjoyment, the part or parcel of the said tract which is hereinafter particularly described, . . . and which is situated at Kettle Point, on Lake Huron, that is to say (setting out in detail the area in which the Kettle Point Reserve is included) . . . together with all and every of the woods and underwoods, ways, waters, watercourses, improvements, profits, commodities, hereditaments and appurtenances on the said tract of land (saving and excepting the reserved tracts aforesaid) lying and being or thereto belonging, or in anywise appertaining, and also all the estate, right, title, interest, trust, property, possession, claim and demand whatsoever of them, the said Chiefs and Principal Men and of the people of the said Chippewa Nation of Indians and their heirs and posterity forever, of, in, to or out of the said two million and two hundred thousand acres of land (saving and excepting the several reserved tracts aforesaid) with their and every of their appurtenances . . .

A perusal of this treaty makes it clear that the Indians on the Kettle Point Reserve still have all the rights enjoyed by their ancestors in that area.

Ever since the judgment of Lord Mansfield in *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 it has been recognized that the Proclamation of 1763 at least had all the effect of a statute of the Parliament of Great Britain.

In *The King v. Lady McMaster*, [1926] Ex. C.R. 68 at p. 72, Maclean, J., said: "The proclamation of 1763, as has been

held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed." With respect, I think there are authorities that warrant the view that the proclamation has even a greater force than a statute. *Campbell v. Hall* was discussed at length in *Sammut et al. v. Strickland*, [1938] A.C. 678, which dealt with the prerogative right of the Crown to legislate by letters patent and Orders in Council for the ceded colony of Malta. I think this case leaves it open to argue that since there was no reservation of a power of revocation of the rights given to the Indians in the Proclamation of 1763, those rights cannot now be taken away even by legislation. Whether this be true or not this much seems clear — that the Indians' rights to hunt for food on the lands reserved to them in the Treaty of 1827 cannot now be taken away by the Parliament of Canada short of legislation which expressly and directly extinguishes those rights. Further than this I need not go for the purposes of the case before me. Hence a general statute such as the *Migratory Birds Convention Act* is ineffective to circumscribe the rights of the Indians conferred on them by the Proclamation of 1763 in so far as those rights are enjoyed on land which has been reserved under the provisions of a treaty such as that of 1827. This view is reinforced by a study of the *Dominion of Canada* case which deals with the Treaty of 1873 made between the late Queen Victoria, acting on the advice of the Government of Canada, and the Salteaux tribe of Ojibway Indians. The effect of the treaty was to extinguish by agreement the Indians' interest in respect of a large tract of land described in the treaty in return for certain payments and other rights. Lord Loreburn, L.C., said [1910] A.C. at p. 644: "In making this treaty the Dominion Government acted upon the rights conferred by the Constitution" and at p. 646: "The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered *to take a surrender of it and to give equivalents in return* . . ." (The italics are mine.)

This case clearly recognizes that the "overlying Indian interest" in the lands reserved to the Indians is not something to be disposed of by any general Act of Parliament applicable to all citizens.

Counsel for the Crown relies on s. 9(1) of the *Interpretation Act*, R.S.C. 1952, c. 158, which reads:

> 9(1) Every Act of the Parliament of Canada, unless the contrary intention appears, applies to the whole of Canada.

This provision must be read with s. 87 of the *Indian Act* which reads:

> 87. *Subject to the terms of any treaty* and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

In any case, for reasons already stated, it would take much more than the provisions of the *Interpretation Act* to affect the rights claimed by the Indians in this case.

I wish to make it quite clear that I am not called upon to decide, nor do I decide, whether the Parliament of Canada by legislation specifically applicable to Indians could take away their rights to hunt for food on the Kettle Point Reserve. There is much to support an argument that Parliament does not have such power. There may be cases where such legislation, properly framed, might be considered necessary in the public interest but a very strong case would have to be made out that would not be a breach of our national honour.

The conclusions that I have arrived at are supported by two Canadian cases.

In *R. v. Wesley*, [1932] 4 D.L.R. 774, 58 C.C.C. 269, [1932] 2 W.W.R. 337, the Alberta Court of Appeal held that the Alberta *Game Act*, R.S.A. 1922, c. 70, did not take away the right of the Indians to hunt for food on unoccupied Crown lands or other lands on which the Indians have a right of access. McGillivray, J.A., speaking for the majority of the Court, did not put his judgment on the basis that the Alberta Act was *ultra vires* but based his judgment on the treaty rights of the Indians.

In *R. v. Sikyea* (1962), 40 W.W.R. 494, Sissons, J., held that the *Migratory Birds Convention Act* did not apply to Indians hunting for food in the Northwest Territories. At p. 504 he said: "There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging, or infringing upon the hunting rights of the Indians."

With this I agree but I would go further. Since the Proclamation of 1763 has the force of a statute, I am satisfied that whatever power the Parliament of Canada may have

226

to interfere with the treaty rights of the Indians, the rights conferred on them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an Order in Council passed under the *Migratory Birds Convention Act*.

The appeal will be dismissed with costs.

Appeal dismissed.

SIMPSON v. McGEE AND FITZPATRICK; FIREMEN'S INSURANCE CO. OF NEWARK, THIRD PARTY

Ontario High Court, Donnelly, J. July 31, 1963.

Costs — Counterclaim — Plaintiff and defendant awarded costs on claim and counterclaim in negligence action — Issues of liability identical — What can be included as costs of counterclaim.

In an action arising out of a motor vehicle collision wherein plaintiff claimed damages for the death of her husband and defendant counterclaimed for damages for personal injuries, each alleging that the other driver was solely at fault, the jury found both the deceased and defendant equally negligent and in the result plaintiff was awarded $8,177 and costs of the action while defendant recovered $5,833 and costs of his counterclaim. The costs were settled by the taxing officer and the plaintiff appealed from his certificate with respect to the taxation of the costs of defendant's counterclaim, alleging that the taxing officer had allowed costs on certain items which were common to both the action and the counterclaim and that the defendant was entitled to only such costs as were occasioned by the counterclaim. *Held*, that plaintiff's contention was correct and that the taxing officer had not limited the costs of the counterclaim to the sum by which the costs of the proceedings were increased by the counterclaim but had improperly included therein costs of the defendant in defending the action. In the absence of special directions of the Court the general rule which is applicable where both claim and counterclaim succeed (or where both are dismissed with costs) is that the costs of the counterclaim include only the amount by which the costs of the proceedings were increased by the counterclaim and such items of defendant's bill of costs which in part relate to the claim and in part to the counterclaim must be appropriately divided. The fact that if the plaintiff had not brought action it would have been necessary for the defendant to issue a writ and incur the costs of an action, does not affect the amount of costs to be taxed on the counterclaim. These, as stated, are limited to such costs as would not have been incurred if there had not been a counterclaim and costs not incurred or costs saved by not bringing a cross-action, are not costs incurred by reason of the counterclaim.

Applying these principles to the instant case, clearly the costs of proving his damages are costs of the defendant's counterclaim but on the issue of liability, which was precisely the same in the claim and counterclaim, the fate of the counterclaim depended upon the determina-

loss of air from the tyres, it ceases to be an automobile and the person responsible for its operation is relieved from all or any responsibility.

I would further point out that under s. 285(3) "Every one who takes or causes to be taken from a . . . street, road, highway or other place, any motor vehicle with intent to operate or drive or use or cause or permit the same to be operated or driven or used without the consent of the owner is liable". If it were logical to hold that under s-s. (4) the lack of gasoline caused it to cease to be a motor car, the question immediately arises: Could a person who took possession and removed same in violation of said s-s. (3) be prosecuted for theft of a motor car? I am of the opinion that the paramount question: "The protection of the public", requires that the motor car, in the condition in which it was in this case, should be held to be a motor car within the meaning of the section, and that the question should be answered: No. And I so answer it.

The case is referred back to the Magistrate to be disposed of.

COYNE and DYSART JJ.A. concur with MCPHERSON C.J.M.

ADAMSON J.A.:—The enactment is for the protection of the public. If the motor vehicle is temporarily out of commission because of some small known defect that can be and ordinarily is remedied by the person in charge of it, it is a motor vehicle to which the legislation is directed. The provision of gasoline for a motor is usually attended to by the driver and that was in the course of being done here.

I would answer the question in the negative.

MONTAGUE J.A. concurs with MCPHERSON C.J.M.

Case referred back for disposition.

REX v. HILL

County Court of the County of Hastings, Ontario, Lane Co.Ct.J. September 25, 1951.

Indians — Game & Fisheries — Constitutional Law III B — Indian charged with unlawful possession of seine net — Whether offence committed on Indian Reserve — Exclusion of Indians from provincial game laws while on Indian Reserves— Exclusive legislative power of Parliament—

The provincial game laws do not apply to Indians while they are on Indian Reserves. The Parliament of Canada has exclusive legislative power to regulate the conduct of Indians while upon their Reserves by virtue of s. 91(24) of the *B.N.A. Act*. Indians are there subject to the Canadian Criminal Code and, by the

Indian Act, R.S.C. 1927, c. 98, and the *Fisheries Act*, 1932 (Can.), c. 42, certain provincial Regulations are rendered applicable to Indians on Reserves. However, no Canadian statute or Regulation makes it an offence to be in possession of a seine net while on a Reserve in a manner contrary to the fish and game laws of the Province of Ontario.

Cases Judicially Noted: *R.* v. *Jim*, 26 Can. C.C. 236, 22 B.C.R. 106, folld; *Sero* v. *Gault*, 64 D.L.R. 327, 50 O.L.R. 27; *R.* v. *Hill*, 15 O.L.R. 406; *R.* v. *Martin*, 29 Can. C.C. 189, 39 D.L.R. 635, 41 O.L.R. 79, refd to.

Constitutional Law III A — Indians — Indian Reserve bounded by Bay of Quinte — Whether low water or high water intended — Whether provincial Legislature competent to define the boundary to Dominion lands — Beds of Navigable Waters Act (Ont.), s. 2(2).

Appeal IV A — Sufficiency of notice of appeal — Cr. Code, s. 750— Whether appellant confined to grounds of appeal as set out — Duty on appeal by trial de novo.

Cases Judicially Noted: *R.* v. *Farrell*, 16 Can. C.C. 419, 21 O.L.R. 540, refd to.

Statutes Considered: *B.N.A. Act*, s. 91(24); *Beds of Navigable Waters Act*, R.S.O. 1950, c. 34, s. 2(2); *Cr. Code*, s. 750.

APPEAL from conviction on a charge of unlawful possession of a seine net. Reversed.

B. C. Donnan, K.C., for the Crown.

J. D. O'Flynn, for appellant.

LANE CO. CT. J.:—This is an appeal from a conviction registered by His Worship Magistrate T. Y. Wills, on January 11, 1951, at the City of Belleville in the County of Hastings upon a charge that William Isaac "Ike" Hill, "at the Township of Tyendinaga in the County of Hastings on or about the 7th day of November in the year of Our Lord One Thousand Nine Hundred and Fifty, did unlawfully possess a seine net without a license so to do, as required by Section 17, subsection 1, of the Game and Fisheries Act of Ontario, 1946 [c. 33], and amendments thereto".

The notice of appeal is dated March 6, 1951, and may be said to be somewhat carelessly drawn. The prosecution took the position at the opening of Court that it was for the defence to show that the appeal had been properly completed and was properly before the Court before the Court could have jurisdiction to deal with it. The filings and documents, including the certificate of the Magistrate, had been properly transferred

from the Magistrate's Court to the County Court, as appears by the documents themselves, on hand in Court. There appeared, however, to be no proof of service of the notice of appeal filed. After satisfying myself that the documents in question had been properly served I directed that proof of service might be put in by the defence.

The objection was then taken by the prosecution that the notice of appeal itself was defective in form. The basic argument on this point is, first, that it does not set out with sufficient clarity the conviction appealed from; and secondly, that it gives grounds, or the basis upon which this appeal is taken, set out as (a), (b), (c) and (d). The prosecution urge that once having given grounds for the appeal in the notice of appeal the appellant would thereby be bound. They say further that since the appellant has given the grounds as set out in the notice of appeal, I not only have the right, but am required, to look into the basis of the grounds themselves before I am justified in proceeding with the appeal. They take the position that if I do this it will demonstrate clearly to the Court that the grounds given are no grounds whatsoever and not justified. After hearing the motion and the reply of the appellant I decided that justice would be better done were I to reserve the motion and proceed with the hearing of the appeal on its merits.

At this stage, therefore, before I enter into the merits of the appeal I must deal with the preliminary motions. The first ground, that the notice of appeal did not show with sufficient clarity the particulars of the conviction appealed from, is, in my opinion, not tenable because in the notice of appeal the particulars of the conviction are set out as follows:

"William Isaac Hill appeals to the County Court of the County of Hastings . . . from the conviction that he did at the Township of Tyendinaga in the County of Hastings on or about the 7th day of November, 1950, unlawfully possess a seine net without a license as required by Section 17(1) of the Game and Fisheries Act of Ontario."

As I see it, the notice of appeal, first, must be in writing. This notice complies. Secondly, the notice must be set forth with reasonable certainty the conviction or order appealed from. The only lack in this notice that I can find is the lack of the date upon which the conviction was registered by the Magistrate.

230

No one, under the circumstances here, could possibly be misled. Since this is the fact I am prepared to find that this part of the requirement has been met.

It is required that the notice of appeal be served upon the respondent and upon the convicting Magistrate within 30 days. This requirement too has been complied with. It is true that the appellant should have filed papers proving that he had met this requirement prior to the opening of Court. This, however, is in my opinion, a matter of good practice and nothing more. The filing of the papers is not the act which is essential to give jurisdiction but the service of the documents themselves is the essential act. While it is necessary to prove that that act took place, this would be a matter which might be proved to the satisfaction of the Court in many ways and would not, and could not, go to the root of jurisdiction. I am satisfied that the proper services were made and that this requirement has been met.

I realize that the requirements set out in the Criminal Code for this type of appeal must be strictly complied with to give the Court jurisdiction. In view of the fact that the Criminal Code no longer sets out a form of notice which must be followed in appeals of this type, any notice of appeal which meets the particulars laid down by s. 750 should be held to comply substantially with the requirements and not oust the jurisdiction of the County Court Judge hearing the appeal. In my opinion, therefore, the objection to form must fail.

On the question whether the appellant is bound by the grounds given for his appeal in his notice of appeal, I have some doubts. In the first place it is rather difficult for me to understand why the appellant could not have utilized the general "blanket" clause set out as (d) to get in whatever grounds he might be advised on the appeal. More important, however, is the fact that this case in appeal is actually to be heard on evidence, and is for all purposes a new trial, and in the ordinary sense is not the usual type of appeal. If this appeal were an appeal on the record, which may be considered as the common type of appeal from one Court to another, I would be seeking to find whether or not a mistake had been made in the Court below. Here we are not so much interested in whether a mistake has taken place in the Court below as

in whether the accused is guilty or innocent of the charge which is to be tried before this Court in this instance, as if it were for the first time. The Magistrate may very well have been right in the decision he gave upon the evidence adduced before him and yet at the same time the accused may have suffered an injustice because some evidence vital to the issue was not adduced before the Magistrate. Under such circumstances, then, it seems that my duty, in view of the fact that this is a trial *de novo,* is to see that the accused has justice done him in the County Court rather than to enquire into the proceedings in the Magistrate's Court on the first trial. Section 752(1) [reenacted 1948, c. 39, s. 31], in my opinion makes it obligatory on me to hear the matter on the basis of a trial *de novo* and to disregard everything that took place during the trial before the Magistrate. I believe that this applies equally to an objection to the notice of appeal as it does to the trial itself.

I have, as a matter of curiosity, checked the record in this case, including the evidence before the Magistrate and I do not see how I could have come to a conclusion different from the conclusion to which he came on the first trial. However, in view of the fact that no notice of appeal is required to be given in any particular form, and in view of the fact that this is a completely new trial and my responsibility is to see that justice is done on the evidence before me, I cannot do otherwise than hold that the accused, or appellant, is free to have his appeal heard whether there are or are not any grounds of appeal set out, or whether or not the grounds set out are justified. I feel that if any authority is needed for the general basis upon which I am resting this ruling, that it may be found in the case of *R.* v. *Farrell* (1910), 16 Can. C.C. 419, 21 O.L.R. 540, where it is said (p. 423): "The burden of proof is the same before the County Court Judge as before the magistrate — the burden of proof is not upon the appellant, as it would be in the case of an appeal properly so-called, to prove that the Court below is wrong."

The motion made by the prosecution will therefore be dismissed.

On the facts at issue here I am prepared to make the following finding: The accused, William Isaac Hill, on November 7, 1950, at the Township of Tyendinaga on the shore of the Bay

of Quinte, was found in possession of two seine nets by officers of the Department of Game and Fisheries and others. The nets at the time when they were picked up by the officers were wet. It was clear and sunny and there had been no rain that day. It would appear then that some inference of use could be made, although that is not a part of the charge here and there is no evidence whatsoever to suggest that the accused had used the nets that day or on any other day. One net, the larger of the two, was on the shore within a few feet of the water's edge and I believe the leads were attached to the winches which are used for hauling the seine. The other net was in the back of a punt across a small peninsula and in a cove. The punt's bow only was on the shore and the stern of the boat was out in the water, which was something less than 2 ft. deep. I find that the location on the shore-line where the nets were found was between the Shannon River and the Town of Deseronto and was on that part of the shore-line of the bay which lies immediately in front of the Tyendinaga Indian Reservation. There was some considerable evidence covering the point on the shore where the one seine was found, as to whether or not that location was ever under water, and there was other evidence with regard to the smaller net which tended to show that this net location was on occasion on dry land. I am prepared to find as a fact that both nets were found in locations which were above low-water mark, and I would probably be prepared to find, if it were in issue, that both nets were actually below high-water mark. It must be remembered that there are considerable fluctuations from year to year in the levels in Lake Ontario and in the Bay of Quinte which would account for this fact. I would further find that William Isaac Hill, the accused, was an Indian and a member of the band. In addition I would find that William Isaac Hill, the accused, was not the holder of a licence issued under the *Game and Fisheries Act* of Ontario, entitling him to have a seine net.

The first point that I must decide is partially one of law and partially one of fact, and that is whether or not the seines were found on or off the Indian Reservation. There is no question but that the original grant of the lands in question to the Indians of this band was made, as shown on ex. 4, in 1793. The boundary of the Reservation given in that document bounds

it in front by the Bay of Quinte between the mouths of the River Shannon and Bowen's Creek. It is true that there is a different description in the release by the Indians given in 1891, where they surrendered the Reserve in question by a description which would include all land covered by water of the bay out to deep water. I have been referred by Mr. O'Flynn's argument to this second description, but so far as I am concerned it is in the nature of a release or surrender and would be, in my opinion, more like a quit claim deed, where parties release something in which they claim to have an interest, but may not legally have. I must therefore come to the conclusion that the description of the Reservation which is effective from a legal standpoint is limited to the waters of the Bay of Quinte. In view of this then it would appear to me that I must decide whether that description means high-water mark or low-water mark. In coming to a conclusion on this I have checked the *Beds of Navigable Waters Act*, R.S.O. 1950, c. 34, which in s. 2(2) reads as follows: "Where in any patent, conveyance or deed from the Crown made either heretofore or hereafter, the boundary of any land is described as a navigable body of water or the edge, bank, beach, shore, shoreline or high water mark thereof or in any other manner with relation thereto, such boundary shall be deemed always to have been the high water mark of such navigable body of water."

It would seem from this that high-water mark would be the boundary. On the other hand, before this section was enacted by 1940, c. 28, s. 3(2) there had been some doubt on this particular point and it had been held that low-water mark was the boundary of land so described. In this connection I would refer to the case of *Carroll* v. *Empire Limestone Co.* (1919), 48 D.L.R. 44, 45 O.L.R. 121, as well as to *Stover* v. *Lavoia* (1906), 8 O.W.R. 398, which was also followed in the case of *Servos* v. *Stewart* (1907), 15 O.L.R. 216. While for most purposes the statutory rules as laid down in the Act above referred to would be conclusive, yet if the *B.N.A. Act* is to be considered in connection with this matter it would seem that s. 91(24) would override this, because it is stated there that "Indians, and Lands reserved for the Indians" are within the exclusive legislative jurisdiction of the Parliament of Canada. In view of the fact that these are lands reserved for the use of Indians it would

234

seem to me that the section of the Act above set out is inoperative and that the common law of the Province generally must be held to govern. It would therefore seem that the least that could be said is that the boundary of the Reservation is low-water mark within the decisions above set out. It may be that those decisions are partially based upon another and older provincial statute which is referred to in one of them, and if that is the case, and that was the basic reason for the decision, then it could be that the English common law rule might apply, that the bed of the bay would be the boundary instead. I am, however, not called upon to decide that issue here because the seines were found, as I have decided, between low and high water mark. I must therefore find that the seines were, when picked up by the officers, within the confines of the Tyendinaga Indian Reserve.

The next issue then which I must decide is whether or not an Indian on the Reservation is subject to a provincial law and in particular the provisions of the *Game and Fisheries Act* of Ontario. There is no question in my mind but that an Indian on the Reservation is subject to the Criminal Code. That, of course, is a federal statute and a federal law, and the Indian is subject to control and under the legislative authority of the Parliament of Canada.

There is also no question but that the Indian is subject to the laws of the Province once he is off or out of the confines of the Reservation. There is considerable law on this point. I would refer in particular to *R.* v. *Hill* (1907), 15 O.L.R. 406; *R.* v. *Martin* (1917), 39 D.L.R. 635, 29 Can. C.C. 189, 41 O.L.R. 79, and many others.

There is no question but that an Indian on a Reservation would be bound to refrain from fishing without a licence if he were so charged (unless there is in existence a specific right given to Indians so to fish by the federal authority), because the federal authority has passed, for the Province of Ontario, certain requirements under s. 2 of the *Fisheries Act*, 1932 (Can.), c. 42, which prohibits fishing without a licence, the applicable parts of which read as follows: "2(1) Subject to subsection (2) of this section, no person shall take clams or fish by any means other than angling, except under a licence." [P.C. 5694 ([1949] S.O.R. 3175)]

In this instance the exceptions do not apply. I have checked the federal statutes and regulations to find if there are in existence any special rights granted to the Indians and I have failed to find any such special legislation. I have checked particularly the *Indian Act*, R.S.C. 1927, c. 98, and amendments, and have found that s. 69, as amended by 1936, c. 20, s. 2, has partially dealt with the matter by contemplating regulations, but apparently intending them only to apply to Alberta, Manitoba, Saskatchewan and the Territories. I have checked the regulations and have been unable to find anything which would at all apply. I have, therefore, come to the conclusion that there are no regulations which affect this matter under the *Indian Act*, at least in so far as the Province of Ontario is concerned. If, therefore, the accused had been charged with operating the seine in question without a licence obtained from the Ontario authorities he could have been apprehended and charged under these regulations. That course had apparently been followed in the case of *Sero* v. *Gault* (1921), 64 D.L.R. 327, 50 O.L.R. 27. That case contains general statements on this aspect of the law by a very eminent Judge, which would tend to show that an Indian on a Reservation is subject to the general law of the Province, but even there the Judge qualifies it, and I think rightly so, to be effective by reason of the federal requirements passed under the *Fisheries Act*. There is no question in my mind that under this case and under the *Fisheries Act* and its Regulations the operation of a seine is prohibited to Indians as well as white people even though that operation be on a Reservation.

Here the man is not charged with operating a seine, but he is charged rather with the possession of a seine. There is nothing under the Regulations passed pursuant to the federal Act which prohibits the possession of that type of net. Therefore, there is no assistance to be obtained from the federal legislative authority to support the charge here. It must therefore stand or fall solely as a charge under an Ontario statute against an Indian possessing a seine on a Reservation.

I have read a great many cases on this matter and for a time I had come to the conclusion that most of the cases cited to me were applicable only by inference, because it seemed to me that in almost every instance the Court was able to by-pass

the vital issue of an Indian breaking a provincial statute on a Reservation. In almost every instance the Court was prepared to say that because the man in question was not an Indian but on a Reservation he was liable; or he was an Indian off a Reservation and therefore liable.

However, I have found one decision which is directly in point. It is the decision of Chief Justice Hunter of British Columbia and is to be found in the case of *R.* v. *Jim* (1915), 26 Can. C.C. 236, 22 B.C.R. 106. He holds in that case that an Indian is not liable to conviction under a provincial game law for the killing of a buck out of season on the Reservation. I have therefore come to the conclusion, on the authority of that case and by inference from many Ontario cases, that the accused here is not guilty by reason of the fact that the offence, if any, would be a breach by an Indian upon an Indian Reservation of a provincial Act and that the Parliament of Canada is the only competent legislative authority which can regulate the situation which is involved here.

I, therefore, must find the accused not guilty and set aside the conviction.

Appeal allowed.

MALLET v. THE KING

Quebec Court of King's Bench, Marchand, Bissonnette, McDougall, Casey and Bertrand JJ. June 22, 1951.

Sentence I A—Assault IV—Appeal VIII B—Conviction of assault causing bodily harm—Accused ordered to pay costs and $200 damages to victim for loss of earnings—Whether award of damages justified by Cr. Code, s. 1044 or s. 1048—Appeal from conviction—Whether award of compensation reviewable—

Accused was convicted after summary trial under *Cr. Code*, Part XVI, of assault causing bodily harm to one S, contrary to *Cr. Code*, s. 295, and the trial Judge ordered accused to pay Court costs and "the sum of $200 damages to the plaintiff or, in default, three months in prison ($200 damages for loss of time)". On appeal from conviction, *held*, unanimously, the conviction must be affirmed. *Held*, further, by a majority, the trial Judge erred in making an award of $200 to S to compensate him for loss through inability to work. *Cr. Code*, s. 1044 under which the trial Judge acted empowers the Court to give a moderate allowance for the victim's loss of time but this is meant to be in addition to, and not in substitution of the sentence provided by law for the offence charged. Moreover,

R. v. ISAAC

Nova Scotia Supreme Court, Appeal Division
Crown Side
MacKeigan, C.J.N.S., Coffin, Cooper and Macdonald, JJ.A.
November 19, 1975.

FISH AND GAME - TOPIC 884
INDIAN AND ESKIMO RIGHTS - HUNTING BY INDIANS ON RESERVES - VALIDITY OF PROVINCIAL REGULATORY LEGISLATION - AN INDIAN WAS CHARGED AND CONVICTED OF POSSESSION OF A RIFLE CONTRARY TO S. 150 OF THE NOVA SCOTIA LANDS AND FORESTS ACT - THE INDIAN HAD POSSESSION OF THE RIFLE ON THE CHAPEL ISLAND INDIAN RESERVE, CAPE BRETON, NOVA SCOTIA - THE NOVA SCOTIA COURT OF APPEAL STATED THAT S. 150 OF THE LANDS AND FORESTS ACT WAS A LAW REGULATING LAND USE - THE NOVA SCOTIA COURT OF APPEAL STATED THAT THE PROVINCE OF NOVA SCOTIA DID NOT HAVE THE LEGISLATIVE POWER TO REGULATE THE USE OF LAND ON INDIAN RESERVES - THE NOVA SCOTIA COURT OF APPEAL STATED THAT HUNTING WAS A USE OF LAND AND ITS RESOURCES - SEE PARAGRAPHS 20 AND 141 - THE NOVA SCOTIA COURT OF APPEAL DECLARED THAT S. 150 OF THE LANDS AND FORESTS ACT DID NOT APPLY TO AN INDIAN WHILE PRESENT ON AN INDIAN RESERVE AND QUASHED THE CONVICTION OF THE INDIAN.

CONSTITUTIONAL LAW - TOPIC 6354
ENUMERATION IN S. 91 OF THE BRITISH NORTH AMERICA ACT, 1867 - INDIANS AND LANDS RESERVED FOR INDIANS - USE OF LAND IN RESERVES - THE NOVA SCOTIA COURT OF APPEAL STATED THAT A PROVINCE DOES NOT HAVE THE LEGISLATIVE POWER TO REGULATE THE USE OF LAND IN INDIAN RESERVES - SEE PARAGRAPH 14 - THE NOVA SCOTIA COURT OF APPEAL STATED THAT INDIANS HAVE A RIGHT TO USE RESERVE LAND AND ITS RESOURCES AND REFERRED TO SUCH A RIGHT AS A USUFRUCTUARY RIGHT - SEE PARAGRAPHS 18 AND 140.

This case arose out of a charge against an Indian of possession of a rifle contrary to s. 150 of the Nova Scotia Lands and Forests Act. The Indian had possession of the rifle on the Chapel Island Indian Reserve, Cape Breton, Nova Scotia. The trial court convicted the accused.

On appeal to the Nova Scotia Court of Appeal by way of stated case the appeal was allowed and the conviction of the accused was quashed. The Nova Scotia Court of Appeal stated that s. 150 of the Nova Scotia Lands and Forests Act did not apply to an Indian while present on an Indian reserve. The Nova Scotia Court of Appeal referred to s. 91(24) of the British North America Act, 1867, the Royal Proclamation respecting Indians 1763, and the historical

hunting and fishing rights of Indians on Indian reserves. The Nova Scotia Court of Appeal stated that hunting by Indians on Indian reserves was a use of land and its resources and that the Province of Nova Scotia did not have the legislative power to regulate the use of land on Indian reserves.

CASES JUDICIALLY NOTICED:

R. v. McPherson, [1971] 2 W.W.R. 640 (Man. C.A.), ref'd. to. [para. 9].
Daniels v. White and The Queen, [1968] S.C.R. 517, ref'd to. [para. 9].
Prince and Myron v. The Queen, [1964] S.C.R. 82, ref'd to. [para. 9].
Cardinal v. The Attorney General of Alberta, [1974] S.C.R. 695, folld. [para. 10] & ref'd to. [para. 93].
R. v. Jim (1915), 26 C.C.C. 736, ref'd to. [para. 11].
R. v. Rodgers (1923), 40 C.C.C. 51 (Man. C.A.), ref'd to. [para. 11].
Corporation of Surrey v. Peace Arch Enterprises Ltd. (1970), 74 W.W.R. 380 (B.C.C.A.), ref'd to. [para. 11].
R. v. Peters, 57 W.W.R. 727 (Y. Terr. C.A.), folld. [para. 15].
The Natural Parents v. The Superintendent of Child Welfare et al., 6 N.R. 491, folld. [para. 15 & 132].
R. v. Sikyea, [1964] S.C.R. 642, ref'd to. [para. 16].
R. v. George, [1966] 3 C.C.C. 137 (S.C.C.), ref'd to. [para. 16 & 104 & 106].
Daniels v. White, [1968] S.C.R. 517, ref'd to. [para. 16].
Madden v. Nelson and Fort Sheppard Ry. Co., [1899] A.C. 626, ref'd to. [para. 22].
Re Birth Registration No. 67-09-022272, [1974] 3 W.W.R. 363, ref'd to. [para. 33].
Calder et al. v. The Attorney-General of British Columbia, [1973] S.C.R. 313, ref'd to. [para. 40].
Johnson and Graham's Lessee v. McIntosh (1823), 8 Wheaton 543 (21 U.S.), ref'd to. [para. 41].
Worcester v. Georgia (1832), 6 Peters 515 (31 U.S.), ref'd to. [para. 41].
United States v. Santa Fe Pacific Ry. Co. (1941), 314 U.S. 339, ref'd to. [para. 44].
St. Catharines Milling and Lumber Company v. The Queen (1889), 14 App. Cas. 46 (P.C.), ref'd to. [para. 45].
R. v. Wesley, [1932] 4 D.L.R. 774 (Alta. C.A.), ref'd to. [para. 50].
R. v. White and Bob (1965), 50 D.L.R. (2d) 613, ref'd to. [para. 56] & folld. [para. 121 & 130].
R. v. Syliboy (1928), 50 C.C.C. 389 (N.S. Co. Ct.), ref'd to. [para. 64 & 129].

R. v. Simon (1958), 124 C.C.C. 110 (N.B.C.A.), ref'd to. [para. 65].
R. v. Francis (1969), 10 D.L.R. (3d) 189 (N.B.C.A.), ref'd to. [para. 65].
Cardinal v. Attorney-General of Alberta (1973), 40 D.L.R. (3d) 553: [1974] S.C.R., folld. [para. 118].
District of Surrey v. Peace Arch Enterprises Ltd. (1970), 74 W.W.R. 380 (B.C.C.A.), dist. [para. 122].
Spooner Oils Ltd. et al. v. Turner Valley Gas Conservation Board, [1933] 4 D.L.R. 545, [1933] S.C.R. 629, dist. [para. 123].
Deeks McBride Ltd. v. Vancouver Associated Contractors Ltd., [1954] 4 D.L.R. 844, dist. [para. 123].
Western Canada Hardware Co. Ltd. v. Farrelly Bros. Ltd., [1922] 3 W.W.R. 1017, 70 D.L.R. 480, dist. [para. 123].
R. v. Lady McMaster, [1926] Ex.C.R. 68, folld. [para. 130].
Calder v. Attorney General of B.C., [1973] S.C.R. 313, folld. [para. 130].
St. Catherine's Milling and Lumber Company v. The Queen (1888), 14 App. Cas. 46, folld. [para. 132].
Isaac et al. v. Davey et al. (1975), 5 O.R. (2d) 610, folld. [para. 142].
Corporation of Surrey v. Peace Arch Enterprises Ltd. (1970), 74 W.W.R. 380, ref'd to. [para. 100].
R. v. Jim (1915), 26 C.C.C. 236, ref'd to. [para. 104].

STATUTES JUDICIALLY NOTICED:
Lands and Forests Act, R.S.N.S. 1967, c. 163, s. 150 [para. 5].
British North America Act, 1867, s. 91(24) [para. 102].
Indian Act, R.S.C. 1970, c. I-6, s. 88 [para. 31].
Royal Proclamation Respecting Indians 1763, R.S.C. 1970, Appendices 123 to 129 [para. 130].

BRUCE E. WILDSMITH, for the appellant,
MARTIN E. HERSCHORN, for the respondent.

This appeal was heard by the Nova Scotia Court of Appeal on March 21, 1975. Judgment was delivered by the Nova Scotia Court of Appeal on November 19, 1975, and the following opinions were filed:

MacKEIGAN, C.J.N.S. - see paragraphs 1 to 87,
COFFIN, J.A. - see paragraphs 88 to 112,
COOPER, J.A. - see paragraphs 113 to 133,
MacDONALD, J.A. - see paragraphs 134 to 144.

PART I

1 MacKEIGAN, C.J.N.S.: A question not previously de-

termined by this Court or by the Supreme Court of Canada here falls to be decided. Does a provision of a Nova Scotia Act regulating the hunting of game apply to an Indian hunting on an Indian reserve? In my opinion we should answer "no" to that question.

2 The matter comes to us by stated case following the conviction of the appellant by His Honour Judge Leo McIntyre, Q.C., in Provincial Magistrate's Court at Port Hawkesbury on a charge that he unlawfully had in his possession a rifle upon a road at or near Barra Head, Nova Scotia, contrary to s. 150(1)(b) of the *Lands and Forests Act*, R.S.N.S. 1967, c. 163.

3 The parties agree that the appellant committed the act described in the charge, that the road passed through or by a resort of moose or deer (a fact which should have been alleged in the charge), that the road was within the bounds of the Barra Head or Chapel Island Indian Reserve, Richmond County, Cape Breton, and that the appellant was an Indian. The learned magistrate asked:

> Was I correct in holding that the provisions of the *Lands and Forests Act*, and in particular s. 150(1)(b) thereof, apply to an Indian while present upon a reserve as defined by the *Indian Act*, R.S.C. 1970, c. I-6?

4 The question asked is wider in scope than the charge and should be amended to read:

> Was I correct in holding that s. 150(1)(b) of the *Lands and Forests Act* applies to an Indian while present upon an Indian reserve?

5 Section 150(1)(b) is undoubtedly a hunting or game law. It appears in Part III of the Act, a part entitled "Game - Moose, Caribou and Deer". Subsections (1) and (2) of s. 150 (as amended by Statutes of 1969, c. 55, s. 3) read:

> (1) Except as provided in this Section, no person shall take, carry or have in his possession any shot gun cartridges loaded with ball or with shot larger than AAA or any rifle,
>
> (a) in or upon any forest, wood or other resort of moose or deer; or
>
> (b) upon any road passing through or by any such

forest, wood or other resort; or

(c) in any tent or camp or other shelter (except his usual and ordinary permanent place of abode) in any forest, wood or other resort.

(2) Any person may hunt with a shotgun using cartridges loaded with ball or with one rifle during the big game season for which he holds a valid big game license.

6 Should the Nova Scotia Act be treated as if it contained an unwritten clause exempting Indians hunting on Indian reserves? The Act on its face applies to all persons and all places in Nova Scotia and is manifestly within the province's legislative power under s. 92 of the *British North America Act, 1867*. If such an exemption is to be implied, it must come from Parliament's exclusive authority over "all Matters' coming within the class of subject described in s. 91(24) as "Indians, and Lands reserved for the Indians". Putting the question slightly differently - does the federal exclusivity of power over Indians and their lands exclude this provincial game law from applying to an Indian reserve?

7 If, as I shall suggest, the game law is a law relating to the use of land and is so excluded by the federal exclusivity respecting reserve land, I must then consider whether s. 88 of the *Indian Act* strengthens the provincial position, or whether it is merely declaratory of the application of provincial laws to Indians, as distinct from their non-application to reserve land and its use. Section 88 decrees, with significant exceptions, that "all laws of general application from time to time in force in any province are applicable to and in respect of Indians".

8 The issue was settled for Manitoba, Saskatchewan and Alberta by constitutional amendment when natural resources were transferred to those provinces in 1930. Almost identical agreements between Canada and the three provinces were made part of the constitution by the *British North America Act, 1930* (which, with the agreements, appears in R.S.C. 1970, Appendix No. 25, pp. 365 ff.). Section 12 of the Alberta and Saskatchewan Agreements (s. 13 of the Manitoba Agreement) provides:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Pro-

vince from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

9 The scope of the hunting rights thus confirmed to Indians by the Agreements was defined in cases such as:

Regina v. McPherson, [1971] 2 W.W.R. 640 (Man. C.A.); *Daniels v. White and the Queen*, [1968] S.C.R. 517; *Prince and Myron v. The Queen*, [1964] S.C.R. 82.

10 Recently in *Cardinal v. The Attorney General of Alberta*, [1974] S.C.R. 695, a majority of the Supreme Court of Canada, per Martland, J., held that the Agreement applied game legislation to Indian reserves, subject only to the exception as to hunting and fishing for food. Mr. Justice Martland based his opinion squarely on his interpretation of the Agreement, as did Mr. Justice Laskin (as he then was) who, speaking for Hall and Spence, JJ., and himself, strongly dissented. Both judges, however, by dicta expressed definite views about how, apart from the 1930 Agreements, s. 91(24) of the *British North America Act, 1867*, should be interpreted and applied. Mr. Justice Martland at pp. 702-3 said:

> ... Section 91(24) of the *British North America Act, 1867*, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over land reserved for the Indians. Section 92 gave to each Province, in such Province, exclusive legislative power over the subjects therein defined. It is well established, as illustrated in *Union Colliery Co. of B.C. v. Bryden*, [1899] A.C. 580, that a Province cannot legislate in relation to a subject-matter exclusively assigned to the federal Parliament by s. 91. But it is also well established that provincial legislation enacted under a heading of s. 92 does not necessarily become invalid because it affects something which is subject to federal legislation.
>
> A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act, 1867*, was to create enclaves within a Province within the

> boundaries of which provincial legislation could have no application. In my opinion, the test as to the application of provincial legislation within a reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian reserves, but if provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian reserves, even though Indians or Indian reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.

11 He discussed, apparently with approval, cases in which the 1930 Agreements did not apply, including three involving use of reserve land, of which two are themselves strong authorities holding provincial game laws inapplicable to Indians on a reserve. These three are:

> *R. v. Jim* (1915), 26 C.C.C. 236, where Hunter, C.J. B.C., held a charge of hunting deer without a provincial licence would not lie against an Indian hunting on an Indian reserve.
>
> *R. v. Rodgers* (1923), 40 C.C.C. 51 (Man. C.A.), which was a decision "to the like effect, involving the trapping of mink on an Indian Reserve without a Provincial licence" - Martland, J., p. 704.
>
> *Corporation of Surrey v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.), which held that non-Indians building on reserve lands (under lease) were not subject to provincial or municipal zoning and health laws.

12 Turning to the main issue, he held that s. 12 of the Alberta Agreement applied to Indians on a reserve. At p. 708 he said that:

> Canada ... in order to achieve the purpose of the section, agreed to the imposition of Provincial con-

trols over hunting and fishing, *which, previously, the Province might not have had power to impose.* (italics added)

13 Mr. Justice Laskin referred in his dissenting opinion to the applicability to Indians of the *Wildlife Act* of Alberta and said (pp. 714-715):

> In its generality, it extends to them but, as in other situations where generally expressed provincial legislation must be construed to meet the limitations of provincial authority *because of exclusive federal competence or because of precluding or supervening federal legislation*, the inquiry is whether the *ex facie* scope of the Act must be restricted in recognition of federal power, whether unexercised or exercised.
>
> I propose to deal first with the effect of s. 91(24) upon the reach of provincial game laws. Apart entirely from the exclusive power vested in the Parliament of Canada to legislate in relation to Indians, its exclusive power in relation also to Indian Reserves puts such tracts of *land*, albeit they are physically in a Province, *beyond provincial competence to regulate their use or to control resources thereon.* (italics added)

14 Mr. Justice Martland declared (p. 703), supra) that valid provincial legislation "is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it", *if* the particular legislation "is not construed as being legislation in relation to those classes of subjects", viz., "Indians or Lands reserved for the Indians". I take it that, conversely, if a particular provincial law, in this case a game law, is construed as being legislation relating to the use of Indian reserve land, then such legislation does not apply to Indian reserves, or, as Mr. Justice Martland said (p. 705) in commenting on *Peace Arch, supra:*

> Once it was determined that the lands remained lands reserved for the Indians, Provincial legislation relating to their use was not applicable.

This parallels the dicta of Mr. Justice Laskin just quoted and emphasizes that provincial legislation cannot validly regulate the reserves as land, cannot regulate the use of that land and cannot control the resources on that land. Accordingly, if, as I contend, a provincial game law is

clearly a land use law, it cannot apply on a reserve.

15 Two principles appear: (1) a provincial law may be precluded from operation if it is supervened by a federal law, or a valid pre-1867 law, dealing with Indians as to the same subject-matter, either on a reserve (e.g., motor vehicle offences covered by the *Indian Reserve Traffic Regulations* - *Regina v. Johns*, 133 C.C.C. 43 (Sask. C. A.)), or off a reserve (e.g., Yukon liquor law not applicable to Indians because of *Indian Act* provisions re intoxicants - *Regina v. Peters*, 57 W.W.R. 727 (Y. Terr. C.A.)); (2) a provincial law is *excluded* from operation if it deals with an Indian *qua* Indian, or with Indian reserve land *qua* land, or perhaps, more accurately, if it is "legislation in relation to Indian status or Indian land rights" (Ritchie, J., in *The Natural Parents v. The Superintendent of Child Welfare et al.*, October 1, 1975, unreported). [now reported 6 N.R. 491].

16 I can find no supervening law made by or under an Act of Parliament since 1867 that directly affects hunting on a Nova Scotia reserve, except the *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12 - *Regina v. Sikyea*, [1964] S.C.R. 642; *Regina v. George*, [1966] 3 C.C.C. 137 (S.C.C.); and *Daniels v. White*, [1968] S.C.R. 517; which cases have been mercifully modified in their effect on Indians and Inuit by the *Migratory Bird Regulations* of 1971, P.C. 1971-1465, July 21, 1971, as amended by S.O. & R. 75-436, July 22, 1975. Section 73(1) and s. 81 of the *Indian Act* authorize regulations by Order in Council or band bylaws to be made for the protection and preservation of fish and game on reserves. No such regulations have been passed, and, at least in Nova Scotia, no band bylaws, although regulations and bylaws have been enacted on many other subjects, e.g., traffic, timber, oil and gas, sanitation, dogs running at large, etc. The only Chapel Island Reserve band bylaws enacted deal with oyster farming (October 30, 1973), S.O. & R. 73-696).

17 Support for the proposition that game laws on reserves are laws relating to the use of Indian land within the exclusive federal domain is found in the delegation of regulatory power effected by Sections 73(1) and 81, referred to above. The legislative history confirms that Parliament has always considered regulation of hunting on reserves as its prerogative. The *Indian Act* as it was before the 1951 revision delegated no regulatory power as to hunting, except that the Superintendent General of Indian Affairs was given "the control and management" of all Indian lands (R.S.C. 1927, c. 98, s. 4(1)). It did, how-

ever, restrict hunting on a reserve by anyone other than a band member (e.g., Sections 34-36, 115) and contemplated a band leasing to outsiders "shooting privileges" on reserves (Sections 117 and 156). By s. 69 of the Superintendent General could declare game laws applicable in whole or in part to Indians - but only within any of the Prairie Provinces, the Northwest Territories or the Yukon.

18 In Part II of these reasons I conclude that Indians on Nova Scotia reserves have a usufructuary right in the reserve land, a legal right to use that land and its resources, including, of course, the right to hunt on that land. In my opinion that right arises in our customary or common law, was confirmed by the *Royal Proclamation* of 1763 and other authoritative declarations, was preserved in respect of reserve lands when they were originally set apart for the Indians, and is implicit in the *Indian Act* which continues reserves "for the use and benefit of the respective bands" (s. 18(1)). That legal right is possibly a supervening law which in itself precludes the application of provincial game laws in a reserve, but it is, I think, more properly considered as an "Indian land right" which is inextricably part of the land to which the provincial game law cannot extend.

19 That right, sometimes called "Indian title" is an interest in land akin to a *profit a prendre*. It arose long before 1867 but has not been extinguished as to reserve land and, being still an incident of the reserve land, can be controlled or regulated only by the federal government. This stresses legalistically the perhaps self-evident proposition that hunting by an Indian is traditionally so much a part of his use of his land and its resources as to be for him, peculiarly and specially, integral to that land.

20 We need not, however, rely on aboriginal right theories or "Indian title" concepts to establish that hunting is a use of land and its resources. To shoot a rabbit, deer or grouse on land especially Indian reserve land, is as much a use of that land as to cut a tree on that land, or to mine minerals, extract oil from the ground, or farm that land, or, as in the *Peace Arch* case, supra, erect a building on that land - all of which are activities unquestionably exclusively for the federal government to regulate.

21 To hold otherwise would require us to disregard the strong authority of *R. v. Jim, supra, R. v. Rodgers, supra,* and the *Peace Arch* case.

22 *Jim* and *Rodgers* directly held that provincial game legislation does not apply to an Indian on a reserve. In the former, Hunter, C.J.B.C., based his decision on the ground, as Mr. Justice Martland points out in *Cardinal* at p. 704, that the *Indian Act:*

> ... had provided that all Indian lands should be managed as the Governor-in-Council directs and that management included the regulation of hunting on a Reserve.

He found himself unable to distinguish *Madden v. Nelson and Fort Sheppard Ry. Co.*, [1899] A.C. 626, which held that provincial law as to fencing did not apply to a railway because of the federal exclusive authority over railways.

23 In *Rodgers* Perdue, C.J.M., in the Manitoba Court of Appeal, said (40 C.C.C. 51 at pp. 53-54):

> By sec. 91(24) of the *B.N.A. Act*, the Parliament of Canada is given exclusive legislative authority over 'Indians, and lands reserved for the Indians.' It would, therefore, seem clear that no statutory provision of regulation made by the Province in regard to the hunting of game or furbearing animals on an Indian reserve would apply to treaty Indians residing on the reserve. ...
>
> I do not think that the Provincial Legislature has any power to pass laws interfering with the rights of treaty Indians to hunt, fish and trap on their own reserves. ...
>
> The right of an Indian to hunt or fish on his reserve without restraint or interference is often essential to the well-being of himself and of those dependent upon him. Any legislation, therefore, affecting this right would naturally come under sec. 91(24) of the B.N.A. Act. From an expression used by Lord Watson in *St. Catharines Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, I would take it that this was the view adopted by that eminent authority. He said at p. 60:-
>
> > 'The fact that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber

which has now passed to Ontario.'

24 In the *Peace Arch* case the British Columbia Court of Appeal held that zoning and health regulations did not apply to non-Indians erecting a building on reserve land. MacLean, J.A., for the British Columbia Court, said ((1970) 74 W.W.R. 380 at p. 383):

> In my view the zoning regulations passed by the municipality, and the regulations passed under the *Health Act*, are directed to the use of the land. It follows, I think, that if these lands are 'lands reserved for the Indians' within the meaning of that expression as found in s. 91(24) of the *B.N.A. Act, 1867*, that provincial or municipal legislation purporting to regulate the use of these 'lands reserved for the Indians' is an unwarranted invasion of the exclusive legislative jurisdiction of Parliament to legislate with respect to 'lands reserved for the Indians'.

25 I am considerably persuaded by the analogy of other exclusively federal activities or enterprises which provincial laws of general application similarly cannot touch. As Mr. Justice Laskin said in *Cardinal* at p. 717:

> I do not wish to overdraw analogies. It would strike me as quite strange, however, that when provincial competence is denied in relation to land held by the Crown in right of Canada (see *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 643), or in relation to land upon which a federal service is operated (see *Reference re Saskatchewan Minimum Wage Act*, [1948] S.C.R. 248 at 253), or in relation to land integral to the operation of a private enterprise that is within exclusive federal competence (see *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207), there should be any doubt about the want of provincial competence in relation to lands that are within s. 91(24).

26 In *Natural Parents*, supra, nine members of the Supreme Court of Canada unanimously agreed that the *Adoption Act* of British Columbia applied to authorize adoption of an Indian child by non-Indian adopting parents. The majority, represented in separate opinions by Martland, J., Ritchie, J., and Beetz, J., held that the provincial Act applied to Indians, that it was not legislation pointed at Indians *qua* Indians, and that it did not restrict Indian rights. Their comments on s. 88 of the *Indian Act*, which

I shall shortly discuss, did not affect their primary conclusion.

27 The minority, represented by Chief Justice Laskin, found that the *Adoption Act* encroached on a federal legislative area in affecting the status of the adopted child as an Indian but that the Act was preserved by s. 88, which applied it, as legislation affecting Indians, to all Indians.

28 Mr. Justice Martland, in finding that the *Adoption Act* did not restrict Indian rights and thus did not invade the federal areas, contrasted the Act with statutes which had "the effect of restricting an enterprise or activity within exclusive federal jurisdiction". In the latter category he placed the *Campbell-Bennett* and *Saskatchewan Minimum Wage* cases referred to by Chief Justice Laskin in the extract from *Cardinal* just quoted. He also cited two other similar cases, saying:

> The case of *Minimum Wage Commission v. The Bell Telephone Company of Canada*, [1966] S.C.R. 767, held that a company which had been declared to be a work for the general advantage of Canada was not subject to having its employer-employees relationships affected by a provincial minimum wage statute. ...
>
> *McKay v. Her Majesty the Queen*, [1965] S.C.R. 798, held that a municipal zoning regulation governing the erection of signs on residential properties could not preclude the erection of a sign to support a candidate in a federal election.

29 Mr. Justice Ritchie agreed with Mr. Justice Martland and specifically rejected Chief Justice Laskin's suggestions that the *Adoption Act* was *prima facie* invalid as invading the exclusive field of "Indians" or that it was preserved only by s. 88 incorporating it by reference into federal law. Mr. Justice Ritchie positively emphasized that:

> In my view, when the Parliament of Canada passed the *Indian Act* it was concerned with *the preservation of the special status of Indians and with their rights to Indian lands*, but it was made plain by s. 88 that Indians were to be governed by the laws of their province of residence except to the extent that such laws are inconsistent with the *Indian Act* or relate to any matter for which provision is made under the Act. (italics added)

He went on to answer negatively the key question as to

> ... whether s. 10 of the *Adoption Act* is *legislation in relation to Indians so as to affect Indian status or Indian land rights*.

30 The majority opinions in *Natural Parents* clearly distinguish between, on the one hand, provincial laws of general application to individuals which *prima facie* apply to everyone, including Indians, and which are *intra vires*, and, on the other hand, provincial laws which by their nature necessarily "affect Indian status or Indian land rights" (to use Mr. Justice Ritchie's phrase) and which the federal exclusivity of power *pro tanto* renders *ultra vires*.

31 The provincial game law in the present case necessarily affects Indian land rights and is thus excluded from applying to the appellant on the reserve. Does s. 88 of the *Indian Act* override that principle and subject the appellant to a law which without that section would not apply? Section 88 reads:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

32 Chief Justice Laskin in his dissent in *Cardinal* ([1974] S.C.R. at pp. 727-8) and again in *Natural Parents* expressed the view that s. 88 by reference incorporated provincial legislation into the *Indian Act* and thus applied to Indians provincial laws which without s. 88 would not apply.

33 The majority in *Natural Parents* specifically rejected the referential incorporation interpretation of s. 88 and held that s. 88 did not make applicable to Indians provincial legislation which without s. 88 would not have validly applied to them. Mr. Justice Martland stated:

> The section is a statement of the extent to which provincial laws apply to Indians.

He specifically approved, as did Mr. Justice Ritchie, the British Columbia Court of Appeal per Farris, C.J.B.C. (now

reported *sub nom. Re Birth Registration No. 67-09-022272*, [1974] 3 W.W.R. 363, at pp. 366-7), which had said:

> In my opinion, Sec. 88 does not have the effect of converting provincial legislation to federal legislation whenever it applies to Indians. Sec. 88 simply defines the obligation of obedience that Indians owe to provincial legislation. Parliament is neither delegating legislative power to the province nor adopting provincial legislation as its own by declaring in Sec. 88 what was true before Sec. 88 existed, namely, that Indians are not only citizens of Canada but also are citizens of the province in which they reside and are in general to be governed by provincial laws.

34 Mr. Justice Ritchie also approved the following from Chief Justice Farris' opinion at p. 364:

> It [s. 88] defines the extent to which laws of general application of a province are applicable to Indians.

Mr. Justice Ritchie's agreement that s. 88 is merely declaratory of the existing law is confirmed by his conclusion:

> ... I am of opinion that s. 88 of the *Indian Act* should be construed as meaning that the provincial laws of general application therein referred to apply of their own force to the Indians resident in the various Provinces.

35 This authoritative interpretation of s. 88, which I unhesitatingly adopt, does not make applicable the game law in the present case. Section 88 gave it no added vitality and no widened scope.

36 Section 88 merely declares that valid provincial laws of general application to residents of a province apply also to Indians in the province. It does not make applicable to Indian reserve land a provincial game law which would have the effect of regulating use of that land by Indians. It does not enlarge the constitutional scope of the provincial law which is limited by the federal exclusivity of power respecting such land.

37 The question asked by the learned magistrate in the stated case should be answered in the affirmative. I respectfully think he erred in holding that s. 150(1) of the

Lands and Forests Act applies to an Indian while present on a reserve. In my opinion the appeal should be allowed and the appellant's conviction quashed.

PART II

38 This Part is a historical review which assembles and summarizes data from many sources not readily available. It will confirm, perhaps unnecessarily, that an Indian has a special right to hunt on reserve lands.

39 The review begins with the original rights of Indians to the use of the land when the white man came, and then examines to what degree those rights have been modified, affirmed or extinguished in Nova Scotia.

40 *Calder et al. v. The Attorney-General of British Columbia*, [1973] S.C.R. 313, confirmed that such rights existed in law and that "Indian title" to land was a legal reality. The Nishga Indians of British Columbia sought a declaration "that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory ... has never been lawfully extinguished". The provincial Court of Appeal held (13 D.L.R. (3d) 64) that no Indian title could be recognized unless it had been incorporated into provincial law by executive or legislative authority, and that no such incorporation could be found. The Supreme Court of Canada, on equal division on this issue, dismissed the appeal, three of seven judges per Judson, J., finding that any Indian title that existed originally had been extinguished and three other judges per Hall, J., finding that title had existed but that it had not been extinguished.

41 Both Mr. Justice Judson and Mr. Justice Hall agreed that the "Indian title" or rights flowed from basic principles authoritatively expressed by Chief Justice Marshall of the United States Supreme Court in *Johnson and Graham's Lessee v. McIntosh* (1823), 8 Wheaton 543 (21 U.S.), and *Worcester v. Georgia* (1832), 6 Peters 515 (31 U.S.), and adopted by many other American, Canadian and English courts. Those rights were rights to use and occupy the land, rights which overlay the basic Crown title but which could be extinguished by the Crown.

42 Mr. Justice Hall at pp. 381-2 quoted at length from Chief Justice Marshall's opinion in the *Johnson* case, including the following at p. 574:

> ... They were admitted to be *the rightful occupants*

> *of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion* ... (italics added)

43 Mr. Justice Judson at p. 321 also quoted extensively from *Johnson*, including the following at p. 588:

> ... All our institutions recognize the absolute title of the crown, *subject only to the Indian right of occupancy:* and recognize the absolute title of the crown to extinguish that right. (italics added)

44 It will be noted that the Indian title or right could be extinguished by the sovereign power. Statements are found in some of the cases (notably in *Worcester v. Georgia* and see Hall, J., in *Calder* at p. 389) implying that the extinction of the right could only occur with the consent of the Indians, by purchase, treaty or otherwise. Bearing in mind the scant evidence in Nova Scotia, or indeed in New England, Quebec or New Brunswick, of any recorded transaction or explicit consent, I must prefer Mr. Justice Judson's view (p. 329) that extinction may occur by prerogative acts, e.g., by setting apart reserves and opening the rest of the land for homestead grants and settlement, however unfair that may sometimes have been. He quoted (p. 334) the United States Supreme Court in *United States v. Santa Fe Pacific Ry. Co.* (1941), 314 U.S. 339, at 347, as follows:

> As stated by Chief Justice Marshall in *Johnson v. McIntosh,* 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.

45 *Calder* adopted *St. Catharines Milling and Lumber Company v. The Queen* (1889), 14 App. Cas. 46 (P.C.), which was greatly influenced by the Marshall judgments which were discussed at length in the courts below (13 S.C.R. 577 (S.C.C.), 13 Ont. App. R. 148 (Ont. C.A.), and 10 Ont. R. 196 (Boyd, C.)). *St. Catharines* held that lands originally occupied by Indians became completely owned by the Provincial Crown, after the Indian right had been extinguished by an 1873 treaty between the tribe and the federal government. The Privy Council held that once the lands were by the surrender "disencumbered of the Indian title" (p. 59), they became again fully provincial Crown property, subject only to the federal government's "exclusive power

to regulate the Indians' privilege of hunting and fishing" (P. 60).

46 The Judicial Committee per Lord Watson at p. 54 held that "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign", and said:

> There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominion whenever that title was surrendered or otherwise extinguished.

And at p. 58 stated:

> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden.

47 In 1921 the Privy Council (per Duff, J., as he then was) applied the *St. Catharines* case to an Indian reserve which in 1882 had been surrendered by the Indians to the federal government. The title was held to be vested in the provincial Crown "freed from the burden" of the Indian interest, which was described as:

> ... a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.
>
> (*Attorney-General for Quebec v. Attorney-General for Canada*, [1921] A.C. 401 at p. 408 - the *Silver Chrome* case).

48 (The *St. Catharines* and *Silver Chrome* cases are doubtless the two Privy Council cases referred to in the Canada-Nova Scotia agreement of April 14, 1959, whereby the province transferred to Canada all its interest in "reserve lands", consisting of the existing Nova Scotia reserves, including the Chapel Island reserve. The agreement also confirmed any grants previously made by the federal government to any person of former reserve lands surrendered by the Indians since 1867. The agreement was ratified by Statutes of Canada, 1959, c. 50, and Statutes of Nova Scotia,

1959, c. 3.)

49 A "usufructuary right" to land is, of course, merely a right to use that land and its "fruit" or resources. It certainly must include the right to catch and use the fish and game and other products of the streams and forests of that land. For the primitive, nomadic Micmac of Nova Scotia in the 18th Century, no other use of land was important.

50 The original Indian rights as defined by Chief Justice Marshall were not modified by any treaty or ordinance during the French regime which lasted until 1713 in Acadia, and until 1758 in Cape Breton, and must be deemed to have been accepted by the British on their entry. Such acceptance is shown by the British *Royal Proclamation* of October 7, 1763, (R.S.C. 1970, Appendices, pp. 123-129), which has been perhaps a little extravagantly termed the "Indian Bill of Rights" (Gwynne, J., in *St. Catharines*, 13 S.C.R. at p. 652), or the "Charter of Indian Rights" (McGillivray, J.A., in *Rex v. Wesley*, [1932] 4 D.L.R. 774 (Alta. C.A.) at p. 784). It had, however, the legislative effect of a statute. Hall, J., in *Calder*, supra, at p. 394 said:

> This Proclamation was an Executive Order having the force and effect of an Act of Parliament ...

Maclean, J. (as he then was) in *The King v. Lady McMaster*, [1926] Ex. C.R. 68 at p. 72 said the Proclamation "has the force of a statute, and ... has never been repealed".

51 The Proclamation was clearly not the exclusive source of Indian rights (Judson, J., in *Calder* at p. 322) but rather was "declaratory of the aboriginal rights" (Hall, J., in *Calder* at p. 397).

52 I am of the opinion that the Proclamation in its broad declaration as to Indian rights applied to Nova Scotia including Cape Breton. Its recital (p. 127) acknowledged that in all colonies, including Nova Scotia, all land which had not been "ceded to or purchased by" the Crown was reserved to the Indians as *"their Hunting Grounds"*. Any trespass upon any lands thus reserved to the Indians was forbidden (p. 127).

53 A long provision (p. 128) prohibited any purchase of land by whites from Indians or any sale by Indians of their land except by a public assembly of Indians and then only to the Crown. It applied to "Lands reserved to the

said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement".

54 The "lands reserved" apparently included all lands in Nova Scotia which the Indians had not ceded or sold to the Crown. "Ceded" land presumably included lands then occupied with the assumed or forced acquiescence of the Indians, such as those at Halifax, Lunenburg, Liverpool and Yarmouth and the former Acadian lands taken over by New England "planters". Later the "lands reserved" as "Hunting Grounds" were, of course, gradually restricted by occupation by the white man under Crown grant which extinguished the Indian right on the land so granted. Indeed, the land where that right exists may have in time become restricted in Nova Scotia to the reserved lands which we now know as "Indian reserves".

55 I shall now review how the Indian land rights, confirmed by the Proclamation of 1763, were further confirmed, modified or extinguished in Nova Scotia between 1713 and 1867.

56 A basic distinction exists between treaty Indians and non-treaty Indians. In most of Ontario, the Prairies, the Northwest Territories, and eastern British Columbia, treaties were made with Indian tribes, in the west between 1871 and 1921, and earlier in Ontario, whereby the Indians formally ceded lands to the Crown, which in return set aside specific lands as "reserves" for the Indians. The Indians often retained a specific right to hunt and fish on the land they had ceded, so long as it remained unoccupied Crown land. (Examples of such treaties are Treaty No. 3, in the *St. Catharines* case, and Treaty No. 8, in *Regina v. White and Bob* (1964), 50 D.L.R. (2d) 613. See, generally, *"Native Rights in Canada"*, 2nd ed., by P. Cumming and N. Mickenberg, 1972, chapters 9 and 14.)

57 In the rest of Canada, including Nova Scotia, the treaties or arrangements were quite different. No Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves, although thorough archival research might well disclose record of informal agreements especially in the early 1800's when reserves were established by executive order.

58 Agreements with the Indians in the Maritimes were primarily treaties of peace, informal and sometimes oral. They were pledges of peace, often soon broken prior to

1758, and between 1775 and 1784 when many Indians in New Brunswick fought for the American rebels. They usually provided for exchange of prisoners. They often acknowledged gifts to the Indians and sometimes specifically assured hunting and fishing rights to the Indians.

59 The Micmacs of Nova Scotia, like related tribes in New Brunswick and Maine, were not highly developed socially and politically. The tribe consisted of many loose clans and nomadic groups, over which the so-called chiefs had little authority, and which had no clear territorial jurisdictions. They were a poor, disorganized race, decimated by disease and famine in 1746, and demoralized after the fall of Louisbourg in 1758. (As to the nature of the early Micmac society, see: *"The Native Peoples of Atlantic Canada"*, H.F. McGee, ed., 1974, Carleton Library, No. 72: *"The Micmac Indians of Eastern Canada"*, W.D. and R.S. Wallis, 1955: Reports of Joseph Howe, as Commissioner for Indian Affairs, 1843-4, Appendices to Journal, N.S. Legislative Assembly.)

60 Nova Scotia until 1784 included New Brunswick and much of Maine and from 1763 to 1784 included Prince Edward Island and Cape Breton Island. The latter was a separate colony from 1784 to 1824.

61 The earliest treaty was made in 1713 with Indians of the eastern part of the then Massachusetts Bay Colony, including tribes in most of what is now New Brunswick. The treaty (*Native Rights in Canada*, supra, pp. 296-8) promised peace and confirmed to the English rights of land in their settlements, "saving unto the said Indians their own Grounds, & free liberty for Hunting, Fishing, Fowling ..."

62 A treaty of December 15, 1725 (*Native Rights*, supra, pp. 300-306) purportedly covered all tribes of Nova Scotia, but specifically named only the Cape Sable Indians. It pledged peace and saved unto the Indians all lands "not by them convey'd or sold or possessed by" the English, "As also the privilege (sic) of fishing, hunting, and fowling as formerly".

63 Next is the treaty of November 22, 1752, made by Governor Hopson of Nova Scotia with representatives purportedly acting for all Micmacs on the eastern coast of Nova Scotia, and in the Shubenacadie area. It was agreed "the said Tribe of Indians shall ... have free liberty of hunting and Fishing as usual". (*Native Rights*, supra, pp. 307-308).

64 The 1752 treaty was held in *Rex v. Syliboy* (1928), 50 C.C.C. 389 (N.S. Co. Ct.), not to apply to Cape Breton or to protect a Cape Breton Micmac from conviction for having muskrat skins in his possession contrary to provincial law (apparently not on a reserve); aboriginal rights were not mentioned and the 1763 Proclamation was, wrongly in my opinion, held not applicable to Cape Breton.

65 Both the 1725 and 1752 treaties were found in *Regina v. Simon* (1958), 124 C.C.C. 110 (N.B.C.A.), and *Regina v. Francis* (1969), 10 D.L.R. (3d) 189 (N.B.C.A.), not to apply to Micmac Indians from the parts of New Brunswick involved. The treaties were unsuccessfully invoked to avoid application of regulations under the federal *Fisheries Act*. The courts properly held that valid federal law may override any Indian "rights".

66 Many other "treaties" of peace were made with groups of Nova Scotia Micmacs of which no copies have been produced. Beamish Murdoch, Q.C., in his *History of Nova Scotia*, 1866, Vol. 2, refers to many, including April 1753 for LeHave (p. 219); November 1753 for Cape Sable (p. 225); February 1755 for the Amherst area (p. 257); February 1760 for LaHave, Shubenacadie and Musquodoboit (p. 385); October 15, 1761, for Pictou and Merigomish (p. 407); November 9, 1761, for LaHave (p. 407); and August 1763 again for LaHave (p. 431).

67 Murdoch refers also to treaties during the American Revolution, when Michael Francklyn reported in June 1779 (p. 599) that he had succeeded in re-establishing peace with "all the tribes who inhabit this province". This probably referred mainly to New Brunswick Indians who had been supporting the American rebels (p. 595). Francklyn, who was the Nova Scotia deputy of Sir William Johnson, who was then Indian Commissioner for all the colonies north of Virginia, worked assiduously to maintain peace, meeting with and writing many groups of Indians.

68 In the meantime, important "Royal Instructions" were issued on December 9, 1761, to the Governor of Nova Scotia. I assume they were in the form of the draft instructions printed in *Native Rights in Canada*, supra, pp. 285-6, and there erroneously called a Proclamation, but I note Lieutenant-Governor Belcher in his 1762 report describes them (p. 286) as dealing with encroachments upon the Indians, "to the interruption of their hunting, Fowling and Fishing", a subject not specifically mentioned in the draft.

69 The draft instruction anticipated the 1763 Proclama-

tion in directing the Governor to protect the Indians "in their just Rights and Possessions", to prevent persons buying lands from the Indians, and to require trespassers to vacate any land "reserved to or claimed by the said Indians".

70 Belcher on May 4, 1762, issued a proclamation (*Idem*, pp. 287-8). He recited the Indian claim of land along the relatively unsettled eastern coast "for the more special purpose of hunting, fowling and fishing". He enjoined all persons to avoid molestation of the Indians, and to vacate any lands possessed "to the prejudice of the said Indians in their Claims".

71 Belcher in a report of July 2, 1762 (*Idem*, pp. 286-7) explained why he had implied that the coastal claim of the Indians was the only one about which anyone need be concerned. He said the only complaint received from the Indians had been respecting interference with fishing along the coast. He said:

> This claim was therefore inserted in the Proclamation, that all persons might be notified of the Reasonableness of such a permission, whilst the Indians themselves should continue in Peace with Us, and that this Claim should at least be entertained by the Government, till his Majesty's pleasure should be signified. After the Proclamation was issued no Claims for any other purposes were made. If the Proclamation had been issued at large, the Indians, might have been incited by the disaffected Acadians and others, to have made extravagant and unwarrantable demands, to the disquiet and perplexity of the New Settlements in the Province. Your Lordships will permit me humbly to remark that no other Claim can be made by the Indians in this Province, either by Treaties or long possession (the Rule, by which the determination of their Claims is to be made, by Virtue of this His Majesty's Instructions) since the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht.

72 Belcher, of course, was right as to basic title to the land having been received by Britain from France, but erred in not recognizing the "burden of Indian rights" overlying that title. Neither the French nor British had extinguished the Indian rights in Nova Scotia. Belcher, although not recognizing that Indians had a general right to use land not occupied by settlement, did recognize the

"reasonableness" of the Indian claim to hunt and fish freely, at least in most of the province, and recognized that Indians justly complained about "interruptions in their hunting grounds" by Acadians.

73 I have been unable to find any record of any treaty, agreement or arrangement after 1780 extinguishing, modifying or confirming the Indian right to hunt and fish, or any other record of any cession or release of rights or lands by the Indians.

74 The history of the next eighty-seven years discloses little concern for the Indians. The incoming settlers pushed them back to poorer land in the interior of the province. The government gradually herded them into reserves and made sporadic and unsuccessful attempts to convert them into an agricultural people.

75 In 1773 the Executive Council had issued a proclamation forbidding land negotiations with Indians and stating that tracts of land would be set aside for their use (*Indians of Quebec and the Maritime Provinces; an Historical Review*, Department of Indian Affairs, Ottawa, 1971, p. 12). A two mile square reserve was established at Shubenacadie in 1779 (*Idem*). The Crown in 1786 granted 500 acres to Indians in St. Margaret's Bay ("*Indian Affairs in Nova Scotia*, 1760-1834," by Elizabeth A. Hutton, in *The Native Peoples of Atlantic Canada*, supra, p. 76). (See also: *The Canadian Indian - A History Since 1500* by E. Palmer Patterson, 1972, pp. 62-65.)

76 During 1819 and 1820 eight additional reserves of 1,000 acres each were established in mainland Nova Scotia. They were placed in trust for the Indians "to whom they are to be hereafter considered as exclusively belonging" (*Idem*, p. 78). The separate colony of Cape Breton had by 1824, when it rejoined Nova Scotia, similarly set aside six Indian reserves, totalling over 12,000 acres.

77 The Indian problem was first given statutory attention by c. 16 of the Statutes of 1842, which provided for a Commissioner for Indian Affairs, who was to survey the reserves, and "preserve them for the use of the Indians". He was "to put himself in communication with the Chiefs of the different tribes of the Micmac Race throughout the Province ... and to invite them to co-operate in the permanent settlement and instruction of their people".

78 The Indian Commissioner for the first two years was the Honourable Joseph Howe. His first report (Assembly

Journal, 1843, Appendix No. 1) spoke eloquently of the neglected condition of the Micmacs. He found not more than 1,300, of whom 500 lived in Cape Breton, a drastic decrease since 1798. He inspected most reserves and found the land "sterile and comparatively valueless". In this and his 1844 report (Assembly Journal, 1844, Appendix No. 50) he gave many instances of extreme poverty and of reserve land being taken by white trespassers.

79 A few years later Commissioner Crawley complained in his 1849 report about Scots settlers trespassing on the reserves at Margaree and Whycocomagh (M.G. 15, Vol. 4, No. 70):

> Under the present circumstances no adequate protection can be obtained for the Indian property. It would be in vain to seek a verdict from any jury in this Island against the trespassers on the reserves: nor perhaps would a member of the Bar be found willingly and effectually to advocate the cause of the Indians, inasmuch as he would thereby injure his own prospects, by damaging his own popularity.

80 Apparently little improvement was effected before 1867. Howe himself in 1873 condemned policies in the Maritimes as compared to those in Ontario and Quebec, where the "crowning glory" was the treatment of Indians. (Sess. Papers, 1873, Vol. 6, No. 5, Paper No. 23, quoted by Boyd, C., in the *St. Catharines Milling* case, 10 Ont. Rep. at p. 216) (See: *The Canadian Indian - A History Since 1500*, supra, pp. 115-119.)

81 Pre-Confederation fish and game laws occasionally recognized that Indians were in a special position. The first game act, providing for closed seasons for partridge and black duck, 1794, c. 4, exempted "any Indian or other poor settler who shall kill any partridge or black duck ... for his own use". A like exemption respecting snipe and woodcock appeared in 1816, c. 5, and, as to trout, in 1824, c. 36. An Act of 1843, c. 19, prohibiting the use of moose snares, did not specifically exempt Indians, but seemed to presume they were excluded. It noted that the use of snares would "lead to the destruction of all the Moose ... thereby depriving the Indians and poor Settlers of one of their means of subsistence".

82 The exemptions as to partridge, duck, snipe and woodcock were continued in the Revised Statutes of 1851 (c. 92) and 1859 (c. 92), but were dropped by the commissioners compiling the Revised Statutes of 1864. Similarly,

no exemptions as to Indians appeared in the consolidations respecting river fishing which appeared in the Revised Statutes of 1851 and subsequently.

83 The pre-Confederation statutory record as to the application of fish and game laws to the Indians is thus spotty and ambiguous and we do not know how they were in fact administered. The legislature at no time, however, either revoked any Indian exemption or dealt specifically with the use of reserve land.

84 I would here apply the comments of Norris, J.A., in *Regina v. White and Bob*, who, referring to colonial game laws in British Columbia, said ((1964) 50 D.L.R. (2d) at p. 662):

> In none of these statutes was there any prohibition applying specifically to Indians. It would have required specific legislation to extinguish the aboriginal rights, and it is doubtful whether Colonial legislation, even of a specific kind, could extinguish these rights in view of the fact that such rights had been confirmed by the *Royal Proclamation of 1763*.

85 This Part has established that Indians in Nova Scotia had a usufructuary right to the use of land as their hunting grounds. That right was not extinguished for reserve land before Confederation by any treaty, or by Crown grant to others or by occupation by the white man. It has not been extinguished or modified since 1867 by or under any federal Act. (We are not concerned whether the right may still exist for any land other than reserves. It would appear that in Nova Scotia, apart from reserves, only a few thousand widely scattered acres have never been granted, placed under mining or timber licences or leases, set aside as game preserves or parks, or occupied prescriptively.)

86 The review has confirmed that Indians have a special relationship with the lands they occupy, not merely a quaint tradition, but rather a right recognized in law. Hunting by Indians is and always has been a use of land legally integral to the land itself. A provincial law purporting to regulate that use on a reserve must be therefore *pro tanto* constitutionally ineffective.

PART III

87 In summary, I repeat that we should inform the learn-

ed magistrate that he erred in applying s. 150(1)(b) of the *Lands and Forests Act* to an Indian on a reserve. The appeal should accordingly be allowed and the appellant's conviction quashed.

88 COFFIN, J.A.: The question for the opinion of the court is:

> Was I correct in holding that the provisions of the *Lands and Forests Act*, R.S.N.S. 1967, c. 163, as amended, and in particular section 150, subsection (1)(b) thereof, apply to an Indian while present upon a reserve as defined by the *Indian Act*, R.S.C. 1970, c. I-6, as amended?

89 The Chief Justice in his reasons for judgment has suggested that we should amend the question to read:

> Was I correct in holding that s. 150(1)(b) of the *Lands and Forests Act* applies to an Indian while present upon an Indian reserve?

90 It was submitted in the argument before the trial judge, referring to s. 88 of the *Indian Act*, that there one has in mind the Federal Government dealing with Indians and not lands reserved for Indians.

91 The respondent took the position that in the *George* case and the *Cardinal* case the majority of the Supreme Court of Canada held that the meaning of s. 88 was that provincial laws of general application apply to Indians and to lands reserved to Indians. The respondent acknowledged that had there been by-laws and regulations, they would have taken precedence under the federal law, but there being none, the decisions under s. 88 apply.

92 The trial judge found the appellant guilty in a very brief decision, in which he said:

> ... I am bound by the most recent, 1974 case, of Charlie Cardinal and the Attorney General of Alberta, and Mr. Justice Martland in writing the majority decision there makes no bones about it - as a matter of fact he uses the simple illustration of saying, 'to hold otherwise would be to say that by the creation of Reservations, the Government split Canada up into little enclaves where Provincial Laws did not apply.'

93 In *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695, as the Chief Justice has indicated in his reasons, it was held that an agreement between the Government of Canada and the Government of Alberta was effective to make applicable provisions of the *Wildlife Act* of that Province to Indians including those on a reserve.

94 Section 12 of that agreement is as follows:

> 12. In order to secure to the Indians of the Province, the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

95 Martland, J. at p. 699 pointed out that:

> Sections 10 and 12 of the Agreement were, therefore, given the force of law, notwithstanding anything in the *British North America Act, 1867*.

96 He expressed the opinion at p. 703 that provincial legislation enacted under a heading of s. 92 does not necessarily become invalid because it affects something which is subject to federal legislation.

97 He disagreed with the philosophy that s. 91(24) of the British North America created "enclaves within a Province within the boundaries of which Provincial legislation could have no application." It was his view that if Provincial legislation within s. 92 is not construed as being in relation to a subject matter assigned exclusively to Parliament under s. 91, it is applicable anywhere in the Province. It matters not under these circumstances that Indians or Indian Reserves might also be affected.

98 The Chief Justice has quoted Martland, J. on this point.

99 The position of Martland, J. in *Cardinal* was that s. 91(24) enumerates classes of subjects for exclusive Federal power of legislation, but did not "purport to define areas within a Province within which the power of a Pro-

vince to enact legislation, otherwise within its powers, is to be excluded."

100 He distinguished *Corporation of Surrey v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 because here were lands in an Indian Reserve and the question was whether they were subject to municipal by-laws and to regulations under the *Provincial Health Act*. This was clearly legislation relating to the use of land reserved for Indians.

101 The basic issue with which we are faced in this appeal is whether s. 150(1)(b) of the *Lands and Forest Act* is effective to support a conviction against an Indian while present upon a Reserve, having in mind particularly s. 91(24) of the *British North America Act*.

102 I quote the sections:

> 150(1) Except as provided in this Section, no person shall take, carry or have in his possession any shot gun cartridges loaded with ball or with shot larger than AAA or any rifle,
>
> (a) in or upon any forest, wood or other resort of moose or deer; or
>
> (b) upon any road passing through or by any such forest, wood or other resort; ...
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —
>
> . . .
>
> 24. Indians, and Lands reserved for Indians.

103 It seems clear that the section of the *Lands and Forests Act* is not legislation relating to Indians per se, the question is whether or not it is legislation relating to lands reserved for Indians within the reasoning of Martland, J. in *Cardinal*.

104 I can follow the argument that there is a distinction between the *Peace Arch* case and the one before us, but I am not satisfied that we can dismiss the reasoning in *Rex v. Jim* (1915), 26 C.C.C. 236, and *Regina v. George*, [1966] 3 C.C.C. 137.

105 In *Rex v. Jim*, Hunter, C.J.B.C. stated briefly that the defendant who was charged under the *Game Protection Act* was an Indian who killed a two-year old buck on a Reserve upon which he was entitled to live, and was using the meat for his household use. At p. 237 he said that by s. 91(24), "Indians and lands reserved for the Indians are reserved for the exclusive jurisdiction of the Dominion Parliament." And at p. 238 he concluded that:

> ... the proper course for the local authorities is not to attempt to pass legislation affecting the hunting by Indians on their reserves or to apply general legislation regarding game to such Indians, but if necessary to apply to the proper law-making authority and make any representations that they may see fit.

106 *Regina v. George*, [1966] 3 C.C.C. 137, dealt with s. 87 of the *Indian Act* making all laws of general application in force in any province subject to the terms of any treaty and any Act of Parliament.

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

107 Martland, J. at p. 150 said that he understood the object and intent of the section was to make Indians who were under the exclusive legislative jurisdiction of Parliament of Canada, by virtue of s. 91(24) subject to provincial laws of general application.

108 In his opinion the incorporation of the restrictive words in the section made it clear that when the section referred to "laws of general application from time to time in force in any province", the statute law of Canada was not included in that expression. He said at p. 151:

> In my view the expression refers only to those rules of law in a Province which are provincial in scope, and would include provincial legislation and any laws which were made a part of the law of a Province, as, for example, in the Provinces of Alberta and Saskatchewan, the laws of England as they existed on July 15, 1870.

109 He rejected the idea that the section was intended to be a declaration of the paramountcy of treaties over Federal legislation. The section was merely included to prevent any interference with rights under treaties "resulting from the impact of provincial legislation".

110 Section 87 dealt with in *Regina v. George* is identical with s. 88 as it appears in c. I-6 of the 1970 Revision.

111 I agree with the comments made by the Chief Justice on the judgments in *The Natural Parents v. The Superintendent of Child Welfare et al.*

112 I also agree that the appeal should be allowed and the appellant's conviction quashed.

113 COOPER, J.A.: I have had the privilege of reading the reasons for judgment of the Chief Justice and agree with him that this appeal should be allowed but as my reasons differ from his I wish to set them out separately.

114 The charge against the appellant was that on or about October 2, 1974 he did unlawfully have in his possession a rifle upon a road contrary to s. 150(1)(b) of the *Lands and Forests Act*, R.S.N.S. 1967, c. 163. Section 150 of that Act, as amended by c. 55 of the *Statutes of 1969*, reads in part:

> 150(1) Except as provided in this Section, no person shall take, carry or have in his possession any shot gun cartridges loaded with ball or with shot larger than AAA or any rifle,
>
> (a) in or upon any forest, wood or other resort

of moose or deer; or

(b) upon any road passing through or by any such forest, wood or other resort; or

(c) in any tent or camp or other shelter (except his usual and ordinary permanent place of abode) in any forest, wood or other resort.

(2) Any person may hunt with a shotgun using cartridges loaded with ball or with one rifle during the big game season for which he holds a valid big game license.

It is obvious that these provisions are aimed at the prevention of hunting big game by a person without a license and out of season.

115 The admitted facts are that the appellant is an Indian and a member of the Micmac Band, Chapel Island Reserve, Cape Breton Island, Nova Scotia, that he was carrying a rifle on a road passing through a resort of deer, that the road was within the geographical boundaries of the Reserve and that he resided within the Reserve. It also appears to be common ground that the appellant did not have a big game license and that October 2, 1974 was not a date within the big game season for that year.

116 The question put to us by the Judge of the Provincial Magistrate's Court, who convicted the appellant, is:

> Was I correct in holding that the provisions of the *Lands and Forests Act*, R.S.N.S. 1963, c. 163, as amended, and in particular section 150, subsection (1)(b) thereof, apply to an Indian while present upon a reserve as defined by the *Indian Act*, R.S.C., 1970, c. I-6, as amended.

117 Section 91(24) of the *British North America Act, 1867*, provides that the Parliament of Canada has exclusive legislative authority over "Indians, and Lands reserved for the Indians". The exercise of this authority is to be found in the *Indian Act*, R.S.C. 1970, Chap. I-6.

118 The first question which arises here is whether the *Lands and Forests Act* is *ultra vires* of the Legislature of the Province of Nova Scotia because of the provisions of s. 91(24). I am satisfied that this question must be answered in the negative. In *Cardinal v. Attorney-General of Alberta* (1973), 40 D.L.R. (3d) 553; [1974] S.C.R. Mr.

Justice Martland, speaking for the majority, said at pp. 559, 60 D.L.R.; pp. 702, 3 S.C.R. in a passage which the Chief Justice has quoted in full that a Province cannot legislate in relation to a subject-matter exclusively assigned to the federal Parliament by s. 91:

> But it is also well established that provincial legislation enacted under a heading of s. 92 does not necessarily become invalid because it affects something which is subject to federal legislation.

It is common ground that the *Lands and Forests Act* was enacted under one or more headings of s. 92. Its subject-matter is not Indians or lands reserved for Indians and the fact that it may affect Indians does not render it invalid. Section 150(1)(b) applies to all persons in the Province. In my opinion it includes in its ambit persons who are Indians and whether on or off a reserve. I quote again from Mr. Justice Martland's judgment in *Cardinal* - pp. 559, 60 (D.L.R.):

> A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act, 1867,* was to create enclaves within a Province within the boundaries of which provincial legislation could have no application. In my opinion, the test as to the application of provincial legislation within a reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian reserves, but if provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian reserves, even though Indians or Indian reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.

119 I now direct my attention to s. 88 of the *Indian Act* which reads:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or bylaw made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

This section was first enacted as s. 87 of the *Indian Act, 1951*, (Can.), c. 29. Mr. Justice Martland referred in *Cardinal* to s. 88 but in the end found it unnecessary in resolving the issue there before the Court to determine its meaning and effect.

120 It should be first noted that although s. 91(24) of the *British North America Act, 1867*, refers not only to "Indians" but also to "Lands reserved for the Indians" s. 88 refers only to Indians in the phrase "to and in respect of Indians in the province". The Chief Justice has found that hunting is a use of the land and of its resources integral to the land and that the absence of the words "Lands reserved for the Indians" in s. 88 results in that section not being applicable to the charge against the appellant.

121 I am, with respect, unable to accept this conclusion. The act of hunting is one personal to the hunter, in this case the appellant. Section 88 makes laws of general application (subject to the prefatory words and the exceptions therein contained) applicable "to and in respect of Indians in the "province". It is obvious that a hunter "uses" land in the sense of walking or driving over it but the act of hunting with which s. 150 of the *Lands and Forest Act* is concerned is that of the *person* engaged in that activity. I find support for this view in *Regina v. White and Bob* (1965), 50 D.L.R. (2d) 613 (B.C.C.A.) and on appeal to the Supreme Court of Canada in (1966), 52 D.L.R. (2d) 481. It was held there that a certain document was a "treaty" within the meaning of that term as used in s. 87 (now s. 88) of the *Indian Act* and that the operation of s. 25 of the *Games Act*, R.S.B.C. 1960, c. 160, was excluded by reason of the terms of that treaty. The charge was that the accused, native Indians, had possession of six deer more than nine days after the close of the open season, contrary to the said s. 25. The judgments make no reference, in applying s. 87, to the absence in that section of the words "Lands reserved for the Indians". Nor have I found any other hunting case where such reference has been made. In fairness it might be contended that this point was not

raised in *White and Bob* and other cases but in my opinion the absence of the words "Lands reserved for the Indians" in s. 88 is not a valid ground for allowing this appeal.

122 I should add that reliance in support of the argument that hunting by Indians is in essence use of the land itself and its resources was placed by the appellant upon *District of Surrey v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.). The facts in that case were markedly different from those in this appeal. The subject matter there was very clearly use of lands in an Indian reserve. The lands had been surrendered in trust to the federal Crown for the purpose of leasing. The issue was, as expressed by Mr. Justice Martland in *Cardinal* at p. 561 (D.L.R.), whether the lands were subject, in their use by the lessees who were non-Indians, to certain municipal by-laws and to Regulations made under the provincial *Health Act*. The court found that the lands in question were still "lands reserved for the Indians" and that being so, only the federal Parliament could legislate as to the use to which they might be put. The *Surrey* case therefore was concerned with the very land itself as being the subject of surrender and lease. There are no such circumstances here when the provincial legislation applies, in my opinion, to persons including Indians, and not to land as such.

123 The appellant also referred to cases where a federal statute had conferred a certain status and powers upon a corporation or institution and provincial legislation was held not to apply to them. The appellant cited *Spooner Oils Ltd. et al. v. Turner Valley Gas Conservation Board*, [1933] 4 D.L.R. 545 at p. 557, [1933] S.C.R. 629; *Deeks McBride Ltd. v. Vancouver Associated Contractors Ltd.*, [1954] 4 D.L.R. 844 at p. 848; *Western Canada Hardware Co. Ltd. v. Farrelly Bros. Ltd.*, [1922] 3 W.W.R. 1017, 70 D.L.R. 480 at p. 486. I find it unnecessary to review these cases in detail. I consider them inapplicable here. They stand in my opinion for the proposition that if an enterprise or activity is within federal jurisdiction a province may not legislate in derogation of the status and powers conferred upon a person or company to carry on such enterprise or activity so as to nullify or impair what had been authorized under federal legislation. Here the federal Parliament itself in enacting s. 88 has invoked provincial laws of general application.

124 It is perhaps unnecessary for me to deal further with s. 88 in view of my conclusion expressed later on that this appeal should be allowed and of my reason for

so deciding but I nevertheless add my further observations with respect to that section.

125 Section 88 is expressly made "Subject to the terms of any treaty and any other Act of the Parliament of Canada" and there are limitations upon its application expressed as being "except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

126 In the first place I do not think that either exception is applicable here. I find no inconsistency between the provisions of the *Lands and Forests Act* with which we are concerned and the *Indian Act*. Section 73(1)(a) of the latter Act empowers the Governor-in-Council to make regulations for the protection of fur-bearing animals, fish and other game on reserves and an Indian bank has like power to make by-laws under s. 81(o) of the Act. No such regulation or by-laws were brought to our attention and it appears to be common ground that none have been made. That being so I do not think that the exceptions affect the issue in this appeal.

127 There remains the provision set out by the opening words of the section making it subject to the terms of any treaty and any other Act of the Parliament of Canada. I know of no other such Act, but is there any treaty the terms of which prevent the application of s. 88 in this appeal?

128 In certain other parts of Canada treaties were entered into with Indians by which the Indians who were parties to the treaties ceded land to the Crown in return for certain rights and privileges. As pointed out by the Chief Justice the Indians by such land cession treaties often retained a specific right to hunt and fish on the ceded land so long as it remained unoccupied Crown land. Such treaties were effective to bring into operation the opening words of s. 88 to which I have referred. This was the situation in *White and Bob*, supra. The document there in question was one by which the ancestors of a tribe of Indians on Vancouver Island had sold lands to the Hudson's Bay Company on the understanding, *inter alia*, that "we are at liberty to hunt over the unoccupied lands, and to carry on our fishing as formerly". The document was, as I have said, held to be a treaty within the meaning of that term as used in s. 88 of the *Indian Act* with the result that the right of the respondents to hunt over the lands in question

reserved to them by the treaty was preserved by s. 87 (now s. 88) and remained unimpaired by the *Game Act*, supra.

129 There do not appear to have been any land cession treaties in Nova Scotia but rather "treaties" or agreements of another character - see, App. III to *Native Rights in Canada*, 2nd ed., Cumming and Mickenberg. These have been comprehensively reviewed by the Chief Justice in his reasons for judgment. I will not repeat that review. It is sufficient for me to say that I do not find in any of them hunting rights reserved to the Indians on Cape Breton Island so as to overcome the application of s. 88 in respect of the appellant. I should perhaps mention the "Treaty or Articles of Peace and Friendship Renewed" of 1752. It does state that the Tribe of Indians there referred to "shall not be hindered from, but have free liberty of hunting and fishing as usual..." Cape Breton Island was held by the French in 1752 and the Tribe of Micmac Indians referred to in the *Treaty* are those inhabiting the eastern coast of Nova Scotia. The *Treaty of 1752* was considered in *Rex v. Syliboy* (1928), 50 C.C.C. It was there held by Patterson, Acting C.C.J., that it did not extend to Cape Breton Indians and further that it was not in reality a treaty. I have doubt as to the second finding and express no opinion on it, but I have no doubt as to the correctness of the first finding.

130 I now turn to my reason for agreeing that this appeal should be allowed. Following the *Treaty of Paris* in 1763 there was issued on October 7, 1763 a *Royal Proclamation* - see, R.S.C. 1970, appendices 123-129. This *Proclamation*, as pointed out by the Chief Justice, has been held to have the legislative effect of a statute - see, *The King v. Lady McMaster*, [1926] Ex.C.R. 68, where Maclean, J., said at p. 72:

> The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed.

and see also *Regina v. White and Bob* (1965), 50 D.L.R. (2d) 613 at p. 616 and *Calder v. Attorney General of B.C.*, [1973] S.C.R. 313 at p. 394. The *Proclamation* has also been held in *Calder* at pp. 396,7 to have been declaratory of the aboriginal rights of Indians and it is beyond dispute that such rights included the right to hunt.

131 The *Proclamation* recites that:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

and declares, *inter alia,* that no Governor or Commander in Chief "do presume for the present, and until our further Pleasure be known" to grant Warrants of Survey or pass any Patents "upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them."

132 I respectfully agree with the Chief Justice that the *Proclamation* extended to and included the Indians on Cape Breton Island. There is no evidence before us that the rights of the Indians to the reserve lands here in question have been surrendered to or purchased by the Crown. The Federal Crown holds legal title to the lands in trust for the use and benefit of the Indians concerned but their interest remains. That interest has been characterized as a personal and usufructuary right which in my opinion must include the right to hunt. It remains until it has been surrendered to the Crown or otherwise extinguished by the federal power: neither of which has happened - see, *St. Catharine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 at pp. 54,5. Section 88 does not have the effect of converting the *Lands and Forests Act* into federal legislation by referential incorporation. That Act remains provincial legislation and as such cannot be held to have extinguished hunting rights of the Indians confirmed by the *Royal Proclamation* - see, *Natural Parents v. The Superintendent of Child Welfare et al.* (S.C.C.) October 7, 1975, as yet unreported. [now reported 6 N.R. 491].

133 I conclude, therefore, that s. 150 of the *Lands and Forests Act* in the circumstances of this case does not apply to the appellant on the ground that he had, pursuant to the terms of the *Royal Proclamation,* the right to hunt and this right has not been surrendered or extinguished. It follows that this appeal should be allowed. I respectfully agree, however, with the Chief Justice that the question should be amended to encompass s. 150(1)(b) of the *Lands and Forests Act* only.

134 MacDONALD, J.A.: I have had the opportunity of read-

ing the reasons for judgment prepared by the Chief Justice and agree entirely with his conclusions. However, because of the importance of the issue raised I wish to set forth my views on the land use aspect.

135 There can be no question that legislative competency with respect to the use of reserve lands is vested solely in the federal parliament and it is equally clear in my opinion that s. 88 of the *Indian Act* does not delegate legislative power to the province. In my opinion the provisions of s. 150 of the *Lands and Forests Act*, as amended, relevant to the matter in issue in this appeal is provincial legislation of general application dealing with hunting.

136 The core of the problem here is whether such legislation can be termed *in personam* as distinct from *in rem* legislation. In other words, is it legislation dealing with the use of land or is it legislation of a regulatory nature directed at and affecting individuals only. At first blush it would appear that such legislation affects individuals only and is in effect a licensing or regulatory provision and consequently has nothing to do with land use.

137 With deference to those who may hold a contrary view, I think that a real distinction exists in law between the status of an Indian hunting on reserve lands and an Indian or non-Indian hunting on non-reserve lands. In addition to what the Chief Justice has said I believe that one basis for this distinction lies in the historical background of Indian reserves.

138 Prior to their conquest the Indians possessed this province. After conquest and with the expansion of the white immigrant population the position of the Indians was compromised and as a result of treaties and governmental policy they were literally forced to live in and on certain designated tracts of lands which were called reserves.

139 This action resulted in the Indians being stripped of many of their rights, but the one right that was never taken away from them by treaty, or otherwise, was the right to hunt and fish on reserve land. Although such right could be taken away by amendments to the *Indian Act* or by regulations made thereunder, this has not been done.

140 In consequence it is my opinion that the historical and traditional right of an Indian to hunt on a reserve in this province remains to this day unhampered and unimpeded

by the relevant provisions of s. 150 of the *Lands and Forests Act*. No such right is vested in Indians or non-Indians hunting on non-reserve lands. What I am saying is that historically, reserves were created for the use of Indians: not only as their place of residence but also as their exclusive hunting and fishing grounds. Thus, hunting and fishing on reserves are so inextricably bound up with land and land use as to constitute a usufructuary right - a legal right that has never been taken away.

141 The distinction I have drawn may be considered artificial in this day and age but I believe that so long as Indian reserves remain in this province those Indians engaged in hunting on such reserves are exercising a land use right which has been theirs since the conception of reserves. In consequence, in my opinion, those provisions of s. 150 of the *Lands and Forests Act* with which we are concerned have no application to Indians on reserves.

142 In addition to the reasons expressed by the Chief Justice I find support for my opinion in the judgment of the Ontario Court of Appeal in *Isaac et al. v. Davey et al.* (1975), 5 O.R. (2d) 610, wherein Arnup, J.A., said at p. 620:

> For the purposes of this case, it is sufficient to say that Indian title in Ontario has been 'a personal and usufructuary right, dependent upon the good will of the Sovereign'. *Indian lands were reserved for the use of the Indians, as their hunting grounds, under the Sovereign's protection and dominion.* The Crown at all times held a substantial and paramount estate underlying the Indian title. The Crown's interest became absolute whenever the Indian title was surrendered or otherwise extinguished. These are the words of the Privy Council (*per* Lord Watson) in *St. Catherines Milling & Lumber Co. v. The Queen*, at pp. 54-5, and this statement of the legal position has been followed ever since. (my italics)

143 This statement in my opinion is equally applicable to Indians on reserves in this province and is not affected by the fact that reserve lands in Nova Scotia are owned by the Government of Canada.

144 I would dispose of this appeal in the manner proposed by the Chief Justice.

Appeal allowed.

made to the note on *Rex* v. *Perry* in *Law Journal Weekly* (1911), at p. 786.

In the circumstances, and concurring in the view that the appellant is to be held to have had a custody of the girl, I agree in the conclusion that there was evidence to support the verdict.

Conviction affirmed.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE HUNTER, C.J.

REX v. JIM.

1. GAME LAWS (§ I—12)—NON-APPLICABILITY OF PROVINCIAL LAW TO INDIANS ON RESERVE.

The regulation of Indian reserves being under the exclusive jurisdiction of the Dominion Parliament, a Provincial game protection law is not effective, as regards such Indian reserve, to prohibit an Indian there resident from hunting and killing a deer on the reservation for his own use; a conviction under the Game Protection Act, B.C., on a charge brought against an Indian for having venison in his possession without a permit, was therefore quashed.

[*Madden* v. *Nelson and Fort Sheppard R. Co.* [1899] A.C. 626, applied.]

DECIDED: April 27, 1915.*

CASE stated by way of appeal from the conviction by the Police Magistrate of Victoria of one Edward Jim, an Indian, on the charge that he unlawfully had in his possession a portion of a deer contrary to the provisions of the Game Protection Act. The case submitted by the magistrate was as follows:—

"It was admitted and proved upon the hearing that: (1) The defendant is chief of the North Saanich Tribe of Indians, who have a reserve at Union Bay on the Saanich Peninsula, and another on Saturna Island, both in the Province of British Columbia. (2) The defendant killed a two-year-old buck deer upon the Saturna Island reserve for his household use, and had a portion of such deer in his possession at the time and place alleged in the information. (3) The defendant at no time made any attempt to conceal the said deer or any part thereof from the

*Also reported 22 B.C.R. 106.

game warden or any person whatsoever. (4) The defendant had not obtained a permit pursuant to the provisions of the Game Protection Act. (5) The said reserve on Saturna Island is not occupied except by the Indians of the North Saanich tribe at short intervals for hunting and fishing purposes.

"The defendant submitted that by virtue of the treaty of 1852, the statutes of British Columbia in force at the time of confederation, the Terms of Union, the provisions of the British North America Act, and the Indian Act, the Province had no authority or jurisdiction to create the acts in question an offence so far as concerns the Indian in question. I determined that the Game Protection Act is *intra vires* of the Provincial Legislature, and that the matters hereinbefore stated afforded no ground of answer or defence to the said information. The question for the opinion of the Court is whether my said determination was erroneous in point of law?"

W. J. Taylor, K.C., for the accused.
Maclean, K.C., for the Crown.

HUNTER, C.J.B.C.:—In my opinion, this conviction must be quashed. The facts are not in dispute, the central fact being that the defendant charged with an infraction of the Game Protection Act was an Indian who killed a two-year-old buck upon a reserve upon which he was entitled to live, and was using the meat for his household use. The question at once arises as to whether the Indian is within the scope of the prohibitions of the Provincial Game Protection Act. In my opinion, he is not. By the British North America Act, 1867, that is to say, by subsection (24) of section 91, Indians and lands reserved for the Indians are reserved for the exclusive jurisdiction of the Dominion Parliament. The Dominion Parliament has enacted a lengthy Act known as the Indian Act. Many provisions are there to be found in connection with the management of Indians upon their reserve; in fact, by section 51 it is expressly enacted "that all Indian lands . . . shall be managed, leased and sold as the Governor-in-Council directs." Now, I cannot conceive it possible how any wider term can be used than the word "management" in connection with the Indians as to what shall or shall not be done upon an Indian reserve. I would say that the word "manage-

279

ment" would, at all events, include the question of regulation and prohibition in connection with fishing and hunting upon the reserves.

Then, also, special provisions have been made in connection with the subject of shooting and fishing. We find in another section that special provision has been made with regard to the subject of game in certain reserves in certain other Provinces. Undoubtedly if there was jurisdiction in the Dominion Parliament to make that regulation, there certainly would be, in my opinion, jurisdiction to make similar regulations with regard to reserves in British Columbia, and possibly, as Mr. Taylor suggests, it has not done so out of respect to the early treaties with the Indians in the Province. Then laws regarding the question of bringing in intoxicants on the reserves have been passed, and as I understand no question has ever been raised as to the right of the Dominion Parliament to pass those laws, and one would say that if the matter of bringing in intoxicants on to reserves was within the purview of the Dominion Parliament, that the question of what should be done with the game and fish within the reserves would *a fortiori* fall within their jurisdiction.

Moreover, I think that the question is in reality concluded by the case of *Madden* v. *Nelson and Fort Sheppard Ry. Co.* (1897), 5 B.C. R. 541; [1899] A.C. 626. 68 L.J. P.C. 148. It was there contended that because the Dominion did not choose to enact certain legislation regarding the fencing of railways which the Provincial Legislature thought was desirable, that the Legislature could, in the absence of such legislation on the part of the Dominion, temporarily, at all events, pass such laws under its power over civic rights. It was held that it would be impossible to maintain the authority of the Dominion Parliament if the Legislature was to be permitted to enter into the former's field of legislation.

I am unable to distinguish this case in principle from that case. Obviously the proper course for the local authorities is not to attempt to pass legislation affecting the hunting by Indians on their reserves or to apply general legislation regarding game to such Indians, but if necessary to apply to the proper law-making authority and make any representations that they may see fit.

Conviction quashed.

not and that her information therefore will have to be dismissed, and under the circumstances of the case the complaint is dismissed without costs."

If, for example, the husband in this instance was able to show that, in fact, he had no divorce from his wife at the time he went through the ceremony in Reno, I feel that the magistrate would be justified in considering whether, in fact, the respondent was validly married to the applicant. A determination of this question seems to me to be a prerequisite to the making of an order.

Although I can see the possibility of a number of difficulties arising when a magistrate has made a finding with respect to marital status, nevertheless I feel that the principle enunciated in *Armstrong v. Armstrong, supra,* is the proper one to adopt.

On the evidence, I have no hesitation in coming to the conclusion that the applicant at no time intended to take up permanent residence in Reno and that, in fact, it was his plan to continue to live on and operate his farm in Saskatchewan. At the time of his Reno divorce he was domiciled in Saskatchewan.

In view of this conclusion I hold that the purported marriage which was celebrated between the parties on April 15, 1952, is not a valid one and that the appeal should be and is allowed.

There will be no order as to costs.

NORTHWEST TERRITORIES

TERRITORIAL COURT — SISSONS, J.

Kallooar v. Reginam

Game Laws — Applicability of Game Ordinance of Northwest Territories to Eskimos — "Abandonment" of Game — Meaning of.

The word "abandon" as used in sec. 15 (1) (*a*) of the *Game Ordinance* of the Northwest Territories, 1960 (2nd Sess.) ch. 2, though not defined in the ordinance, must be given its ordinary general meaning and not a restricted meaning. It signifies not merely "leaving," but "leaving completely and finally; giving up all concern in." Thus, a hunter who has killed game does not "abandon," so as to be guilty of an offence, any part of it which he cannot immediately carry away, if he intends to return and remove it. The amending Act, 1960, ch. 20, of the *Northwest Territories Act*, RSC. 1952, ch. 331, does not make the *Game Ordinance* of the Northwest Territories applicable to the Eskimos. *Re Noah Estate* (1961-62) 36 WWR

* * *

"(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

"(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, * * *."

It is hard to see how a justice of the peace or a police magistrate of the Northwest Territories, under the peculiar setup in the Northwest Territories, is "an independent and impartial tribunal."

I may have something further to say later about these matters, but I must first deal with the merits of this particular case now before me.

This is a summary conviction appeal and a trial *de novo*. On September 2, 1964, at Baker Lake, in the Northwest Territories, Parker, police magistrate in and for the Northwest Territories, found Francis Kallooar, E2-28, guilty on the following charge, and imposed a fine of $20 and, in default, imprisonment for 14 days:

"That he on or about the 19th day of July 1964, at or near a point six miles east of the mouth of the Kazan River, in the Northwest Territories, did kill and abandon game fit for human consumption, contrary to Section 15 (1) (a) of *The Game Ordinance.*"

Sec. 15 (1) (*a*) of the *Game Ordinance* of the Northwest Territories, 1960 (2nd Sess.), ch. 2, reads as follows:

"15 (1) No person who has killed, taken or acquired game shall

"(*a*) abandon any part thereof that is suitable for human consumption."

The elements of this offence which the prosecution must establish beyond a reasonable doubt, are: (1) That the accused killed game; (2) That he possessed the intent to abandon this game, and abandoned this game; (3) That this game was fit for human consumption; (4) That this abandonment took place on or about July 19, 1964, at or near a point six miles east of the mouth of the Kazan River; and (5) That this was contrary to sec. 15 (1) (*a*) of the *Game Ordinance*.

282

577, 1962 Can Abr 805 (N.W.T.); *Katie's Adoption Petition* (1962) 38 WWR 100, 1962 Can Abr 819 (N.W.T.); *Reg. v. Koonungnak* (1963-64) 45 WWR 282, 42 CR 143, 1963 Can Abr 774 (N.W.T.), applied.

[Note up with 10 CED (2nd ed.) *Eskimos*, secs. 2, 3; 12 CED (2nd ed.) *Game Laws*, secs. 2, 5; 3 CED (CS) *Words and Phrases* (1947-1964 Supps.).]

A. E. Williams, for appellant.

J. D. Neilson, for crown, respondent.

December 11, 1964.

SISSONS, J. (in part) — This court considers this to be a very important case.

The issues are bigger than the accused, Kallooar, and three caribou carcasses and the fine of $20 imposed.

The case involves the aboriginal hunting rights of the Eskimos and the Royal Proclamation of 1763 and the struggles to maintain those rights.

It involves the question whether the Eskimos are being treated "in conformity with the equitable principles which have uniformly governed the British crown in its dealings with the aborigines" which the government of Canada pledged itself to observe at the same time that it accepted the duty to make adequate provision for the protection of the Eskimos.

It involves also the important question as to whether the inferior courts of the Northwest Territories are not bound by the decisions of the territorial court of the Northwest Territories.

It involves the question whether, in the administration of justice in the Northwest Territories, the rule of law shall prevail or the will and interest of the colonial civil-service-bureaucracy which governs and administers the Northwest Territories.

This case is part of a pattern, part of a larger picture, another chapter in what is now an old story. There have been a number of cases, particularly in the eastern Arctic, in which Eskimos have been charged with infractions of the Game Ordinances, and not given a fair trial, in contempt of this court and the rule of law and the administration of justice.

This case also raises the fundamental question whether in this case and in other cases there has been an infringement of the *Canadian Bill of Rights*, 1960, ch. 44, which provides that

> "2. * * * no law of Canada shall be construed or applied so as to

The essence of this charge is "abandonment" and it is first necessary to determine what is meant by abandonment.

The word "abandon" is not defined in the *Game Ordinance* and has here no special meaning.

The only definition of "abandon" in the *Criminal Code*, 1953-54, ch. 51, is in sec. 185, and is special to pt. VI of the *Code*, "Offences against the Person:"

> "185. In this Part,
>
> "(a) 'abandon' or 'expose' includes
>
> "(i) a wilful omission to take charge of a child by a person who is under legal duty to do so, and
>
> "(ii) dealing with a child in a manner that is likely to leave that child exposed to risk without protection; * * * ."

Some of you here may have some understanding of this meaning of "abandon" as Kikik was charged with this in this area in 1958.

The word "abandon" had there a special meaning which cannot be applied to the present case. We have to look for the general ordinary meaning of the word "abandon." There are a number of dictionary definitions of "abandon" which are applicable to the present case. I think that the American College Dictionary gives the latest, clearest and most applicable definition, and I accept this. The American College Dictionary defines "abandon" as follows:

> "(1) To leave completely and finally; forsake utterly; (2) To give up all concern in; (3) To give up the control of; Abandon means to give up (or discontinue any further) interest in something, because of discouragement, weariness, distaste or the like."

The gist of the material evidence of the trial is:

About the middle of July, 1964, a group of Eskimos from Baker Lake went to Kazan River to fish and hunt caribou. The party was apparently organized by the area administrator of northern affairs and one, Hugh Angangai, was placed in charge by the administrator. The accused was one of the group. There were four usable boats at the camp, including the boat of the accused which had engine trouble.

On July 19, the party went after caribou for dry meat for use as food for the families which were at Kazan River. The accused was hunting with Nick Tagga and Luke Ikseetarkyuk.

The accused shot five caribou. Luke says he saw the accused shoot five or that the accused told him he had shot five caribou.

The accused took two caribou back to the boat. He says he left the others, taking only the tongues of these, thinking of going back later and bringing them out. He was in doubt as to what his companions were going to do, whether they were in a hurry or not, so he took what he could carry to the boat and left the rest. The boat was small and was loaded, as it carried two men, three boys and five caribou.

He wanted and intended to go back and get the three caribou for food for himself and father and family. He could not get another boat as every Eskimo had some work of his own to do, in connection with the fishing operation.

He tried to fix his own boat and kept working on it, getting a little response from the engine and thinking he could fix it on the spot without any spare parts. He found out eventually what the trouble was and that he needed spare parts. He had to go to Baker Lake for these parts. It was five days before he got back, too late as the game had long since spoiled.

Bearing in mind what is meant by "abandon," the evidence clearly indicates that the accused did not intend to abandon these caribou and did not on July 19, or at any time, in fact, abandon the said caribou.

The accused may have been too indifferent, too self-reliant, too independent, too diffident and too obsessed with the philosophy of Iyounamut, and may not have done all he might have done to get these caribou out at the time or to get help from others of the party. He knew caribou spoiled quickly in warm weather. That does not make him guilty of this offence.

I find that the prosecution has not established beyond a reasonable doubt that the accused possessed the intent to abandon the three caribou or that he did abandon them. I find that the accused did not abandon these caribou. He is not guilty of the offence charged.

The appeal is allowed and I find the accused not guilty. The fine of $20, paid by the accused, will be returned to him.

I think this really disposes of the matter.

However, in case I am in error, and for the record and to emphasize the different issues, I feel I must say something about the legal questions which were considered and dealt with

Secs. 1 and 2 read as follows:

"1. (1) Section 14 of the *Northwest Territories Act* is amended by adding thereto the following subsections:

"'(2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make Ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and Ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.

"'(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.'

* * *

"'2. (2) All laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.'"

It will be noted that this legislation, obnoxious as it is, does not say that the *Game Ordinance* shall apply to Eskimos. On the contrary, it specifically provides that the *Game Ordinance* shall *not* apply to Eskimos hunting for food, game other than game declared to be in danger of becoming extinct.

I dealt with this legislation in *Re Noah Estate* (1961-62) 36 WWR 577 (which had to do with Eskimo marriage rights); *Katie's Adoption Petition* (1962) 38 WWR 100 (which had to do with Eskimo adoption rights); *Reg. v. Koonungnak* (1963-64) 45 WWR 282, 42 CR 143 (which had to do with game declared to be in danger of becoming extinct).

In the *Koonungnak* case, I said at p. 305:

"The obvious intent of these amendments was to authorize the abrogation, abridgment or infringement of the hunting rights of the Eskimos and other rights of the Eskimos by the territorial government.

"I held in *Re Noah Estate* [*supra*], that this legislation was not effective in accomplishing its purpose of abrogating, abridging or infringing the hunting and other rights of

at the previous trial and were the basis of the magistrate's decision.

In *Reg. v. Kogogolak* (1959) 28 WWR 376, 31 CR 12, I said at p. 377:

> "Traditionally, this is the land of the Eskimos — the Innuit, i.e. — the People (par excellence) — and from time immemorial they have lived by hunting and fishing.
>
> "Historically, in accord with the equitable principles of the British Crown, they have been assured of their right to follow their vocation of hunting and fishing."

And at pp. 383-4:

> "I think the Royal Proclamation of 1763 is still in full force and effect as to the lands of the Eskimos. The Queen has sovereignty and the Queen's writ runs in these Arctic 'lands and territories.' This is the Queen's court and it needs must be observant of the 'Royal will and pleasure' expressed 200 years ago and of the rights royally proclaimed.
>
> "The lands of the Eskimos are reserved to them as their hunting grounds. It is the royal will that the Eskimos 'should not be molested or disturbed' in the possession 'of these lands.' Others should tread softly, for this is dedicated ground.
>
> • • •
>
> "There has been no treaty with the Eskimos and the Eskimo title does not appear to have been surrendered or extinguished by treaty or by legislation of the Parliament of Canada.
>
> "The Eskimos have the right of hunting, trapping, and fishing game and fish of all kinds, and at all times, on all unoccupied Crown lands in the Arctic.
>
> • • •
>
> "The *Game Ordinance* of the Northwest Territories cannot and does not apply to the Eskimos."

That case was not appealed.

It has been argued and was held by the magistrate in this present case that 1960, ch. 20, amending the *Northwest Territories Act*, RSC, 1952, ch. 331, made the *Game Ordinance* of the Northwest Territories applicable to the Eskimos. I, of course, do not agree.

the Eskimos. Vested rights are not to be taken away without express words or neeessary intendment or implication. The *Canadian Bill of Rights* also stands in the way.

* * *

"The ordinances of the Northwest Territories in relation to the preservation of game in the Territories are not applicable to and in respeet of Indians and Eskimos and eannot be made so without the concurrence of the Indians and Eskimos."

It was further argued in this case, and agreed by the magistrate, that the partieular provision of the *Game Ordinance* as to abandonment of game does not interfere with the right of hunting for food but merely, in effeet, regulates sueh hunting with a view to preserving the resourees and designed to prevent the wasting of food.

I eannot follow this argument. Ordinanees for the preservation of game are not applieable to Eskimos hunting for food. The accused was certainly hunting for food. This charge of killing and abandoning game is certainly tied in with the hunting rights of the Eskimos. Conservation eannot be served in this way. This argument is contrary to the reasoning of many authorities, ineluding *Rex v. Wesley* [1932] 2 WWR 337, 58 CCC 269 (Alta. C.A.); *Reg. v. Prince* (1962-63) 40 WWR 234, 39 CR 43, (1963) 1 CCC 129 (dissenting judgment of Friedman, J.A.), reversed (*sub nom. Prince and Myron v. Reg.*) (1964) 46 WWR 121, [1964] SCR 81, [1964] 3 CCC 2.

I think that this eovers the legal aspects of the case.

It is elear that the law is on the side of the accused.

* * *

cumstances actually existed at the time. Instead it considered at some length "a *proposed* subdivision" of the area, submitted by Mr. Martin, the city planner, and based its decision solely on the ground that the applicant's proposed use of the area was of a commercial nature and therefore not to be allowed in an area which would *eventually* become residential. In other words the appeal was not considered on the merits and circumstances as they then existed, but on the basis of some future and uncertain change in the use of the area, proposed by the city planner, who might have changed his mind as to such use on the following day, and as appears from the minutes, none of the property owners in the area had yet been approached, nor had the plan been submitted to the technical planning board.

In my view the board in coming to a decision without complying with the terms of the statute and without having regard to the merits and circumstances of the particular case, as they then existed, acted without jurisdiction.

For the reasons aforesaid I would grant the application and quash the decision or order of the appeal board.

Costs to be spoken to.

NORTHWEST TERRITORIES

TERRITORIAL COURT SISSONS, J.

Regina v. Kogogolak

Eskimos — Rights of — Royal Proclamation, 1763 — Hunting Rights.

Constitutional Law — Eskimos as Subject Matter of Dominion or Territorial Legislation.

Game Laws — Applicability of Territorial Game Laws to Eskimos — Game Ordinance.

The Royal Proclamation of 1763, issued following the *Treaty of Paris*, is the *Magna Carta* of the Eskimos and their only Bill of Rights. As such it must be guarded and upheld by the court. The said proclamation is still in full force and effect as to the lands of the Eskimos. Such lands are reserved to them as their hunting grounds.

Quaere, whether other persons have, or should have, the right to hunt or fish on the lands so reserved, except by special leave or licence of the government of Canada.

Eskimos have the right of hunting, trapping and fishing game and fish of all kinds, and at all times, on all unoccupied Crown lands in the Arctic. Such right can only be extinguished or abridged by legislation of the Parliament of Canada.

The Game Ordinance of the Northwest Territories cannot and does not apply to the Eskimos. *St. Catherine's Milling & Lbr. Co. v. Reg.* (1888) 14 App Cas 46, 58 LJPC 54, 11 Can Abr 440; *Canada v. Ontario (Indian Annuities)* [1910] AC 637, 80 LJPC 32, 11 Can Abr 460; *Rex v. Wesley* [1932] 2 WWR 337, 58 CCC 269, 20 Can Abr 1156; *Rex v. Smith* [1935] 2 WWR 433, 64 CCC 131, 20 Can Abr 1157; *Rex v. Little Bear* (1959) 26 WWR 335, 28 CR 333, 122 CCC 173; *The Ontario Mining Co. and Atty.-Gen. for Can. v. Seybold* [1903] AC 73, 72 LJPC 5, affirming (1902) 32 SCR 1, 11 Can Abr 31; *Indian Act*, RSC, 1952, ch. 149, sec. 4 (1), referred to.

[Note up with 4 CED (2nd ed.) *Constitutional Law*, as new sec. 44A, "Eskimos;" 2 CED (CS) *Game Laws*, sec. 1; 1959 Supp., as new title, "Eskimos."]

M. de Weerdt, for the Crown.

J. Bond, Northern Services Officer, appeared with the accused.

April 20, 1959.

SISSONS, J. — The charge against the accused is that:

> "Jimmy Kogogolak of Cambridge Bay in the Northwest Territories, did on or about the 25th day of February 1959, hunt a Musk-Ox by shooting it at or near Cape Colborne in the Northwest Territories:
>
> "Contrary to Paragraph (*a*) of Section 4 of the Game Ordinance; the whole being an offence punishable on summary conviction under Section 90 (*b*) of the Game Ordinance."

This charge raises an important issue.

Traditionally, this is the land of the Eskimos—the Innuit, i.e.—the People (par excellence)—and from time immemorial they have lived by hunting and fishing.

Historically, in accord with the equitable principles of the British Crown, they have been assured of their right to follow their vocations of hunting and fishing.

In the early days the Eskimos were considered as a tribe or nation of Indians. The Supreme Court of Canada has held that Eskimos are "Indians" within the contemplation of sec. 91 (24) of the *B.N.A. Act, 1867*, ch. 3 (*Reference re Term "Indians"* [1939] SCR 104) and under the exclusive legislative jurisdiction of the Dominion. This was a unanimous decision of a strong court headed by The Right Honourable Sir Lyman Duff, Chief Justice.

The *Department of Northern Affairs and National Resources Act*, 1953-54, ch. 4, provides:

> "5. The duties, powers and functions of the Minister extend to and include all matters over which the Parliament

293

of Canada has jurisdiction, not by law assigned to any other department, branch or agency of the Government of Canada, relating to:

"(*a*) the Northwest Territories and the Yukon Territory;

"(*b*) Eskimo affairs."

In 1763 a Royal Proclamation was issued following the *Treaty of Paris*. This proclamation conserving the hunting rights of the Indians has been spoken of as the Charter of Indians Rights. It is the *Magna Carta* of the Eskimos. Indians have their treaties. Eskimos have none. Indians have the *Indian Act*, RSC, 1952, ch. 149. This Act does not apply to Eskimos. There is no Eskimo Act. This proclamation is the only bill of rights the Eskimos have as Eskimos. They seem to have nothing else. What they have is extremely important and far reaching, and must be guarded and upheld by the court.

This Royal Proclamation reads in part as follows:

> "And whereas it is Just and Reasonable and Essential to our Interests and the Security of our Colonies that the several Nations or Tribes of Indians with whom we are connected and who live under Our protection should not be molested or disturbed in the possession of such parts of Our Dominions and Territories as, not having been ceded or purchased by Us are reserved to them or any of them as their hunting grounds.
>
> "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our Sovereignty, protection and dominion, for the use of the said Indians, all the lands and territories not included within the limits of our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company; also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases of settlements whatsoever, or taking possession of any of the lands above reserved, without special leave or license for that purpose first obtained."

This area was not within the limits of the territory granted to the Hudson's Bay Company in 1670. I do not think it matters if this was Hudson's Bay Company land. The hunting rights of the Eskimos existed at all times. The Hudson's Bay Company always respected these rights.

In 1870 the Hudson's Bay Company by deed of surrender transferred their lands to the Canadian government. Sched. A of the order in council of June 23, 1870, provides:

> "And furthermore that upon the transference of the territories in question to the Canadian Government the claims of the Indian Tribes to compensation for lands required for the purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

In sched. B the following resolution is to be found:

> "That upon the transference of the territories in question to the Canadian Government it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interest and well being are involved in the transfer."

The Royal Proclamation of 1763 was the subject of consideration in the Privy Council case of *St. Catherine's Milling and Lbr. Co. v. Reg.* (1888) 14 App Cas 46, 58 LJPC 54. Lord Watson said:

> "The tenure of the Indians was a personal and usufructuary right, depending upon the goodwill of the Sovereign * * *
>
> * * * * there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title * * *
>
> "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden * * *."

In *Dom. of Canada v. Prov. of Ontario (Indian Annuities)* [1910] AC 637, 80 LJPC 32, Lord Loreburn refers to "the overlying Indian interest."

Commenting on this, McGillivray, J.A. in *Rex v. Wesley* [1932] 2 WWR 337, 26 Alta LR 433, 58 CCC 269, said, at p. 348:

> "It is thus clear that whether it be called a title, an interest, or a burden on the Crown's title, the Indians are conceded to have obtained definite rights under this proclamation in the territories therein mentioned which certainly included the right to hunt and fish at will all over those lands in which they held such interest."

292

The Dominion government made treaties with a number of Indian tribes in each of which they gave recognition to and provided for the surrender and extinguishment of the Indian title.

The treaties affirmed the ancient hunting right of Indians, and contained a provision in the following form:

> "And Her Majesty the Queen hereby agrees with her said Indians, that they shall have right to pursue their vocations of hunting throughout the tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty; and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by her Government of Canada, or by any of Her Majesty's subjects duly authorized therefore by the said Government."

It is interesting to note that Governor Laird who with Colonel MacLeod negotiated the treaty with the Assiniboines or Stonies in 1877, said to the chiefs of the Indian tribes:

> "I expect to listen to what you have to say today, but first, I would explain that it is your privilege to hunt all over the prairies, and that should you desire to sell any portion of your land, or any coal or timber off your reserves, the government will see that you receive just and fair prices, and that you can rely on all the Queen's promises being fulfilled."

And again he said:

> "The reserve will be given to you without depriving you of the privilege to hunt over the plains until the land is taken up."

As McGillivray, J.A. said in *Rex v. Wesley, supra,* at p. 352:

> "It is true that Government regulations in respect of hunting are contemplated in the treaty but considering that treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land."

Further recognition of the right of the Indian to hunt for food is found in the memorandum of agreement between the government of Canada and the province of Alberta and the province of Saskatchewan on the transfer of the natural resources in 1930:

"12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

In *Rex v. Wesley, supra,* McGillivray, J.A. said at p. 345:

"In the result I hold that in turning over to Alberta the public domain of the province the Dominion has sought and the province has given an assurance which has been confirmed by the Imperial Parliament, that Indians hunting for food may kill all kinds of wild animals regardless of age or size wherever they may be found on unoccupied Crown lands or other lands to which they have a right of access, at all seasons of the year and that they may hunt such animals with dogs or otherwise as they see fit and that they need no licence beyond the language of sec. 12 [of the statutory agreement in *The Alberta Natural Resources Act,* 1930, ch. 21] to entitle them so to do."

I hold the same in regard to Eskimos. The position of the Eskimos is stronger.

Provision in the *Indian Act* dealing with the application of provincial game Acts to Indians have been changed from time to time but the hunting and fishing rights of Indians have generally been protected although there has been some sinning.

It is important to note sec. 4 (1) of the present *Indian Act* which provides:

"A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Eskimos."

It is surprising that the present *Game Ordinance* of the Northwest Territories was not disallowed in so far as it relates to Eskimos.

In 1890 Sir John Thompson, then Minister of Justice recommended that a proposed *Game Ordinance* of the North West Territories be disallowed because it violated the rights of Indians. In his report the Minister of Justice said:

"The Ordinance now under review purports to regulate and control the avocations of hunting and fishing by the Indians, as well as by the other subjects of Her Majesty, and in so far as it relates to Indians, is a violation of the rights secured to them by the treaties referred to.

"The undersigned does not consider it necessary to discuss the propriety of these regulations, or whether the Indians should be exempt from the regulations. It is sufficient to observe that the utmost care must be taken, on the part of Your Excellency's government, to see that none of the treaty rights of the Indians are infringed without their concurrence."

A new ordinance was passed but care was taken to see that it did not offend as regards the rights of Indians. The next *Game Ordinance* of the Northwest Territories, passed in 1893, contained the following provision:

"22. This Ordinance shall only apply to such Indians as it is specially made applicable to in pursuance and by virtue of the powers vested in the Superintendent General of Indian Affairs of Canada by Section 133 of *The Indian Act* as enacted by 53 Victoria, chapter 29, sec. 10."

It is interesting to note sec. 3 of this ordinance:

"3. No person shall fire at, hunt, take, or kill—

"1. Any buffalo at any time."

This, of course, does not apply to Indians.

In *Rex v. Wesley, supra,* an Indian was charged with, and convicted of, an infraction of *The Game Act,* RSA, 1922, ch. 70, in that he did hunt and kill one male deer having horns or antlers less than four inches in length. The Appellate Division of the Supreme Court of Alberta held that *The Game Act* had no application to Indians hunting for food and set aside the conviction.

Rex v. Smith [1935] 2 WWR 433, 64 CCC 131, had to do with an Indian carrying firearms on a game preserve contrary to *The Game Act,* RSS, 1930. J. G. Diefenbaker, K.C., was counsel for the Indian, and upheld and ably argued for Indian "rights." The Saskatchewan Court of Appeal affirmed the hunting rights of Indians but held that they did not have a right of access to game reserve.

In the recent case of *Reg. v. Little Bear* (1959) 26 WWR 335, 28 CR 333, 122 CCC 173, an Indian was convicted by a magistrate on a charge under *The Game Act* of shooting a deer for

food out of season on private land where he had been given permission to hunt. Turcotte, D.C.J. reversed the magistrate's conviction. There was an appeal by the Crown and the Alberta Supreme Court, Appellate Division, upheld the judgment of Turcotte, D.C.J. The headnote of the case reads as follows:

> "By virtue of par. 12 of the Schedule of *The Alberta Natural Resources Act,* 1930 (Alta.) C. 21 in conjunction with s. 87 of the *Indian Act,* RSC, 1952, c. 149, an Indian is not bound by provincial game laws if he is hunting for food. This right to hunt game for food extends to all unoccupied Crown lands and any other land to which he has a 'right of access,' which latter expression includes a right to enter privately-owned land with the consent of the owner or occupier for the purpose of hunting."

I agree with Gwynne, J. in *Ont. Mining Co. and Atty.-Gen. for Can. v. Seybold* (1902) 32 SCR 1, at p. 19, affirmed [1903] AC 73, 72 LJPC 5:

> "Now unless the proclamation of 1763 and the pledge of the Crown therein * * * are to be considered now to be a dead letter; * * * and unless the grave and solemn proceedings which ever since the issue of the proclamation until the present time have been pursued in practice upon the Crown entering into treaties with the Indians * * * are to be regarded now as a delusive mockery; and unless the provision in the constitutional charter of the Dominion that the Parliament of the Dominion of Canada shall have exclusive legislative authority over all matters coming within the subject "Indians and land reserved for the Indians" is quite illusory and devoid of all significance; it does appear to me to be free from doubt that all the provisions of the statutes of the Dominion Parliament above cited in relation to the Indians and their property, the management of all their affairs * * * are within the exclusive legislative authority of the Dominion Parliament."

In these days when there is much talk of a Canadian Bill of Rights it is well to keep in mind the rights of the Eskimos. Talk of a new Canadian Bill of Rights would be rather strange and futile if at the same time we treat the old Eskimo Bill of Rights as a dead letter.

I think the Royal Proclamation of 1763 is still in full force and effect as to the lands of the Eskimos. The Queen has sovereignty and the Queen's writ runs in these Arctic "lands and territories." This is the Queen's court and it needs must

be observant of the "Royal will and pleasure" expressed 200 years ago and of the rights royally proclaimed. The Queen's justice is a "loving subject" and would not wish to incur "the pain of the Queen's displeasure."

The lands of the Eskimos are reserved to them as their hunting grounds. It is the royal will that the Eskimos "should not be molested or disturbed" in the possession "of these lands." Others should tread softly, for this is dedicated ground.

This may be *obiter dictum*, but I question whether other persons have, or should have, the right to hunt or fish on the lands reserved to the Eskimos as their hunting grounds, except by special leave or licence of the government of Canada.

There has been no treaty with the Eskimos and the Eskimo title does not appear to have been surrendered or extinguished by treaty or by legislation of the Parliament of Canada.

The Eskimos have the right of hunting, trapping, and fishing game and fish of all kinds, and at all times, on all unoccupied Crown lands in the Arctic.

This right could be extinguished or abridged and the Eskimos could be prohibited from shooting musk ox or polar bear or caribou but this would have to be by legislation of the Parliament of Canada.

The Game Ordinance of the Northwest Territories cannot and does not apply to the Eskimos.

I find the accused not guilty.

NORTHWEST TERRITORIES TERRITORIAL COURT.

Sissons J.

Regina v. Koonungnak.

Eskimos — Hunting rights — Whether The Game Ordinance, 1960 (*2nd sess.*) (*N.W.T.*), *c.* 2 *applicable to Eskimos — The Northwest Territories Act, R.S.C.* 1952, *c.* 331 *amended* 1960, *c.* 20 *— Effect of Royal Proclamation.*

Trials — Improper acceptance by justice of the peace of guilty plea by Eskimo — Other irregularities prejudicial to fair trial.

Costs — When awarded against the Crown.

Accused, an Eskimo was convicted of killing a musk ox contrary to s. 54(1) of the Game Ordinance, and appealed to the Territorial Court.

Held, the conviction should be quashed.

1. As there does not appear to be a corresponding word for "guilty" in the Eskimo language, a plea of "guilty" should not ordinarily be accepted from Eskimos.

2. The taking of game for food should be the primary consideration in interpreting laws regarding Eskimos in the Northwest Territories.

3. The Ordinances of the Northwest Territories in relation to the preservation of game are not applicable to Indians and Eskimos and cannot be made so without their concurrence. As presently constituted the game laws infringe on the hunting rights of the Eskimos and also discriminate against them.

[PRACTICE NOTE. "Hunting and fishing rights of Indians and Eskimos." It will be noted that Sissons J. in the instant case refers to *Regina v. Prince et al.*, 39 C.R. 43, 40 W.W.R. 234, [1963] 1 C.C.C. 129, 1962 Can. Abr. 747. The *Prince* case subsequently came before the Supreme Court of Canada, 41 C.R. 403 which allowed the appeal of the two Manitoba treaty Indians. The question of the rights of Indians was dealt with in this judgment.

APPLICATION by the Crown to quash a conviction under the Game Ordinance.

D. H. Searle for the Crown.

Elizabeth R. Hagel for accused.

29th November 1963. SISSONS J.:—This is an application by the Crown to quash the following conviction:

"CONVICTION

Canada)
Northwest Territories)

"Be it remembered that on the 13th day of September, A.D. 1963, at Baker Lake, Northwest Territories, E2-48, Matthew Koonungnak hereinafter called the accused, was tried under Part XXIV of the Criminal Code [1953-54, c. 51] upon the charge that:

"between the 25th day of August A.D. 1963 and the 31st day of August A.D. 1963, at or near 96 degrees 45 minutes longi-

tude, 64 degrees 10 minutes latitude in the Northwest Territories, did unlawfully hunt musk-ox contrary to the provisions of Section 54 Sub-Section (1) of the Game Ordinance [1960 (2nd sess.), c. 2].

"was convicted of the said offence and the following punishment was imposed upon him, namely,

"That the said accused forfeit the sum of $200.00 or in default to be imprisoned in the Northwest Territories Gaol at Fort Smith, N.W.T. for the term of 4 months.

"Dated this 7th day of November, A.D. 1963, at Baker Lake, Northwest Territories.

["Sgd.] J. B. H. GUNN
(J. B. H. Gunn) J.P."

This application is welcome in the interest of due administration of justice in the north but it comes rather late, perhaps too late, both generally and particularly.

On 9th August 1962, three Eskimos, Aolak E5-159, Kadloo E5-881 and Angotitayok W1-210, were each convicted at Gjos Haven and Creswell Bay on the Arctic coast on charges that between 23rd and 30th April 1962, at or near Stewart Point in the Northwest Territories, and between 1st and 5th May 1962, at or near Akitilik, Prince of Wales Island, Northwest Territories, they did unlawfully hunt musk ox contrary to the provisions of s. 54(1) of the Game Ordinance.

The justice of the peace was W. A. Heslop, of Cambridge Bay. The informant and prosecutor was Constable J. W. Pringle, then of the Spence Bay detachment of the R.C.M.P., the same party who was informant and prosecutor in the present Koonungnak case. The accused were not represented by counsel. These were all "guilty" pleas. The accused were each fined $50.

This came to the attention of this Court and on 22nd August 1962, the Court communicated with the Department of Justice pointing out that these convictions were flagrantly contrary to decisions of this Court and should not be allowed to stand and suggesting that the Crown make application to quash the said convictions.

The Department of Justice with considerable Ottawa arrogance and contempt refused to move to quash the convictions.

There have been, during the past year, a number of other summary convictions by justices of the peace under the Game Ordinance infringing on the hunting rights of Indians and

Eskimos. Eight cases have come to the notice of the Court office and there have been probably many more. This has been brought to the attention of the Department of Justice but nothing has been done to quash these convictions.

Particularly, there is s. 682 of the Criminal Code of Canada:

"682. No conviction or order shall be removed by *certiorari*

"(*a*) where an appeal was taken, whether or not the appeal has been carried to a conclusion . . . "

This matter first came to the attention of the Court when the clerk of the Court at Yellowknife received for his information a copy of a letter from the O.C. Central Arctic subdivision of the R.C.M.P., addressed to the Administrator of the Arctic, Dept. of N.A. & N.R., Blackburn Bldg., Ottawa 4, Ontario, "re Matthew Koonungnak E2-48 Unlawfully Hunt Musk-ox—Baker Lake Area, N.W.T." Attached to this letter was a copy of police report from Baker Lake detachment.

This Court has original inherent jurisdiction to examine and correct all errors committed by the lower courts to the end that all men should be assured of a fair trial according to law.

In this case it appeared clear that there were errors committed by the lower Court.

The Court appointed Elizabeth R. Hagel, barrister, of Yellowknife, to act for the accused and instructed her to launch an appeal.

Notice of appeal was filed on 28th October 1963, and served on David H. Searle, Crown prosecutor, Yellowknife, J. B. H. Gunn, Baker Lake and Constable J. W. Pringle, R.C.M.P., Baker Lake, and affidavit of service of the said notice of appeal filed on 12th November 1963.

The justice of the peace, under date of 7th November, 1963, pursuant to s. 726 of the Criminal Code, forwarded to the Court the conviction herein together with a copy of the information and $200 fine, and a transcript of the evidence.

The question arises whether I should deal with the Crown's application to quash or proceed with the appeal and fix a date and hold a trial *de novo* at Baker Lake.

I have considered this question and have come to the conclusion that the ends of justice would be best served if I heard the application to quash and dealt with the matter on the basis of the material forwarded by the justice of the peace.

The information herein reads as follows:

"Matthew Koonungnak, E2-48, of Baker Lake, Northwest Territories, did, between the 25th day of August, A.D. 1963 and the 31st day of August, A.D. 1963, at or near 96 degrees 45 minutes longitude, 64 degrees 10 minutes latitude in the Northwest Territories, unlawfully hunt musk-ox contrary to the provisions of Section 54, Sub-section (1) of the Game Ordinance."

Section 54(1) of the Game Ordinance of the Northwest Territories, assented to 16th July 1960, and which came into force 1st July 1961, reads as follows:

"54.(1) Every person who hunts musk-ox in violation of the provisions of this Ordinance or the regulations is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year or to both such fine and imprisonment."

The definition of "hunting" is:

"(2)(*h*) 'hunting' includes chasing, pursuing, worrying, following after or on the trail of, stalking, or lying in wait for the purpose of taking game, and any trapping, attempting to trap, or shooting at game, whether or not the game is then or subsequently captured, killed or injured."

Of "game";

"(2)(*e*) 'game' means big game, fur-bearing animals, game birds and any part of any of them."

"(2)(*a*) 'big game' means bison (buffalo), musk-ox, mountain sheep, mountain goat, bear and any member of the deer family whether known as caribou, moose, deer or by any other name but does not include reindeer."

Authority to hunt is covered by:

"4.(1) No person shall

"(*a*) hunt any game except as authorized by this Ordinance or the regulations . . . "

"23.(1) The person mentioned in Column I of Schedule B may carry on the activity set out in Column II of that Schedule in the area of the Territories or at the location set out in Column III of that Schedule during the period prescribed by the Commissioner or set out in Column V of that Schedule, subject to this Ordinance and the Regulations and to any limitation set out in Column IV of that Schedule."

A relevant part of Schedule B reads as follows:

SCHEDULE B.

Col. I. Person	Col. II. Activity	Col. III. Area or Location	(Col. IV. Limitation	Col. V. Period
1. Any person	(a) Hunt any game and take the eggs of non-migratory birds in order to prevent starvation of himself or his immediate family. (a) Kill a bear that is endangering life or property.	All the Territories, licensed trapping areas, game preserves and game sanctuaries.	The person shall as soon as practicable report to a game officer the number and kind of game or eggs taken, and such other information as may be required.	All year.
4. Any Indian or Eskimo	(a) Hunt for food for himself and dependants game other than migratory game birds, musk ox, polar bear and caribou.	(a) All the Territories, licensed trapping areas and game preserves.	(a) In case of occupied lands, must obtain the consent of the occupier.	All year.
5. An Indian or Eskimo who was (1) born in Territories; holds a general hunting license.	(a) (l) Hunt big game.	(a) (l) Game preserves.	(a) May not hunt caribou on Coats Island and Southampton Island.	
6. Holder of a general hunting license.	(a) Hunt black bear. (b) Hunt female polar bear without young under one year of age and male polar bear. (c) Hunt polar bear. (d) Hunt male caribou over one year of age. (e) Hunt female caribou over one year of age. etc., etc.	(a) All of the Territories and licensed trapping areas. (b) Keewatin District and Franklin District except any part of the said Districts included in a game preserve or game sanctuary. (c) Banks Island, Victoria Island, Mackenzie District except any part of the said District included in a game preserve or game sanctuary. (d) All the Territories and licensed trapping areas except Reindeer Grazing Reserve. (e) All the Territories and licensed trapping areas except Reindeer Grazing Reserve and that part of the Territories lying east of Mackenzie River.		

By s. 40 the Commissioner may:

"40. (1) prescribe periods during which the activities described in Schedule B may be carried out."

Pursuant to this, certain regulations respecting the preservation of game were made and established under date of 2nd April 1962, covering among other things the open seasons and bag limits with respect to certain species of game, and including:

Schedule B.

General Open Seasons

	Col. I	Col. II
1.	black bear, polar bear, caribou, skunk, squirrel and weasels.	1. January 1 to December 31 next following.
3.	musk-ox.	3. No period.

The transcript of the trial held at Baker Lake, N.W.T., Friday, 13th September 1963, concerning the alleged shooting of a musk ox by Koonungnak E2-48 is as follows:

"At 4:00 p.m. court opened.

"Cst. Pringle takes oath as follows:

"I swear that the evidence contained in the charge against Koonungnak E2-48 is the truth to the best of my knowledge. So Help Me God.

"Constable Pringle asks Koonungnak E2-48 to stand before the Court.

"J.P. Matthew Koonungnak E2-48, a charge has been laid against you by the Prosecution, Constable Pringle. The charge reads as follows:

"Matthew Koonungnak E2-48, of Baker Lake, Northwest Territories, did between the 25th day of August A.D. 1963 and the 31st day of August A.D. 1963, at or near 96 degrees 45 minutes longitude, 64 degrees 10 minutes latitude in the Northwest Territories, unlawfully hunt musk-ox contrary to the provisions of Section 54, Sub-Section (1) of the Game Ordinance.

"J.P. (To interpreter) Would you interpret this charge to Koonungnak?

"I. Yes. (Hesitates).

"J.P. The charge says that he killed a musk-ox, that he hunted this musk-ox on 25th August, near his camp, and that this

was against the law as written in the Regulations. Does he understand the charge that is laid before him?

"K. Aptinik's wife told me to shoot it.

"J.P. Yes. (To interpreter) Does he understand what this charge is? Ask him to answer 'yes' or 'no.'

"K. They said to shoot it. We never saw a musk-ox before and it was coming and they . . .

"J.P. (To Interpreter) Tell Matthew that we will have this explained to us later. Just now I want to know if he understands that he did this on this day. Will he say 'yes' or 'no,' that is all. Ask him to say it, please.

"K. Yes.

"J.P. Thank you, Koonungnak.

"Prosecutor. Your Worship, I might ask that before the taking of actual evidence starts, we must swear the interpreter and Court Reporter.

"J.P. Yes.

"Court Reporter, Mrs. Thelma Pilgrim, sworn. Court Interpreter, Miss Sally Kate Parker E2-6, sworn.

"Constable Pringle asks Koonungnak to come forward.

"J.P. Matthew Koonungnak, do you plead 'guilty' or 'not guilty' to the charge laid before you?

"K. (Hesitates).

"J.P. Let me ask you this. Just take your time. (To interpreter) Does he say that he did this, or does he say that he didn't do it?

"K. Yes, I did this.

"J.P. Matthew Koonungnak, you plead 'guilty' to the charge. You admit that you killed the animal as it is stated here. It that true?

"K. Yes.

"Prosecutor. Your Worship, would you like to hear the facts of the case?

"J.P. Yes.

"Prosecutor. The facts of the case so far as the prosecution is concerned, is that the accused Koonungnak E2-48, on 2nd September 1963 at 10:30 a.m., came into the Police Detachment Office and advised the Police that he had killed a musk-ox. He said that it was quite close to his camp, which was located on a lake which is approximately on the co-ordinates named in the charge. He said that the musk-ox had come close to the camp and

that a woman at the camp had told him that a male musk-ox such as this animal was, sometimes becomes very upset when he is alone, and was possibly looking for a mate. She apparently told Koonungnak that he should therefore kill the animal, which he apparently promptly did. The woman, I believe, Aptinik's wife, was the party he referred to as having told him to kill the animal. He cached the meat for later use, apparently, and took the skin and the head back to his camp. On the 11th September 1963, I went to his camp, with Koonungnak, and our transportation was Police Aircraft N P P. We found the exhibits which I would like to tender before Your Worship. One musk-ox head complete with horns, and the skin of one musk-ox.

"J.P. Very well.

"Prosecutor. Apparently there was only one animal involved and these exhibits come from that one animal. The fact that Koonungnak came to the Police very shortly after he killed the animal, and told us about it is quite commendable on his part, but it still does not relieve him from the guilt of killing it when he admittedly knew he should not kill a musk-ox. I do not believe there was anyone else involved in the killing of the musk-ox. No one else took an actual part in it except Koonungnak. That is the case as far as it concerns us, Your Worship. Perhaps someone else, perhaps Koonungnak could bring some evidence on his own.

"J.P. Koonungnak, I think we would like to hear exactly in your own words what happened the day that this musk-ox was killed.

"K. I thought it was coming so I went towards it and shot it.

"J.P. Yes. How far away was the musk-ox from this camp when you shot it?

"K. Not very far.

"J.P. Could you see it from where the tents were?

"K. We saw it from our tents.

"J.P. The wife of Aptinik is Noonilk. Is that right?

"K. Yes.

"J.P. Did Noonilk see this animal?

"K. Yes.

"J.P. Who were the other people with you when you saw this animal?

"K. Noonilk and her husband, Ekoota and Ikseetarkyuk.

"J.P. All of these people were in the camp. Was this musk-ox threatening the camp?

"K. No.

"J.P. Let us suppose that you had left this musk-ox alone. Do you think that the musk-ox would have come into the camp?

"K. Noonilk said it might come at night and go to the tents.

"J.P. Right. Tell me, at the time this musk-ox was killed, were the people at your camp hungry, or did they have caribou meat there?

"K. They had caribou.

"J.P. They had caribou. They were not hungry, then.

"K. They were not hungry.

"J.P. Noonilk was the only person, I take it, that asked you to kill the musk-ox.

"K. Yes.

"J.P. Did you, when you were told this, were you not afraid when you knew that you were going to break the law?

"K. I know it, but it is not written in the Bible.

"J.P. It is *not* written in the Bible, we will grant you this point. It is not written in the Bible, but it is written in the laws of the Northwest Territories in which you live.

"K. (Nods his head).

"J.P. Can you tell me if you understand why the Government made this law that you will not destroy musk-ox? Do you know why this law was made?

"K. I don't understand why.

"J.P. Yet you understand that it was not lawful to kill the animal. You understand this. Who had told you this? Who told you this was so, that the musk-ox was not to be killed?

"K. I never heard that musk-ox were not to be killed.

"J.P. You say and you told the Prosecution that you understood that it was not right to kill this animal. Is that true?

"K. Only Eskimos, not by the White people. I don't know who really told me that I was not to kill the musk-ox.

"J.P. Do you think that this law is silly?

"K. I don't know.

"J.P. The law was made, Koonungnak, to stop this kind of animal being killed because so many of them have been killed

over the last number of years that very soon this type of animal is going to disappear. Do you understand this?

"K. I understand now.

"J.P. You understand now. And I want to tell you again to make sure that you do understand, that the animal was protected by the law to prevent it being killed because there are so very few of these animals left. Do you understand that Koonungnak?

"K. Yes.

"J.P. (To Interpreter) I would like him to tell us anything else that he would wish to say about this thing now.

"K. I do not wish to say anything more.

"J.P. You do not wish to say anything more. Do you always listen to Noonilk when she tell you to do something?

"K. This is the first time she told me to do anything.

"J.P. Were you also afraid of the musk-ox?

"K. Yes, because I never saw one before.

"J.P. How many shots did you fire at the musk-ox.

"K. Three times.

"J.P. And the animal died after the third shot?

"K. The first time I shot I didn't hit it.

"J.P. Did you hit it the second time?

"K. I hit it the second time.

"J.P. Fine. I have no further questions at this point to ask you, Koonungnak. Do you have anything further, Constable Pringle?

"Prosecutor. Just one small thing, Your Worship. I would like to ask Koonungnak the reason he didn't try to scare the animal away instead of killing it, if he was afraid of it.

"K. I didn't see it at first, and I went to the other side of the mountain and I saw it and shot it.

"Prosecutor. (To interpreter) What I was driving at was the fact that instead of killing the animal, if he was afraid of it he could have tried to scare it away so it wouldn't come back.

"J.P. (To interpreter) What does he say to that?

"K. I won't say.

"J.P. You haven't got anything to say.

"Prosecutor. I have no further questions. In the manner of the exhibits in an offence of this type, it is usually necessary to seize the firearm which was used in the offence. I looked into this matter and apparently Koonungnak has loaned this

rifle out, and at this time of year the rifle is very important to a hunter. I did not think it necessary to seize the rifle.

"J.P. I think that is a fair decision, Constable Pringle, Koonungnak do you have anything further that you wish to say?

"K. No.

"J.P. I would like to call a recess for 15 minutes.

"Court adjourned at 4.38 p.m.

"Court resumed at 4.45 p.m.

"J.P. In summing up the charge which has been brought before Matthew Koonungnak E2-48, it might be worthwhile to consider the gravity of the charges. He has, in effect, violated one of the most serious regulations which has so far been put down by, and recommended by, the Wildlife Services. The reason for this particular regulation being enacted is to prevent the massacre and extermination of an animal which is in danger, and has been declared in danger, of becoming extinct.

"Prosecutor. Excuse me, Your Worship. I wonder if we could have this interpreted for the benefit of the accused?

"J.P. A good idea. I was going to reduce this later.

"Prosecutor. Fine.

"J.P. It is not enough to plead ignorance of the regulations as these have been circulated widely over the last few years and certainly there have been several cases before courts in the Northwest Territories before this date, involving musk-ox. It is a problem of conservation which is facing not only the Northwest Territories, but the whole of North America and in fact all over the world. We have to consider this when we have such a case before us. It is not enough to excuse or even commend the guilty party for their prompt reporting of the shooting or of any other aspect of this particular case. I wish to bring to your attention, particularly since Matthew has had no previous offence, and it is very unfortunate that he appears before us today, but this is possibly the most serious charge of all, concerning game.

"Justice of the peace addresses the interpreter and saith as follows:

"I'd like to address Koonungnak and the Eskimos. Would you tell everybody, and speak up in loud voice. Tell them that I want them to understand that Matthew Koonungnak is appearing before us today in this Court and before me on a charge

of killing this musk-ox, which is the most serious charge that we can find in the Game Regulations. Would you tell them all this. Just tell them that he is appearing in front of us today . . . he is being charged with killing this musk-ox and that this is one of the most serious charges that can be laid against anyone, Eskimo or white. The reason for this law was to prevent these animals being killed and so many of them being killed that finally there would be no more of them. It is my opinion that the musk-ox in the Thelon Game Sanctuary up above Aberdeen Lake beyond Kakimut's camp are getting to be numerous. Maybe they are starting to come out of the sanctuary now more towards the lake. It is quite likely that in a few years time and maybe 10 years from now there will be quite a few musk-ox if they are left alone. Probably more musk-ox will be seen by the people living out in these camps. The musk-ox is a big animal. When it is threatened or when it is in danger it does not often run away.

"Does Matthew understand now the reason why he is here?

"K. No.

"J.P. Would you mind telling me what you don't understand so that I might explain it for you?

"K. I think I am here because I killed a musk-ox.

"J.P. You know from this musk-ox you are here today.

"K. Yes.

"J.P. Let me ask you one more question. Should you some time in the future sēe another musk-ox, what are you going to do then?

"K. If I am not afraid I won't kill it.

"J.P. If you are afraid of it you will kill it?

"K. If he comes towards me I would kill it."

The accused was then sentenced:

"J.P. Matthew Koonungnak E2-48, I find you guilty of the charge which has been laid against you. I find that you did this act and that you are wrong in doing it. I hereby sentence you to pay a fine of $200 and in default of this to 4 months in jail.

"(To interpreter) Explain that he will pay this $200 or else go to jail for 4 months. Does Matthew know if he can raise or make $200 very soon?

"K. I won't be able to because I have no work.

"J.P. If you had a job would you try to pay this fine within two weeks' time?

"K. If I have a job I will try to pay.

"J.P. I will grant two weeks' extension to you, Koonungnak, to give you time to try to pay this fine. Do you understand this, Matthew?

"K. Yes.

"J.P. Very well."

Directions were then given as to disposal of exhibits.

There were many things wrong in these proceedings.

An R.C.M.P. constable, an *ex officio* game warden, was both the informant and the prosecutor. The constable should not have prosecuted. The Crown prosecutor was not consulted or present.

The justice of the peace was area administrator of the Department of Northern Affairs and a game warden. He should have waived jurisdiction to an independent and impartial tribunal.

The accused, contrary to the Canadian Bill of Rights, 1960, c. 44, was deprived of the right to retain and instruct counsel. He was not asked if he wished counsel or anyone to help him in his defence. There are no lawyers in the area. There is no public defender, as there should be for Eskimos.

He was compelled to give evidence when he was denied counsel, protection against self crimination or other constitutional safeguards.

He was deprived of the right to a fair hearing in accordance with principles of fundamental justice.

He was deprived of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by and independent and impartial tribunal.

Contrary to the Canadian Bill of Rights, he was deprived of the right to the assistance of an independent interpreter. An interpreter for the Court was not sufficient.

The accused was not informed as to what rights he had or whether he had any rights. The proceedings were not explained to him. He was not told that he had the right to make full answer and defence, and had the right to call evidence and witnesses and to examine and cross-examine witnesses. He was not told that he had the right to appeal or what an appeal was or how he could go about appealing.

It is clear the accused did not know and was not informed and possibly could not be clearly informed as to what was meant by "guilty". Eskimos seem to have no corresponding word in their language for "guilty". I have often noted that there always seems to be difficulty in getting the idea across to the Eskimo. When I have asked interpreters what they said to the accused in this connection, the answer has invariably been as in this case: "I asked him if he did this and he said 'Yes'." That, of course, is not sufficient and I do not ordinarily accept it as a "guilty" plea, and I direct that a "not guilty" plea be recorded. Also, I am always afraid that "guilty" is said because the accused Eskimo thinks that this is what you wish him to say and he is anxious to please. I have repeatedly urged that pleas of "guilty" should not ordinarily be accepted from Eskimos.

The accused could not know whether he was guilty or not where the administration says that what he did was an offence and this Court has said there is no offence in an Eskimo shooting a musk ox.

The charge was not properly explained to the accused and he did not understand the charge.

The accused had a good defence on the facts. The musk ox was shot in defence of the Eskimo camp, of which the accused was a member.

Sir William Blackstone in his Commentaries on the Laws of England, vol. III, says:

"Self-defence, therefore as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society."

This principle of the common law is given express statutory recognition in ss. 34, 35 and 37 of the Criminal Code.

The principle is recognized by the Game Ordinance itself when it provides that any person may kill a bear that is endangering life or property.

The same rule applies when a person is attacked by an animal: *Morris v. Nugent* (1836), 7 Car. & P. 572, 173 E.R. 252.

It was not necessary for the accused to show conclusively that the killing of the musk ox was necessary to save the camp or avoid serious harm to the Eskimos. He was entitled to an acquittal if upon all the evidence there was a reasonable doubt whether or not the killing of the musk ox was under reasonable

apprehension of grievous harm to the camp and if he believed on reasonable grounds that he could not otherwise preserve himself or the camp from grievous harm.

The application of common law principles, such as self-defence, must to some extent be controlled by the evolution of society: *Holmes v. Director of Public Prosecutions*, [1946] A.C. 588, 31 Cr. App. R. 123.

Self-defence has been differently estimated in differing ages. Adopting the words of Lord Goddard in *Kwaku Mensah v. The King*, 2 C.R. 113, [1946] 2 W.W.R. 455, [1946] A.C. 83, 3 Abr. Con. (2nd) 239, 863, in this case, the tests have to be applied to the ordinary Eskimo camp and it is on just such questions as these that the knowledge and common sense of the camp itself are invaluable.

A musk ox had come close to the camp. The accused had never seen a musk ox before. Noonilk, a woman of the camp, told him that a male musk ox, such as this animal was, sometimes becomes very upset when he is alone and was possibly looking for a mate. She told Koonungnak that he should therefore kill the animal. Koonungnak said he thought it was coming so he went towards it and shot it. The musk ox was not threatening the camp when he shot it but Noonilk had said it might come at night and go to the tents. Asked what he would do in the future if he saw another musk ox, he said "If he comes towards me I would kill it."

It is notorious in the north, and this Court takes judicial notice, that an outcast bull musk ox driven from the herd and wandering in the barrens alone and homeless is a dangerous animal. Noonilk was old and wise and sensed the danger.

There is a New Brunswick case in point on this issue of self-defence.

In *Regina v. Breau*, 32 C.R. 13, 125 C.C.C. 84, 1958 Can. Abr. 312, West J., New Brunswick Supreme Court, it was held that there was nothing in the Game Act, R.S.N.B. 1952, c. 95, taking away the rights of self-defence and that this defence was open to the accused charged with killing a moose contrary to the Game Act. The accused had alleged he was attacked by the moose and shot it in self-defence. He was found not guilty.

The accused in the present case should have been found not guilty.

The record indicates that there was in fact no "guilty" plea.

"J.P. Matthew Koonungnak, do you plead 'Guilty' or 'Not Guilty' to the charge laid before you?

"K. (Hesitates).

"J.P. Let me ask you this. Just take your time. (To interpreter) Does he say that he did this, or does he say that he didn't do it?

"K. Yes, I did this.

"J.P. Matthew Koonungnak, you plead 'Guilty' to the charge. You admit that you killed the animal as it is stated here. Is that true?

"K. Yes."

The justice of the peace accepted this as a plea of "guilty". It was no such thing. It was simply an admission that he had shot the musk-ox, which he had previously admitted and reported. It was not an admission that he had committed any offence.

This should not have been accepted as a plea of "guilty".

An accused is entitled to plead (a) "guilty" or (b) "not guilty". But the law, for reasons of policy which can well be understood, requires in the case of a plea of "guilty" that the accused shall not plead "guilty" under any misapprehension. It is a first "principle" that a prisoner is not to be taken to admit an offence with which he is charged unless he pleads "guilty" to that charge in unmistakable and unambiguous terms.

A plea of "guilty" ought not to be accepted unless the judge or magistrate is sufficiently informed in open court of the facts upon which accused pleads "guilty" to assure himself that the accused is pleading "guilty" to the offence with which he is charged: *Rex v. Johnson and Creanza,* [1945] 3 W.W.R. 201, 62 B.C.R. 199, 85 C.C.C. 56, [1945] 4 D.L.R. 75, 3 Abr. Con. (2nd) 713; *Rex v. Hand,* 1 C.R. 181, [1946] 1 W.W.R. 421, 62 B.C.R. 359, 85 C.C.C. 388, [1946] 3 D.L.R. 128, 3 Abr. Con. (2nd) 776; *Rex v. Gordon,* 3 C.R. 26, [1947] 1 W.W.R. 468, 88 C.C.C. 413, 3 Abr. Con. (2nd) 772.

In an annotation to *Rex v. Hand, supra,* A. E. Popple, LL.B., the learned editor of the Criminal Reports, says at pp. 183-185:

"There is, therefore, a certain responsibility on the part of the judge, justice or magistrate presiding at the trial to see

"(1) that the charge is read to the accused and explained to him; . . .

"(2) that the accused understands the offence to which the plea relates; . . .

"(3) that there is no qualification or condition on the part of the accused in tendering his plea of guilty; . . .

"(4) that the charge, as drawn, and the facts, as put forth in open court, justify a plea of guilty being accepted and entered on the record. . .

"This [a miscarriage of justice] may easily happen in the case of persons not familiar with court procedure or who have not an adequate knowledge of the English language . . .

"A magistrate under ordinary circumstances is not entitled to interrogate the accused beyond asking the few usual and simple questions on arraignment . . .

"Many of the difficulties can be avoided by taking evidence under oath even after a plea of 'guilty' . . .

"It is equally clear from the authorities that the magistrate has a discretion to allow the accused to withdraw his plea of 'guilty' and substitute one of 'not guilty' at any time up to judgment or sentence . . .

"And there may be circumstances under which the magistrate should advise the accused to so withdraw his plea, . . . " .

I agree completely with these propositions and comments of my respected old criminal law lecturer, supported as they are by strong authorities he cites.

These propositions were not followed in this case.

The accused did not have a fair trial and there was miscarriage of justice. That cannot be tolerated.

For these important and obvious reasons and for other following reasons, equally important and obvious, the present conviction should be quashed.

In *Regina v. Kogogolak,* 31 C.R. 12, 28 W.W.R. 376, 1959 Can. Abr. 347, I held that the Game Ordinance of the Northwest Territories cannot and does not apply to Eskimos and that Eskimos have the right of hunting, trapping and fishing game and fish of all kinds, and at all times, on all unoccupied Crown lands in the Arctic, and found the accused not guilty of the offence of shooting a musk ox contrary to the provisions of the Game Ordinance.

That decision was not appealed and still stands and should have been followed by the justice of the peace in the present case.

314

In the *Kogogolak* case I followed the reasoning of the leading case of *Rex v. Wesley,* [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, 58 C.C.C. 269, [1932] 4 D.L.R. 774, 20 Can. Abr. 1156, a very carefully studied and learned judgment of the Alberta Appellate Division.

I hold that the Royal Proclamation of 1763, issued following the Treaty of Paris, under which the hunting rights of the Indians are strictly conserved, is still in full force and effect as to the lands of the Eskimos.

By this Royal Proclamation, cited in the Statutes of Canada, the first of Canada's constitutional Acts and documents, lands were reserved to Indians (which term included Eskimos) as their hunting grounds; and others were forbidden, on pain of royal displeasure, from purchasing or taking possession of any of the lands so reserved; and the proclamation did further strictly enjoin and require all persons whatever who had either wilfully or inadvertently seated themselves upon any such lands, forthwith to remove themselves from such settlements; and it was provided that if at any time the said Indians should be inclined to dispose of the said lands that purchases of the said lands could be made only by and in the name of the Crown at some public meeting or assembly of the said Indians.

The various Indian treaties flowed from and followed this.

There has been no treaty with the Eskimos and no attempt to negotiate a treaty and no "Public Meeting or Assembly" of the Eskimos to dispose of their lands, and no consent to or concurrence in the extinguishment or abridgment of their hunting rights.

This Proclamation has been spoken of as the "Charter of Indian Rights". Like so many great charters in English history, it does not create rights but rather affirms old rights. The Indians and Eskimos had their aboriginal rights and English law has always recognized these rights.

Indian and Eskimo hunting rights are not dependent on Indian treaty or even on the Royal Proclamation.

The United States Court of Claims case of *Tlingit and Haida Indians of Alaska v. U.S.A.,* (1959) 177 F. Supp. 452, is strong authority in this connection and is also relevant, interesting and helpful because of the parallel of conditions in Alaska and the Northwest Territories and the course of events and the attitudes of Canadian and United States governments and of the

bureaucratic administrations of both Alaska and the Northwest Territories; and because of the common law principles enunciated applicable to both countries. Besides, it gives us a wider perspective.

The Tlingit and Haida Indians of Alaska brought suit against the United States to recover for land and property rights (some 20,000,000 acres of land) allegedly appropriated by the United States from their ancestors.

The Court of Claims, Laramore J., Wilbur K. Miller, circuit judge, sitting by designation, Jones C.J., and Madden and Whittaker JJ. concurring, held that the Indians established Indian title to the lands and waters by proof of actual use and occupancy from time immemorial, and that the Indians continue to use and occupy the area exclusively after the purchase of Alaska from Russia, and that evidence established that Indian land and water was taken by the United States, so as to entitle the Indians to compensation.

The United States never attempted to make treaties with these Indians.

The Indians made claims and protests over their treatment and the rapidly diminishing states of their land and water holdings. There was little official response to repeated requests for help, and the official policy of the government seemed to have been to ignore the claims of these Indians arising from the aboriginal use and occupancy of southeastern Alaska and instead to create a situation in which the Indians would be forced to assimilate into the white men's society and system of property ownership.

Events do not, except for the setting apart of a certain reservation for Canadian Indians, represent any outright takings by the United States of Tlingit and Haida land or property rights. However, the manner in which the government officials administered the provisions of legislation made it possible to white settlers, miners, traders and businessmen, to legally deprive the Tlingit and Haida Indians of their use of the fishing areas, their hunting and gathering grounds and their timber lands and that is precisely what was done.

The major part of the lands aboriginally used and occupied by the Tlingit and Haida Indians was actually taken from them by the United States without the payment of any compensation therefor.

The most valuable asset lost to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others. The fishing rights might be considered in the nature of easements fixed in such lands. Viewed in this way, they could be considered as having been lost or taken as of the dates on which the shore areas were lost or appropriated, and the value of the fishing rights can be considered in determining the value of the land area to which they attached as of the date of the taking or loss of the land areas. The same will be true of lands which were valuable to the Indians for hunting and gathering, or from which they took limited amounts of minerals or timber.

The Eskimos, and the accused in this case, have not only the Royal Proclamation on their side and their aboriginal rights, they have also:

1. The address of Her Majesty the Queen from the Senate and House of Commons of Canada for the admission of Rupert's Land and the Northwest Territory into Confederation containing the following:

"The claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

2. The agreement between Canada and the Hudson's Bay Company:

"That upon the transference of the Territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes where interests and well-being are involved in the transfer."

3. The following resolution of the Senate and House of Commons:

"Resolved—That upon the transference of the Territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."

Northern affairs did not like and apparently do not recognize *Regina v. Kogogolak, supra,* and did not like *Regina v. Otokiak,* 30 C.R. 40, 28 W.W.R. 515, 1959 Can. Abr. 348, which pointed out that the Territorial Government could not legislate for

Eskimos *qua* Eskimos but that the Dominion Government could. The counter remedy sought to be applied was to make legislation of the Territorial Government in relation to preservation of game into: (1) Federal legislation relating to Indians and Eskimos; and (2) Of general application. The Minister of Northern Affairs introduced in the House of Commons a cumbersome tricky Bill, 1960, c. 20, to amend the Northwest Territories Act, R.S.C. 1962, c. 331.

By this Bill, assented to 9th June 1960, the Northwest Territories Act was amended to provide that Ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories are applicable to and in respect of Indians and Eskimos, that this should not be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Eskimos from hunting for food on unoccupied Crown lands, other than game "declared" to be in danger of becoming extinct; that from the day on which this Act came into force the provisions of the various Game Ordinances have the same force and effect in relation to Indians and Eskimos as if on that day they had been re-enacted in the same terms; that all laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.

The obvious intent of these amendments was to authorize the abrogation, abridgment or infringement of the hunting rights of the Eskimos and other rights of the Eskimos by the Territorial Government.

I held in *Re Noah Estate* (1961), 36 W.W.R. 577, 32 D.L.R. (2nd) 185, 1962 Can. Abr. 805, that this legislation was not effective in accomplishing its purpose of abrogating, abridging or infringing the hunting and other rights of the Eskimos. Vested rights are not to be taken away without express words or necessary intendment or implication. The Canadian Bill of Rights also stands in the way.

The legislation recognizes that the Eskimos have hunting rights. It is clear that these rights are being abrogated, abridged or infringed. Also it is clear that contrary to the Canadian Bill of Rights there is discrimination here, and in the Game Ordinance, by reason of race. An Indian or Eskimo may not hunt musk ox, polar bear or caribou. There is no such restriction on the white man, except recently as to musk ox.

It is not expressly declared that the legislation shall operate notwithstanding the Canadian Bill of Rights. The provisions are inconsistent with the Canadian Bill of Rights. This inconsistency should have been reported by the Minister of Justice to the House of Commons pursuant to s. 3 of the Canadian Bill of Rights.

It may seem amazing that such a weird measure should be passed through Parliament, but it is notorious that at Ottawa at the end of a long session and in the hot days of summer almost anything can be slipped over a dozing Parliament with probably only a jaded quorum present, uninformed and indifferent as to the north and Eskimos.

The Ordinances of the Northwest Territories in relation to the preservation of game in the Territories are not applicable to and in respect of Indians and Eskimos and cannot be made so without the concurrence of the Indians and Eskimos.

These Ordinances should have been disallowed at the time they were proposed because they infringe on the hunting rights of the Eskimos and also discriminate against the Eskimos.

In 1890 a prepared Game Ordinance of the Northwest Territories was disallowed, on the recommendation of Sir John Thompson, then Minister of Justice, because it infringed on the hunting rights of Indians by purporting

"to regulate and control the avocations of hunting and fishing by the Indians, as well as by the other subjects of Her Majesty, and in so far as it relates to Indians, is a violation of the rights secured to them by the treaties referred to. . . . The utmost care must be taken, on the part of Your Excellency's Government, to see that none of the treaty rights of the Indians are infringed without their concurrence."

In the Game Ordinance which was disallowed in 1890 there was a provision:

"3. No person shall fire at, hunt, take, or kill—

"(1) Any buffalo at any time."

Buffalo at that time probably seemed to be in danger of becoming extinct. This did not save the Ordinance from disallowance.

It was the white man, not the Indian, who brought about the decimation of the buffalo. The Government could have prevented this as it could prevent decimation of musk ox, caribou and polar bear by placing restrictions on the white man

and recognition and enforcement of the Indians' and Eskimos' exclusive hunting rights.

The Eskimos are in a stronger position than Indians because they have no treaty and have concurred in no respect in any infringement of their aboriginal hunting rights, and any Game Ordinance should provide that it does not apply to Eskimos.

A new Game Ordinance was passed in 1893 but care was taken to see that it did not offend as regards the hunting rights of Indians, and there was a direct provision to this effect.

The present legislation does proclaim that the hunting rights of Indians and Eskimos shall not be infringed and then proceeds to do that very thing and infringes their hunting rights by way of the repugnant and contradictory exception "other than game declared to be in danger of becoming extinct".

The following Order in Council, P.C. 1961/1256, was passed on 14th September 1960:

"His Excellency the Governor General in Council, on the recommendation of the Minister of Northern Affairs and National Resources, pursuant to subsection (3) of Section 14 of the Northwest Territories Act, is pleased hereby to declare musk-ox, barren-ground caribou and polar bear as game in danger of becoming extinct."

The Royal Proclamation said nothing to the effect that the lands of the Indians were reserved to them as their hunting grounds but that they must not hunt musk ox, caribou or polar bear or anything else.

I do not think that the Parliament of Canada could abrogate, abridge or infringe upon the hunting rights of the Eskimos in this way.

Parliament has been led into an attempt to repeal in part the Royal Proclamation.

The proviso of a statute repugnant to the purview is a repeal: *Rex v. Middlesex JJ.* (1831), 2 B. & Ad. 818, 109 E.R. 1347 at 1348, Lord Tenterden C.J.:

"Our decision is conformable with the doctrine laid down in *The Atty-Gen. v. The Chelsea Waterworks Company* (1731), Fitz. G. 195, 94 E.R. 716; there it was resolved, that where the proviso of an Act of Parliament is directly repugnant to the purview of it, the proviso shall stand, and be held a repeal of the purview, as it speaks the last intention of the makers."

I agree with McRuer C.J.H.C. in *Regina v. George,* [1964] 1 O.R. 24, [1963] 3 C.C.C. 109 at 117, 41 D.L.R. (2d) 31:

"Since the Proclamation of 1763 has the force of a statute, I am satisfied that whatever power the Parliament of Canada may have to interfere with the treaty rights of the Indians, the rights conferred on them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an Order in Council passed under the Migratory Birds Convention Act [R.S.C. 1952, c. 179]."

All of the misplaced Game Ordinances of the Northwest Territories should have been disallowed because they allowed and encouraged and did not prohibit hunting and fishing by others on the lands and waters of the Eskimo in and over which the Eskimos had exclusive hunting and fishing rights and others were forbidden to intrude upon pain of royal displeasure.

The Game Ordinance of the Northwest Territories is unrealistic indeed.

This Ordinance, like all Game Ordinances and other Ordinances of the Northwest Territories, is largely a handover from "outside" where conditions are entirely different, and takes little account of local conditions.

The game laws outside were enacted for the benefit of the sportsmen who hunt for fun and relaxation. The taking of game for food should be the primary consideration in the making of game laws in the Northwest Territories.

In the south, residents do not have to depend upon game for food but it is different in the Arctic and the game laws should be different.

If consideration is needed for musk ox, caribou and polar bear it is because of the wanton slaughter and taking by whites permitted and encouraged by the Game Ordinance and not because of killing by the Eskimos.

If the Eskimo was not in self-interest conservation concerned the remedy does not lie in this attempted amendment of the Royal Proclamation, attempted even in the face of the warning and threat of "pain of Royal Displeasure." As the very distinguished Freedman J.A., Manitoba, said in *Regina v. Prince,* 39 C.R. 43, at 51, 40 W.W.R. 234, [1963] 1 C.C.C. 129: [The Supreme Court allowed an appeal in this case, 41 C.R. 403, but expressly approved the dissenting judgment of Freedman J.A.]

"The answer, however, lies in the education of the Indian so he will appreciate that what is in the best interests of the citizenry of Manitoba is also in his own best interests. The answer does not consist in construing the section contrary to what appears to me to be its plain and dominant purpose."

I have dealt with the various issues in this case as I see them. It only remains to dispose of the application to quash. However I must first say something about costs in view of the exceptional circumstances. Ordinarily costs are not given against the Crown and I have never before given costs against the Crown. However in this case justice seems to require that the Crown should pay costs and that the Crown should not be unwilling to do this. In *Re Imperial Canada Trust Co.; Atty-Gen. for Manitoba v. Atty.-Gen. of Canada (No. 2),* [1942] 1 W.W.R. 688 at 690, 50 Man. R. 17, [1942] 2 D.L.R. 96, 2 Abr. Con. (2nd) 705, it was said that: "A present statement of the common law, in so far as Canadian conditions are concerned, is that laid down by the Judicial Committee in *Johnson v. The King,* [1904] A.C. 817, at 825, 73 L.J.P.C. 113, where it is said:

" 'In dealing with costs in cases between the Crown and a subject, this Board ought to adhere to the practice of the House of Lords, and that in future the rule should be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.'

"In enumerating certain heads thereof, judgment includes those cases 'where justice seemed to require that the Crown should pay costs, or where the Crown was not unwilling to be treated as an ordinary litigant'. It is to be appreciated that this statement has ever since been regarded as an authoritative and authentic exposition of the common law, not only within the field of the Judicial Committee's jurisdiction but in the High Court of Justice and the House of Lords as well."

The application is allowed and the conviction is quashed with costs against the Crown. The fine of $200 paid by the accused should be returned to him. The head and hide of the musk-ox should be returned to the accused. I suggest to Koonungnak that he donate the head and hide to the Museum of the North at Yellowknife.

Judgment accordingly.

Jacob Kruger and Robert Manuel *Appellants*;

and

Her Majesty The Queen *Respondent.*

1976: October 19, 20; 1977: May 31.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Indians — Shooting deer during closed season — Applicability of provincial game laws to non-treaty Indians hunting off reserve on unoccupied Crown land — Wildlife Act, 1966 (B.C.), c. 55, s. 4(1)(c) — Indian Act, R.S.C. 1970, c. I-6, s. 88.

While hunting for food during the closed season, the appellants, members of the Penticton Indian Band, killed four deer. They lacked permits, available to them under the *Wildlife Act*, 1966 (B.C.), c. 55, for hunting during the closed season. The hunting took place upon unoccupied Crown land which is the traditional hunting ground of the Penticton Indian Band. Appellants were convicted before a provincial court judge on a charge laid under s. 4(1)(*c*) of the *Wildlife Act* of unlawfully killing big game during the closed season. Appeals to the County Court succeeded on the ground that Indian hunting rights fell within the protection of the Royal Proclamation, 1763, and thereby immunized Indians from the reach of the *Wildlife Act* while hunting for food on unoccupied Crown land. On further appeal to the British Columbia Court of Appeal the convictions were restored. Robertson J.A., who delivered the judgment of the Court, was of the view that s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, made provincial laws of general application, among which he numbered the *Wildlife Act*, applicable to Indians.

Held: The appeals should be dismissed.

The Court of Appeal was not asked to decide nor did it decide, whether aboriginal hunting rights were or could be expropriated without compensation. The argument that absence of compensation supported the proposition that there had been no loss or regulation of rights was not accepted. Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The *Wildlife Act* illustrates the point. It is aimed at wildlife management and to that end it regulates the time, place, and manner of hunting game. It is not directed to the acquisition of property.

Jacob Kruger et Robert Manuel *Appelants*;

et

Sa Majesté La Reine *Intimée.*

1976: 19 et 20 octobre; 1977: 31 mai.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Indiens — Cerf tué hors saison — Les lois provinciales sur la protection de la faune s'appliquent-elles aux Indiens non visés par un traité et chassant à l'extérieur d'une réserve sur des terres inoccupées de la Couronne? — Wildlife Act, 1966 (B.C.), c. 55, al. 4(1)c) — Loi sur les Indiens, S.R.C. 1970, c. I-6, art. 88.

Pendant qu'ils chassaient hors saison pour se nourrir, les appelants, membres de la bande indienne Penticton, ont tué quatre cerfs. Ils n'avaient pas le permis requis par la *Wildlife Act*, B.C. 1966, c. 55 pour chasser hors saison. Ils chassaient sur des terres inoccupées de la Couronne, terrains de chasse traditionnels de la bande indienne Penticton. Sur une accusation portée en vertu de l'al. 4(1)*c*) de la *Wildlife Act*, un juge de la Cour provinciale a déclaré les appelants coupables d'avoir illégalement tué du gros gibier hors saison. En appel, la Cour de comté a infirmé ces jugements aux motifs que les droits de chasse des Indiens relèvent de la Proclamation royale de 1763, qui les soustrait à l'application de la *Wildlife Act* lorsqu'ils chassent pour se nourrir sur des terres inoccupées de la Couronne. La Cour d'appel de la Colombie-Britannique a rétabli les condamnations. Le juge Robertson qui a rendu l'arrêt de la Cour a estimé que l'art. 88 de la *Loi sur les Indiens*, S.R.C. 1970, c. I-6, rend les lois d'application générale, comme la *Wildlife Act*, applicables aux Indiens.

Arrêt: Les pourvois doivent être rejetés.

On n'avait pas demandé à la Cour d'appel de décider si les droits de chasse des Indiens avaient été ou pouvaient être retirés sans indemnisation, et la Cour ne l'a pas fait. La Cour a rejeté l'argument selon lequel l'absence d'indemnisation montrait que les droits n'avaient pas été retirés ni réglementés. En général, les législations prohibitives portent atteinte à des droits antérieurement exercés, sans indemnisation. La *Wildlife Act* l'illustre bien. Son but étant l'exploitation rationnelle de la faune, elle réglemente les temps, lieux et façons de chasser le gibier. Elle ne vise pas l'acquisition de biens.

The constitutional issue as to the nature of aboriginal title, if any, in respect of lands in British Columbia, the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763 were not directly placed in issue by the appellants and accordingly were not determined in this appeal.

1. Laws of General Application. There are two *indicia* by which to discuss whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. The fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than of general application. The line is crossed when an enactment impairs the status or capacity of a particular group.

Applying these criteria to the present case, there is no doubt that the *Wildlife Act* has a uniform territorial operation. Similarly it is clear that in object and purpose the Act is not aimed at Indians.

However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. Section 88 of the *Indian Act* appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.

2. Referential Incorporation. There is in the legal literature a juridical controversy respecting whether s. 88 referentially incorporates provincial laws of general application or whether such laws apply to Indians *ex proprio vigore*. On either view of this issue the appellants must fail: (a) If the provisions of the *Wildlife Act* are referentially incorporated by s. 88 of the *Indian Act*, appellants, in order to succeed, would have the burden of demonstrating inconsistency or duplication with the *Indian Act* or any order, rule, regulation or by-law made thereunder. That burden had not been discharged and, having regard to the terms of the *Wildlife Act*, manifestly could not have been discharged. Accordingly, such provisions take effect as federal legislation in accordance with their terms. (b) If s. 88 does not referentially incorporate the *Wildlife Act*, the only question is whether the Act is a law of general application. Since that proposition has not been here negatived, the enactment would apply to Indians *ex proprio vigore*. It was, therefore, immaterial to the present appeals whether s. 88

Les appelants n'ont pas directement soulevé la question constitutionnelle de la nature du titre aborigène, s'il existe, sur des terres de la Colombie-Britannique ni la question de l'extinction du titre et de l'effet de la proclamation de 1763. En conséquence, les questions n'ont pas été tranchées dans ce pourvoi.

1. Lois d'application générale. Deux critères peuvent permettre de déterminer si un texte législatif provincial est une loi d'application générale. En premier lieu, il faut examiner la portée territoriale de la Loi. Si la Loi n'a pas une portée uniforme sur tout le territoire, rien ne sert d'aller plus loin, il faut répondre par la négative. Par contre, si la loi a une portée uniforme sur tout le territoire, il faut en étudier le but et l'effet. L'objet et l'intention de la loi ne doivent pas être «relatifs à» un groupe de citoyens. Le fait qu'une loi soit plus lourde de conséquences à l'égard d'une personne que d'une autre ne l'empêche pas, pour autant, d'être une loi d'application générale. On franchit la frontière lorsqu'un texte législatif a pour effet de porter atteinte au statut ou aux droits d'un groupe particulier.

Si on applique ces critères au présent litige, il ne fait aucun doute que la *Wildlife Act* a une portée uniforme sur tout le territoire. Il est en outre évident que l'objet et le but de la loi ne visent pas uniquement les Indiens.

Peu importe l'ampleur du droit des Indiens de chasser et de pêcher, il ne fait aucun doute qu'il peut être réglementé et restreint par l'organe législatif compétent. Le but et l'effet de l'art. 88 de la *Loi sur les Indiens* sont clairs. S'ils ne sont pas protégés par un traité ou par une loi, les Indiens sont assujettis à la législation et à la réglementation provinciales.

2. Introduction par renvoi. Il ressort de la jurisprudence et de la doctrine une controverse juridique quant à savoir si l'art. 88 introduit par renvoi les lois provinciales d'application générale ou si ces lois s'appliquent aux Indiens *ex proprio vigore*. Quoi qu'il en soit, les appelants échouent sur les deux plans: (a) Si l'art. 88 de la *Loi sur les Indiens* introduit par renvoi les dispositions de la *Wildlife Act*, il incombe aux appelants, pour avoir gain de cause, de prouver qu'il y a incompatibilité ou chevauchement entre la *Wildlife Act* et la *Loi sur les Indiens* ou un décret, une ordonnance, une règle, un règlement ou un arrêté établi sous son régime. Les appelants ne l'ont pas fait et, compte tenu des termes de la *Wildlife Act*, ils ne pouvaient manifestement pas le faire. En conséquence, ces dispositions sont applicables à titre de législation fédérale, selon leurs termes mêmes. (b) Si l'art. 88 n'introduit pas la *Wildlife Act* par renvoi, il reste seulement à déterminer si la loi est une loi d'application générale. Puisque cette thèse n'a pas été réfutée en l'espèce, elle s'applique aux Indiens *ex pro-*

takes effect by way of referential incorporation or not. In either case, these appeals must fail.

R. v. George, [1966] S.C.R. 267; *Cardinal v. The Attorney General of Alberta*, [1974] S.C.R. 695; *R. v. Martin* (1917), 41 O.L.R. 79, applied; *R. v. White and Bob* (1965), 52 D.L.R. (2d) 481, distinguished.

APPEALS from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Washington Co.Ct.J. allowing an appeal against conviction of an offence contrary to s. 4(1)(*c*) of the *Wildlife Act*, 1966 (B.C.), c. 55. Appeals dismissed.

D. Sanders, for the appellants.

C. C. Locke, Q.C., and *N. J. Prelypchan*, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—These appeals raise the question whether provincial game laws apply to non-treaty Indians hunting off a reserve on unoccupied Crown land. They fall to be decided upon a statement of agreed facts. The appellants, Jacob Kruger and Robert Manuel, are Indians living in British Columbia and are members of the Penticton Indian Band. Between September 5, and September 8, 1973, during the closed season for hunting, while hunting for food near Penticton, they killed four deer. The acts of hunting took place upon unoccupied Crown land which was and is the traditional hunting ground of the Penticton Indian Band. The accused did not have permits issued under the *Wildlife Act*, 1966 (B.C.), c. 55, authorizing them to hunt and kill deer for food during the closed season. Such permits were readily obtainable by local native Indians and both appellants had obtained permits in the past.

Appellants were convicted before a provincial court judge on a charge laid under s. 4(1)(*c*) of the *Wildlife Act* of unlawfully killing big game during

[1] [1975] 5 W.W.R. 167, 60 D.L.R. (3d) 144.

prio vigore. Il n'est donc pas nécessaire à l'égard des présents pourvois de décider si l'art. 88 s'applique par suite d'une introduction par renvoi ou non. Dans chaque cas, les pourvois doivent être rejetés.

Arrêts appliqués: *R. c. George*, [1966] R.C.S. 267; *Cardinal c. Le procureur général de l'Alberta*, [1974] R.C.S. 695; *R. v. Martin* (1917), 41 O.L.R. 79. Distinction faite avec l'arrêt *R. v. White and Bob* (1965), 52 D.L.R. (2d) 481.

POURVOIS à l'encontre d'un arrêt de la Cour d'appel de la Colombie-Britannique[1], accueillant un appel d'un jugement d'un juge de la Cour de comté de Washington qui avait accueilli un appel contre une déclaration de culpabilité pour infraction à l'al. 4(1)*c*) de la *Wildlife Act*, 1966 (B.C.), c. 55. Pourvois rejetés.

D. Sanders, pour les appelants.

C. C. Locke, c.r., et *N. J. Prelypchan*, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—Les présents pourvois soulèvent la question de savoir si les lois provinciales relatives à la protection de la faune s'appliquent aux Indiens non visés par un traité et chassant à l'extérieur d'une réserve sur des terres inoccupées de la Couronne. Les pourvois doivent être tranchés à partir d'un exposé conjoint des faits. Les appelants, Jacob Kruger et Robert Manuel sont des Indiens vivant en Colombie-Britannique qui sont membres de la bande indienne Pentieton. Entre le 5 et le 8 septembre 1973, soit hors saison, ils ont chassé près de Pentieton et tué pour se nourrir quatre cerfs. Ils chassaient sur des terres inoccupées de la Couronne, qui étaient et sont encore des terrains de chasse traditionnels de la bande indienne Pentieton. Les accusés n'avaient pas le permis requis par la *Wildlife Act*, 1966 (B.C.), c. 55 pour chasser et tuer le cerf hors saison. Les Indiens aborigènes de la région peuvent facilement obtenir ce permis et, les années précédentes, les deux appelants se les étaient procurés.

Sur une accusation portée en vertu de l'al. 4(1)*c*) de la *Wildlife Act*, un juge de la cour provinciale a déclaré les appelants coupables

[1] [1975] 5 W.W.R. 167, 60 D.L.R. (3d) 144.

the closed season. Appeals to the County Court succeeded on the ground that Indian hunting rights fell within the protection of the Royal Proclamation, 1763, and thereby immunized Indians from the reach of the *Wildlife Act* while hunting for food on unoccupied Crown land. On further appeal to the British Columbia Court of Appeal the convictions were restored. Robertson J.A., who delivered the judgment of the Court, was of the view that s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, made provincial laws of general application, among which he numbered the *Wildlife Act*, applicable to Indians. The section reads:

88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

He concluded on the authority of this Court's decision in *The Queen v. George*[2], that s. 4 of the *Wildlife Act* applied to the appellants unless they could bring themselves within the opening words of s. 88 or under the exceptions spelled out in the latter part of the section. With respect to the opening words of the section, Mr. Justice Robertson had this to say:

The Proclamation of 1763 was entirely unilateral and was not, and cannot be described as, a treaty. Assuming (without expressing any opinion) that the Proclamation has the force of a statute, it cannot be said to be an act of the Parliament of Canada: there was no Parliament of Canada before 1867 and by no stretch of the imagination can a proclamation made by the Sovereign in 1763 be said to be an act of a legislative body which was not created until more than a hundred years later.

As to the exceptions, the learned justice of appeal said:

There has not been brought to my attention, nor do I know of, any extent to which s. 4 of the *Wildlife Act* is inconsistent with the *Indian Act*, or with any order, rule, regulation or by-law made thereunder. Nor do I know of

[2] [1966] S.C.R. 267.

d'avoir illégalement tué du gros gibier hors saison. En appel, la Cour de comté a infirmé ces jugements aux motifs que les droits de chasse des Indiens relèvent de la Proclamation royale de 1763 qui les soustrait à l'application de la *Wildlife Act* lorsqu'ils chassent pour se nourrir sur des terres inoccupées de la Couronne. La Cour d'appel de la Colombie-Britannique a rétabli les condamnations. Le juge Robertson, qui a rendu l'arrêt de la Cour, a estimé que l'art. 88 de la *Loi sur les Indiens*, S.R.C. 1970, c. I-6, rend les lois d'application générale comme la *Wildlife Act*, applicables aux Indiens. Cet article dit:

88. Sous réserve des dispositions de quelque traité et de quelque autre loi du Parlement du Canada, toutes lois d'application générale et en vigueur, à l'occasion, dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où lesdites lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou statut administratif établi sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou y ressortissant.

Il a conclu, se fondant sur un arrêt de cette Cour, *La Reine c. George*[2], que l'art. 4 de la *Wildlife Act* s'applique aux appelants, à moins qu'ils n'établissent qu'ils relèvent de la réserve au début de l'article, ou des exceptions énumérées plus loin. Voici ce qu'a dit le juge Robertson au sujet de la réserve:

[TRADUCTION] La Proclamation de 1763 est entièrement unilatérale et ne peut être considérée comme un traité. A supposer (et je ne me prononce pas sur ce point) que la Proclamation ait force de loi, il ne peut s'agir d'une loi du Parlement du Canada car il n'y avait pas de Parlement du Canada avant 1867. Même avec un effort d'imagination, on ne peut considérer une proclamation faite par le souverain en 1763 comme une loi émanant d'une législature créée plus de 100 ans plus tard.

Quant aux exceptions, le savant juge a déclaré:

[TRADUCTION] On ne m'a pas indiqué dans quelle mesure, l'art. 4 de la *Wildlife Act* est incompatible avec la *Loi sur les Indiens* ou les arrêtés, ordonnances, règles ou règlements établis sous son régime, et je ne vois pas

[2] [1966] R.C.S. 267.

any provision made by or under the *Indian Act* with respect to the matters for which provision is made by s. 4 of the *Wildlife Act*.

It is contended on behalf of the appellants that the British Columbia Court of Appeal erred in three respects, namely,

1. In ruling that the *Wildlife Act*, S.B.C. 1966, Ch. 55, was a law of general application within the meaning of that phrase in s. 88 of the *Indian Act*.

2. In ruling, in effect, that s. 88 of the *Indian Act* constituted a federal incorporation by reference of certain provincial laws rather than a statement of the general principles relating to the application of provincial laws to Indians.

3. In ruling, in effect, that aboriginal hunting rights could be expropriated without compensation and without explicit federal legislation.

The third point can be disposed of shortly. The British Columbia Court of Appeal was not asked to decide, nor did it decide, as I read its judgment, whether aboriginal hunting rights were or could be expropriated without compensation. It is argued that absence of compensation supports the proposition that there has been no loss or regulation of rights. That does not follow. Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The *Wildlife Act* illustrates the point. It is aimed at wildlife management and to that end it regulates the time, place, and manner of hunting game. It is not directed to the acquisition of property.

Before considering the two other grounds of appeal, I should say that the important constitutional issue as to the nature of aboriginal title, if any, in respect of land in British Columbia, the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763—issues discussed in *Calder v. Attorney-General of British Columbia*[3]—will not be determined in the present appeal. They were not directly placed in issue by the appellants and a sound rule to follow is that questions of title should only be decided when title is directly in issue. Interested

[3] [1973] S.C.R. 313.

en quoi il le serait. En outre, je ne connais aucune disposition de la *Loi sur les Indiens* ou établie sous son régime qui traite des cas prévus à l'art. 4 de la *Wildlife Act*.

On soutient au nom des appelants que la Cour d'appel de la Colombie-Britannique a commis trois erreurs:

1. En statuant que la *Wildlife Act*, S.B.C. 1966, chap. 55, était une loi d'application générale au sens de cette expression à l'art. 88 de la *Loi sur les Indiens*.

2. En statuant, en fait, que l'art. 88 de la *Loi sur les Indiens* constituait une incorporation par renvoi de certaines lois provinciales dans la législature fédérale plutôt qu'une déclaration des principes généraux relatifs à l'application des lois provinciales aux Indiens.

3. En statuant, en fait, que les droits de chasse des aborigènes pouvaient être retirés sans indemnisation et sans législation fédérale explicite.

Le troisième argument peut être facilement écarté. La Cour d'appel de la Colombie-Britannique n'avait pas à décider si les droits de chasse des Indiens avaient été ou pouvaient être retirés sans indemnisation. A mon avis, il ressort de son jugement qu'elle ne l'a pas fait. On à prétendu que l'absence d'indemnisation appuie la thèse selon laquelle les droits n'ont pas été retirés ni réglementés. Il n'en est rien. En général, les législations prohibitives portent atteinte à des droits antérieurement exercés, sans indemnisation. La *Wildlife Act* l'illustre bien. Son but étant l'exploitation rationnelle de la faune, elle réglemente les temps, lieux et façons de chasser le gibier. Elle ne vise pas l'acquisition de biens.

Avant d'examiner les deux autres moyens d'appel, je tiens à préciser que l'importante question constitutionnelle de la nature du titre aborigène, s'il existe, sur des terres de la Colombie-Britannique ainsi que la question de l'extinction du titre et de l'effet de la Proclamation de 1763—points étudiés dans l'arrêt *Calder c. Le procureur général de la Colombie-Britannique*[3]—ne seront pas tranchées dans ce pourvoi. Les appelants ne les ont pas directement soulevées en l'espèce; il convient donc de suivre une règle bien fondée selon laquelle les questions relatives à des titres ne doivent être

[3] [1973] R.C.S. 313.

parties should be afforded an opportunity to adduce evidence in detail bearing upon the resolution of the particular dispute. Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis. Counsel were advised during argument, and indeed seemed to concede, that the issues raised in the present appeal could be resolved without determining the broader questions I have mentioned.

tranchées que si elles sont directement en cause. Les parties intéressées doivent avoir la possibilité de présenter une preuve détaillée relative à la solution du point en litige particulier. Les revendications de titres aborigènes reposent aussi sur l'histoire, les légendes, la politique et les obligations morales. Si l'on doit traiter la revendication de certaines terres par une bande indienne comme un problème juridique et non politique, on doit donc l'examiner en fonction des faits particuliers relatifs à la bande et aux terres en question, et non de façon générale. La Cour a indiqué aux avocats pendant les débats que les questions soulevées dans le présent pourvoi pouvaient être tranchées sans se prononcer sur les questions plus larges que je viens de mentionner. Les avocats ont d'ailleurs concédé ce point.

I

Laws of General Application

Argument was addressed to the Court that the *Wildlife Act* affects Indian people in a manner quite different than it affects non-Indian people and for that reason cannot be considered as a law of general application within the meaning of the *Indian Act*, s. 88. The first thing to notice in this respect is the precise terms of s. 88 itself. It subjects Indians to "*all* laws of general application from time to time *in force in any province*." There formerly existed a doubt as to whether s. 88 was restricted to provincially enacted laws but that question has been settled in the affirmative by this Court in *The Queen v. George*, *supra*. Mr. Justice Martland gave this interpretation to the relevant phrase in s. 88, at p. 281:

In my view the expression refers only to those rules of law in a province which are provincial in scope, and would include provincial legislation and any laws which were made a part of the law of a province, as, for example, in the provinces of Alberta and Saskatchewan, the laws of England as they existed on July 15, 1870.

This section was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section *the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.*

I

Lois d'application générale

On a plaidé que la *Wildlife Act* affecte différemment les Indiens et les non-Indiens et qu'en conséquence on peut la considérer comme une loi d'application générale au sens de l'art. 88 de la *Loi sur les Indiens*. On remarque tout d'abord à ce sujet les termes précis de l'art. 88. Il assujettit les Indiens à «*toutes* (les) lois d'application générale et *en vigueur*, à l'occasion, *dans une province*». On s'était déjà demandé si l'art. 88 visait seulement les lois provinciales et, dans *La Reine c. George*, précité, la présente Cour a répondu par l'affirmative à cette question. Le juge Martland a donné l'interprétation suivante à l'extrait pertinent de l'art. 88, à la p. 281:

[TRADUCTION] *A mon avis, l'expression ne se réfère qu'aux règles de droit en vigueur dans une province et de compétence provinciale*; elle doit inclure la législation provinciale de même que toutes les lois introduites dans le droit provincial, comme par exemple, dans les provinces de l'Alberta et de la Saskatchewan, les lois anglaises en vigueur le 15 juillet 1870.

Cet article ne vise pas à déclarer la suprématie des traités sur la législation fédérale. Le renvoi aux traités a été inclus dans un article *dont l'objet est de rendre les lois provinciales applicables aux Indiens de façon à empêcher tout conflit entre les droits reconnus par les traités et l'effet des lois provinciales.*

The emphasis throughout is mine.

There are two *indicia* by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacities of a federal company; see *Great West Saddlery Co. v. The King*[4]. Such an act is no "law of general application." See also *Cunningham v. Tomey Homma*[5].

Apply these criteria to the case at bar. There is no doubt that the *Wildlife Act* has a uniform territorial operation. Similarly it is clear that in object and purpose the Act is not aimed at Indians. Section 4 of the *Wildlife Act* under which the accused were charged commences: "No person shall" and so, on its face, applies to all persons. Subsections (1) (2) and (3) of the *Wildlife Act* impose licensing requirements on those wishing to hunt, trap or fish. Subsection (4) states that subsections (1) (2) and (3) do not apply to an Indian residing in the Province. From this, it is clear that the other sections are intended to apply to Indians, as well as all other persons within the Province. Provincial game laws, which have as their object the conservation and management of provincial wildlife resources, have been held by this Court not to relate to Indians *qua* Indians: *Cardinal v.*

[4] [1921] 2 A.C. 91.
[5] [1903] A.C. 151.

(Tous les italiques sont de moi.)

Deux critères peuvent nous permettre de déterminer si un texte législatif provincial est une loi d'application générale. En premier lieu, il faut examiner la portée territoriale de la Loi. Si la Loi n'a pas une portée uniforme sur tout le territoire, rien ne sert d'aller plus loin, il faut répondre par la négative. Par contre si la loi a une portée uniforme sur tout le territoire, il faut en étudier le but et les effets. L'objet et l'intention de la loi ne doivent pas être «relatifs à» un groupe de citoyens. Mais le fait qu'elle soit plus lourde de conséquences à l'égard d'une personne que d'une autre ne l'empêche pas, pour autant, d'être une loi d'application générale. Très peu de lois ont des effets uniformes. On franchit la frontière lorsqu'un texte législatif, bien que traitant d'un autre sujet, a pour effet de porter atteinte au statut ou aux droits d'un groupe particulier. On peut faire une analogie avec une loi qui serait en conflit avec le statut et les pouvoirs d'une compagnie fédérale; voir l'arrêt *Great West Saddlery Co. v. The King*[4]. Une telle loi ne constitue pas une «loi d'application générale». Voir également l'affaire *Cunningham v. Tomey Homma*[5].

Appliquons maintenant ces critères au présent litige. Il ne fait aucun doute que la *Wildlife Act* a une portée uniforme sur tout le territoire. Il est en outre évident que l'objet et le but de la Loi ne visent pas uniquement les Indiens. L'article 4 de la *Wildlife Act*, en vertu duquel les accusations ont été portées, commence par ces mots: [TRADUCTION] «nul ne doit» et s'applique donc manifestement à tous. Les paragraphes (1), (2) et (3) de la *Wildlife Act* obligent ceux qui veulent chasser, piéger ou pêcher à se procurer un permis. Le paragraphe (4) précise que les par. (1), (2) et (3) ne s'appliquent pas aux Indiens résidant dans la province. Il s'ensuit donc que les autres dispositions s'appliquent aux Indiens comme aux autres habitants de la province. Cette Cour a jugé que les lois provinciales en matière de chasse et de pêche et dont l'objet est la protection et l'exploitation

[4] [1921] 2 A.C. 91.
[5] [1903] A.C. 151.

The Attorney General of Alberta[6], at p. 706; *The Queen v. George, supra*. It was long ago decided that provincial laws may affect Indians, insofar as the *Act* was not in relation to them.

In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them.

These words of Riddell J. in *R. v. Martin*[7], at p. 84 were cited with approval in this Court by Martland J. in *Cardinal v. The Attorney General of Alberta, supra*, at p. 706. Mr. Justice Martland continued at p. 707: "The point is that the provisions of s. 12 [of the Alberta Natural Resources Transfer Agreement] were not required to make Provincial game laws apply to Indians off the Reserve."

The Chief Justice of this Court, then Laskin J., wrote in dissent in *Cardinal*, but on the point of concern in the present inquiry, namely, the applicability of provincial game laws to Indians off reserves, his views seem to accord with those of Mr. Justice Martland. After referring to the exclusion of reserves from provincial control, he had this to say, p. 722:

They do not return to that control under s. 12 in respect of the application of provincial game laws. That section deals with a situation unrelated to Indian Reserves. It is concerned rather with Indians as such, and with guaranteeing to them a continuing right to hunt, trap and fish for food regardless of *provincial game laws which would otherwise confine Indians in parts of the Province that are under provincial administration*. Although inelegantly expressed, s. 12 does not expand provincial legislative power but contracts it.

However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the

[6] [1974] S.C.R. 695.
[7] (1917), 41 O.L.R. 79.

rationnelle de la faune provinciale, ne visent pas les Indiens en tant qu'Indiens: *Cardinal c. Le procureur général de l'Alberta*[6], à la p. 706; *La Reine c. George*, précité. Il fut décidé, il y a longtemps, que les lois provinciales peuvent toucher les Indiens dans la mesure où elles ne les visent pas exclusivement.

[TRADUCTION] En d'autres termes, aucune loi de la législature provinciale concernant les Indiens ou leurs terres comme tels ne serait valide et exécutoire; mais il n'y a aucune raison pour laquelle des lois d'application générale ne pourraient les toucher.

Cet extrait du jugement du juge Riddell dans *R. v. Martin*[7], à la p. 84 a été cité et approuvé par le juge Martland dans *Cardinal c. Le procureur général de l'Alberta*, précité à la p. 706. Puis le juge Martland a ajouté, à la p. 707: «Ce à quoi je veux en venir, c'est que les dispositions de l'art. 12 [de la Convention sur les ressources naturelles de l'Alberta] n'étaient pas essentielles pour que les lois provinciales en matière de chasse et pêche s'appliquent aux Indiens hors des réserves».

Le Juge en chef de cette Cour, alors juge puîné, était en dissidence dans *Cardinal*. Cependant, en ce qui concerne la question qui nous occupe, à savoir l'applicabilité aux Indiens hors des réserves des lois provinciales visant la conservation de la faune, il semble partager l'opinion du juge Martland. Après avoir mentionné que les réserves étaient hors du contrôle provincial, il dit, à la p. 722:

Elles ne retournent pas sous ce contrôle en vertu de l'art. 12 en ce qui concerne l'application des lois provinciales sur la conservation de la faune. Cet article traite d'une situation qui est sans rapport avec les réserves indiennes. Il s'intéresse plutôt aux Indiens en tant que tels, et a pour objet de leur garantir un droit continu de chasse, de piégeage et de pêche pour leur nourriture, indépendamment des *lois provinciales sur la conservation de la faune qui restreindraient autrement les Indiens dans les parties de la province qui sont soumises à l'administration provinciale*. Bien que l'art. 12 ne soit pas très élégant dans son libellé, il n'élargit pas le pouvoir législatif de la province, mais le contracte.

Peu importe l'ampleur du droit des Indiens de chasser et de pêcher, il ne fait aucun doute qu'il peut être réglementé et restreint par l'organe légis-

[6] [1974] R.C.S. 695.
[7] (1917), 41 O.L.R. 79.

appropriate legislative authority. Section 88 of the *Indian Act* appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.

Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former. If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter—to "preserve moose before Indians" in the words of Gordon J.A. in *R. v. Strongquill*[8]—it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians. But that has not been done here and in the absence of clear evidence the Court cannot so presume.

The judgment of this Court in *Regina v. White and Bob*[9] is of no assistance to appellants in the present case. In *White and Bob* the accused were charged with having game in their possession during the closed season without having a valid and subsisting permit under the *Game Act*, R.S.B.C. 1960, c. 160. The accused raised the defence that an agreement between their ancestors, members of the Saalequun tribe and Governor Doug[illegible] dated December 23, 1854, gave them

[8] (1953), 8 W.W.R. (N.S.) 247.
[9] (1965), 52 D.L.R. (2d) 481, aff. 52 W.W.R. 193.

latif compétent. Le but et l'effet de l'art. 88 de la *Loi sur les Indiens* sont clairs. S'ils ne sont pas protégés par un traité ou par une loi, les Indiens sont assujettis à la législation et à la réglementation provinciales.

Les lois sur la conservation de la faune ont pour but la protection du gibier. On peut soutenir que sans mesure de protection, l'anéantissement de la faune rendrait théorique la question du droit des Indiens ou d'autres personnes de chasser pour se nourrir. Il faut présumer que le texte législatif en cause est valide. En l'espèce, cela signifie qu'en l'absence d'une preuve à l'effet contraire, il faut aussi présumer que les mesures adoptées par la Législature de la Colombie-Britannique ont pour but la protection efficace de la faune de la province, pour ses habitants, et ne visent pas à opposer les intérêts des écologistes à ceux des Indiens en favorisant les revendications des premiers. Bien sûr, si dans le cadre d'un autre litige, on démontre que la Province a favorisé la protection de la faune par rapport aux revendications des Indiens—pour [TRADUCTION] «protéger l'orignal avant l'Indien» selon les mots du juge d'appel Gordon dans *R. v. Strongquill*[8]—il est fort possible que le tribunal décide alors que la législation franchit la frontière qui sépare les lois d'application générale des autres. Il faudrait dans ce cas prouver que l'objet d'une telle loi est de porter atteinte au statut et aux droits des Indiens. Dans ce cas, l'art. 88 n'aurait pas l'effet de rendre cette loi applicable aux Indiens. Cependant, ce n'est pas le cas en l'espèce et en l'absence d'une preuve manifeste, la Cour ne peut présumer qu'il en est ainsi.

Le jugement de cette Cour dans *Regina c. White and Bob*[9] n'est d'aucun secours aux appelants. Dans *White and Bob*, les appelants étaient accusés d'avoir été en possession de gibier, chassé hors saison, sans détenir le permis exigé par la *Game Act* R.S.B.C. 1960, c. 160. En défense, les accusés ont soutenu que la convention conclue le 23 décembre 1854 entre leurs ancêtres, membres de la tribu indienne Saalequun, et le gouverneur Douglas leur donnait le droit de chasser pour se nourrir

[8] (1953), 8 W.W.R. (N.S.) 247.
[9] (1965), 52 D.L.R. (2d) 481, conf. 52 W.W.R. 193.

the right to hunt for food over the land in question and, alternatively, that as native Indians they possessed the aboriginal right to hunt for food over unoccupied land lying within their ancient tribal hunting grounds. The position of the Crown was that the agreement in question conferred no hunting rights and, if it did, these rights were extinguished by s. 87 (now s. 88) of the *Indian Act*, which the Crown said extended the provisions of the *Game Act* (the forerunner of the *Wildlife Act*) to Indians. Mr. Justice Davey (with whom Mr. Justice Sullivan concurred) was of the opinion that Parliament intended the word "treaty" in s. 87 to include agreements such as the one in question and to except their provisions from the operative part of the section. He held that, that being so, s. 87 did not extend the general provisions of the *Game Act* to the respondents in the exercise of their hunting rights under the agreement over the lands in question. The following passage of his judgment is important, p. 198:

Secs. 8 and 15 of the *Game Act* specifically exempt Indians from the operation of certain provisions of the *Act*, and from that *I think it clear that the other provisions are intended to be of general application and to include* Indians. If these general sections are sufficiently clear to show an intention to abrogate or qualify the contractual rights of hunting notoriously reserved to Indians by agreements such as Ex. 8, they would, in my opinion, fail in that purpose because that would be legislation in relation to Indians that falls within parliament's exclusive legislative authority under sec. 91 (24) of the B.N.A. Act, 1867, 30 & 31 Vict., ch. 3, and also because that would conflict with sec. 87 of the *Indian Act* passed under that authority.

He concluded, p. 199:

In the result, the right of the respondents to hunt over the lands in question reserved to them by Ex. 8 are preserved by sec. 87, and remain unimpaired by the *Game Act*, and it follows that the respondents were rightfully in possession of the carcasses. It becomes unnecessary to consider other aspects of a far reaching argument addressed to us by respondents' counsel.

Mr. Justice Sheppard (with whom Mr. Justice Lord concurred) dissented. He considered that the agreement was not a treaty and was therefore not within the opening words of s. 87. He said that the section of the *Game Act* in question was within the legislative jurisdiction of the Province and was

sur les terres en question et, subsidiairement, qu'en tant qu'Indiens aborigènes, ils possédaient le droit aborigène de chasser pour se nourrir sur les terres inoccupées situées sur l'ancien territoire de chasse de leur tribu. La Couronne a plaidé que la convention en question ne conférait aucun droit de chasse et que, de toute façon, ces droits avaient été éteints par l'art. 87 (maintenant l'art. 88) de la *Loi sur les Indiens* qui selon la Couronne, rendait les dispositions de la *Game Act* (la loi précédant la *Wildlife Act*) applicables aux Indiens. Le juge Davey (dont le juge Sullivan a partagé l'avis) a conclu que le Parlement entendait, en employant le terme «traité» à l'art. 87, viser toutes les ententes de ce genre et excepter leurs dispositions de l'application de l'article. Il a donc jugé que l'art. 87 ne rendait pas les dispositions générales de la *Game Act* applicables aux intimés dans l'exercice de leur droit de chasse sur les terres en question aux termes de la convention. L'extrait suivant de son jugement est important, p. 198:

[TRADUCTION] Les articles 8 et 15 de la *Game Act* excluent expressément les Indiens de l'application de certaines dispositions de la Loi et *j'en conclus que manifestement, les autres dispositions de la Loi sont d'application générale et incluent* les Indiens. Si ces dispositions générales révèlent clairement une intention d'abroger ou de restreindre les droits de chasse conventionnels reconnus aux Indiens dans des ententes comme la pièce 8, elles sont, à mon avis, invalides à cet égard car il s'agirait alors d'une loi relative aux Indiens, relevant des pouvoirs législatifs exclusifs du Parlement en vertu de l'art. 91(24) de l'A.A.N.B. de 1867, 30 & 31 Vict., chap. 3, et contrevenant en outre à l'art. 87 de la *Loi sur les Indiens* adopté en conformité de ces pouvoirs.

Il a conclu, à la p. 199:

[TRADUCTION] En conséquence, le droit des intimés de chasser les terres réservées à cette fin par la pièce 8 est protégé par l'art. 87 et il n'est pas modifié par la *Game Act*. Il s'ensuit que les intimés étaient dans leur droit lorsqu'on les a trouvés en possession du gibier. Il est inutile d'analyser les autres aspects de l'argumentation fouillée de l'avocat des intimés.

Le juge Sheppard a écrit des motifs en dissidence (auxquels a souscrit le juge Lord). Il a conclu que la convention ne constituait pas un traité et qu'elle ne relevait donc pas des termes introductifs de l'art. 87. Il a déclaré que l'article de la *Game Act* relevait de la compétence législative de la province

applicable to Indians not on their Reserve. Mr. Justice Norris wrote separate reasons in which he agreed, substantially for the reasons given by Mr. Justice Davey, that the agreement was a treaty within the meaning of s. 87 of the *Indian Act*. He then dealt at length with the matter of aboriginal rights in general and the applicability of the Royal Proclamation of 1763.

As I read the judgments in the Court of Appeal for British Columbia four of the five judges accepted that the section of the *Game Act* under which the accused were charged would apply to the accused unless the agreement of 1854 could be said to be a treaty within the opening words of s. 87 of the *Indian Act*. When the case reached this Court, the only question decided was whether or not the agreement constituted such a treaty. At the conclusion of argument for the appellant the Court rendered the following oral judgment:

> Mr. Berger, Mr. Manders and Mr. Christie, we do not find it necessary to hear you. We are all of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, Exhibit 8, was a "treaty" within the meaning of that term as used in s. 87 of the *Indian Act*. We therefore think that in the circumstances of the case, the operation of s. 25 of the *Game Act* was excluded by reason of the existence of that treaty. The appeal is accordingly dismissed with costs throughout.

The operation of s. 25 of the *Game Act* was excluded because the agreement was a "treaty."

It has been urged in argument that Indians having historic hunting rights which they have not surrendered should not be placed in a more invidious position than those who entered into treaties, the terms of which preserved those rights. However receptive one may be to such an argument on compassionate grounds, the plain fact is that s. 88 of the *Indian Act*, enacted by the Parliament of Canada, provides that "subject to the terms of any treaty" all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except as stated. The terms of the treaty are paramount; in

et s'appliquait aux Indiens à l'extérieur de leurs réserves. Le juge Norris qui a écrit des motifs distincts, partageait essentiellement l'opinion du juge Davey que la convention constituait un traité au sens de l'art. 87 de la *Loi sur les Indiens*. Il a ensuite longuement étudié la question des droits aborigènes en général et l'applicabilité de la Proclamation royale de 1763.

Selon moi, quatre des cinq juges de la Cour d'appel de la Colombie-Britannique ont accepté la thèse voulant que l'article de la *Game Act* en vertu duquel l'accusation était portée devait s'appliquer aux accusés sauf si la convention de 1854 était interprétée comme un traité au sens des termes introductifs de l'art. 87 de la *Loi sur les Indiens*. Devant la présente Cour, la seule question à trancher dans cette affaire consistait à déterminer si la convention constituait ou non un traité. A la fin de la plaidoirie au nom de l'appelante, la Cour a rendu le jugement oral suivant:

> [TRADUCTION] Me Berger, Manders et Christie. Nous ne jugeons pas nécessaire de vous entendre. Nous sommes tous d'avis que la majorité de la Cour d'appel a eu raison de conclure que le document, pièce 8, était un «traité» au sens où ce terme est employé à l'art. 87 de la *Loi sur les Indiens*, S.R.C. 1952, c. 249. Nous croyons par conséquent que dans les circonstances de l'espèce, l'application de l'art. 25 de la *Game Act* était exclue par suite de l'existence de ce traité.

L'application de l'art. 25 de la *Game Act* a été exclue parce que la convention constituait un «traité».

On a soutenu durant les débats que les Indiens possédant des droits de chasse historiques qu'ils n'ont pas cédés ne devraient pas être désavantagés par rapport aux Indiens qui ont conclu des traités qui protègent ces droits. Même si cet argument attire la sympathie, il ne faut pas perdre de vue que l'art. 88 de la *Loi sur les Indiens*, édicté par le Parlement du Canada, prévoit expressément que «sous réserve des dispositions de quelque traité» toutes lois d'application générale et en vigueur, à l'occasion, dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf quelques exceptions. Les termes du traité préva-

the absence of a treaty provincial laws of general application apply.

II

Referential Incorporation

There is in the legal literature a juridical controversy respecting whether s. 88 referentially incorporates provincial laws of general application or whether such laws apply to Indians *ex proprio vigore*. The issue was considered by this Court in *Natural Parents v. Superintendent of Child Welfare*[10]. The question in that appeal concerned the validity of an adoption order made in respect of a male Indian child in favour of a non-Indian couple. The Chief Justice (Judson, Spence and Dickson JJ. concurring, de Grandpré J. concurring in the result) rejected the submission that the *Adoption Act* R.S.B.C. 1960, c. 4, applied *ex proprio vigore* to the adoption of Indian children and, treating the *Adoption Act* as referentially incorporated, considered whether and to what extent that Act was inconsistent with the *Indian Act*. Mr. Justice Martland (with whom Pigeon J. concurred) was of the opinion that the ambit of authority conferred on the Parliament of Canada by s. 91(24) to legislate on the subject of "Indians and Lands reserved for the Indians" was not such that Parliament alone could enact legislation which might affect Indians; it was not such that Indians were totally exempted from the application of provincial laws. After referring to the *Cardinal* case, Mr. Justice Martland said, p. 163:

> The extent to which provincial legislation could apply to Indians was stated to be that the legislation must be within the authority of s. 92 of the *British North America Act, 1867* and that the legislation must not be enacted in relation to Indians. Such legislation, generally applicable throughout the Province, could affect Indians.

Mr. Justice Ritchie, considering s. 88, said, p. 170:

> In my view, when the Parliament of Canada passed the *Indian Act* it was concerned with the preservation of the special status of Indians and with their right to Indian lands, but it was made plain by s. 88 that Indians

[10] (1975), 60 D.L.R. (3d) 148, [1976] 2 S.C.R. 751.

lent; en l'absence d'un traité, les lois provinciales d'application générale s'appliquent.

II

Introduction par renvoi

Il ressort de la jurisprudence et de la doctrine une controverse juridique quant à savoir si l'art. 88 introduit par renvoi les lois provinciales d'application générale ou si ces lois s'appliquent aux Indiens *ex proprio vigore*. Cette Cour a étudié la question dans l'arrêt *Les parents naturels c. Superintendent of Child Welfare*[10]. Ce pourvoi portait sur la validité d'une ordonnance d'adoption d'un enfant indien par un couple non indien. Le Juge en chef (les juges Judson, Spence et Dickson partageant son opinion et le juge de Grandpré parvenant au même résultat mais pour des motifs différents) a rejeté l'argument selon lequel l'*Adoption Act* R.S.B.C. 1960, c. 4, s'appliquait *ex proprio vigore* à l'adoption d'un enfant indien et, considérant l'*Adoption Act* introduite par renvoi, a examiné dans quelle mesure, le cas échéant, cette Loi était incompatible avec la *Loi sur les Indiens*. Le juge Martland (aux motifs duquel le juge Pigeon a souscrit) était d'avis que le pouvoir conféré au Parlement du Canada à l'art. 91(24) de légiférer sur les «Indiens et les terres réservées pour les Indiens» ne signifie pas que seul le Parlement peut légiférer relativement aux Indiens; il ne signifie pas non plus que les lois provinciales ne s'appliquent aucunement aux Indiens. Après avoir mentionné l'arrêt *Cardinal*, le juge Martland a déclaré à la p. 163:

> Il y est indiqué que le critère relatif à l'application d'une loi provinciale aux Indiens est que la législation doit s'inscrire dans le cadre des pouvoirs de l'art. 92 de l'*Acte de l'Amérique du Nord britannique* et non porter sur les Indiens. Une telle législation, applicable de façon générale dans toute la province, peut viser les Indiens.

Le juge Ritchie a déclaré au sujet de l'art. 88 à la p. 170:

> A mon avis, le Parlement du Canada a adopté la *Loi sur les Indiens* dans le but de préserver le statut spécial des Indiens et leurs droits sur leurs terres, mais l'art. 88 énonce clairement qu'ils sont assujettis aux lois de leur

[10] (1975), 60 D.L.R. (3d) 148, [1976] 2 R.C.S. 751.

were to be governed by the laws of their Province of residence except to the extent that such laws are inconsistent with the *Indian Act* or relate to any matter for which provision is made under that Act.

Mr. Justice Beetz did not find it necessary to express an opinion on the purview of s. 88 of the *Indian Act*. In the result four members of the Court, less than a majority, adopted the position that the section is a referential incorporation of provincial legislation which takes effect under the section as federal legislation.

On either view of this issue present appellants must fail. If the provisions of the *Wildlife Act* are referentially incorporated by s. 88 of the *Indian Act*, appellants, in order to succeed, would have the burden of demonstrating inconsistency or duplication with the *Indian Act* or any order, rule, regulation or by-law made thereunder. That burden has not been discharged and, having regard to the terms of the *Wildlife Act*, manifestly could not have been discharged. Accordingly, such provisions take effect as federal legislation in accordance with their terms. Assuming, without deciding, that the theory of aboriginal title as elaborated by Hall J. in *Calder v. The Attorney-General of British Columbia*[11] is available in respect of present appellants it has been conclusively decided that such title, as any other, is subject to regulations imposed by validly enacted federal laws: *Derriksan v. The Queen* (a recent decision of this Court not yet reported). That was also the result in *The Queen v. George, supra, Daniels v. White and The Queen*[12], and *Sikyea v. The Queen*[13]. The latter two cases are instructive as the hunting rights there stood on stronger ground in that they were protected, in the case of *Sikyea*, by treaty, and in *Daniels'* case by the Manitoba Natural Resources Agreement. In neither case did the protection prevail against the federal *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

province de résidence sauf dans la mesure où ces lois sont incompatibles avec la *Loi sur les Indiens* ou portent sur une matière régie par cette Loi.

Le juge Beetz n'a pas jugé nécessaire d'exprimer une opinion sur la portée de l'art. 88 de la *Loi sur les Indiens*. Quatre membres de la Cour, moins que la majorité, ont donc estimé que l'article avait l'effet d'introduire par renvoi la législation provinciale dans la législation fédérale.

Quoi qu'il en soit, les appelants en l'espèce échouent sur les deux plans. Si l'art. 88 de la *Loi sur les Indiens* introduit par renvoi les dispositions de la *Wildlife Act*, il incombe aux appelants, pour avoir gain de cause, de prouver qu'il y a incompatibilité ou chevauchement entre la *Wildlife Act* et la *Loi sur les Indiens* ou un décret, une ordonnance, une règle, un règlement ou un arrêté établi sous son régime. Les appelants ne l'ont pas fait, et, compte tenu des termes de la *Wildlife Act*, ils ne pouvaient manifestement pas le faire. En conséquence, ces dispositions sont applicables à titre de législation fédérale, selon leurs termes mêmes. A supposer, sans toutefois trancher la question, que les appelants en l'espèce aient pu invoquer la théorie du titre aborigène élaborée par le juge Hall dans *Calder c. Le procureur général de la Colombie-Britannique*[11], la Cour a définitivement décidé qu'un tel titre, comme d'ailleurs tout autre titre, est assujetti aux règlements établis en conformité des lois fédérales validement édictées: *Derriksan c. La Reine* (un arrêt récent de cette Cour, non encore publié). C'est également ce qui ressort de *La Reine c. George*, (précité), *Daniels c. White et La Reine*[12] et *Sikyea c. La Reine*[13]. Les deux derniers arrêts sont instructifs car les droits de chasse en cause étaient mieux fondés puisqu'ils étaient protégés par un traité, dans *Sikyea*, et par la Convention sur les ressources naturelles du Manitoba, dans *Daniels*. Or, ni dans l'un ni dans l'autre, la protection n'a prévalu sur la *Loi fédérale sur la Convention concernant les oiseaux migrateurs*, S.R.C. 1952, c. 179.

[11] [1973] S.C.R. 313.
[12] [1968] S.C.R. 517.
[13] [1964] S.C.R. 642.

[11] [1973] R.C.S. 313.
[12] [1968] R.C.S. 517.
[13] [1964] R.C.S. 642.

If s. 88 does not referentially incorporate the *Wildlife Act*, the only question at issue is whether the Act is a law of general application. Since that proposition has not been here negatived, the enactment would apply to Indians *ex proprio vigore*. It is, therefore, immaterial to the present appeals whether s. 88 takes effect by way of referential incorporation or not. In either case, these appeals must fail.

I would dismiss the appeals.

Appeals dismissed.

Solicitor for the appellants: Douglas Sanders, Victoria.

Solicitor for the respondent: Attorney-General of British Columbia.

Si l'art. 88 n'introduit pas la *Wildlife Act* par renvoi, il reste seulement à déterminer si la Loi est une loi d'application générale. Puisque cette thèse n'a pas été réfutée en l'espèce, elle s'applique aux Indiens *ex proprio vigore*. Il n'est donc pas nécessaire à l'égard des présents pourvois de décider si l'art. 88 s'applique par suite d'une introduction par renvoi ou non. Dans chaque cas, les pourvois doivent être rejetés.

Je suis d'avis de rejeter les pourvois.

Pourvois rejetés.

Procureur des appelants: Douglas Sanders, Victoria.

Procureur de l'intimée: Le procureur général de la Colombie-Britannique.

BRITISH COLUMBIA COURT OF APPEAL

336

Farris C.J.B.C., Branca, Robertson, Seaton and McIntyre JJ.A.

Regina v. Kruger and Manuel

Indians — Hunting for food out of season — Applicability of The Wildlife Act, 1966 (B.C.), c. 55, s. 4, as amended by 1971, c. 69, ss. 3, 4.

Game laws — Whether Indians subject to The Wildlife Act, 1966 (B.C.), c. 55, s. 4, as amended by 1971, c. 69, ss. 3, 4—The Royal Proclamation, R.S.C. 1970, App. II.

Appeal from the judgment of Washington Co. Ct. J., [1974] 6 W.W.R. 206, 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435, allowing an appeal against conviction of an offence contrary to s. 4 of The Wildlife Act. Appeal allowed. Washington Co. Ct. J. held that the respondents, who were Indians, were entitled to enjoy the aboriginal right of Indians to hunt on unoccupied Crown lands by virtue of the Royal Proclamation of 1763.

Held, the appeal should be allowed: section 4 of The Wildlife Act applied to the respondents, and the convictions should be restored: *Regina v. George*, 47 C.R. 382, [1966] S.C.R. 267, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386 applied.

[Note up with 13 C.E.D. (West. 2nd) *Indians*, s. 22; 12 C.E.D. (West. 2nd) *Game Laws*, s. 2.]

F. A. Melvin and *N. J. Prelypchan*, for the Crown.

R. W. Rutherford, for respondents. (Vancouver)

28th February 1975. The judgment of the Court was delivered by

ROBERTSON J.A.:—The Wildlife Act, 1966 (B.C.), c. 55, s. 4 [am. 1971, c. 69, ss. 3, 4], provides that:

"4. (1) No person shall hunt, trap, wound, or kill wildlife . . .

"(*c*) at any time not within the open season".

The respondents were charged that between 5th and 8th September 1973 they did unlawfully kill big game during the closed season, to wit, four deer. They were convicted by Denroche Prov. J. From their conviction they appealed to the County Court under The Summary Convictions Act, R.S.B.C. 1960, c. 373, s. 72 [am. 1970, c. 46, s. 4]. Washington Co. Ct. J., following a trial de novo, allowed their appeal: [1974] 6 W.W.R. 206, 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435. Against that decision the Attorney General has applied under The Summary Convictions Act, s. 94 [am. 1963, c. 45, s. 9; 1972, c. 60, Sched.], for leave to appeal to this Court. I would grant the leave.

Before Washington Co. Ct. J. counsel for the Crown and the accused agreed in writing on certain facts. They agreed that on the days in question the accused did hunt deer, that deer are big game as defined in The Wildlife Act, that the days when they hunted were during the closed season for hunting, and that during those days the accused killed four deer. The last three paragraphs in the admission read:

"5. THAT Jacob Kruger and Robert Manuel are Indians as defined by the Indian Act, Revised Statutes of Canada 1970, Chapter I-6.

"6. THAT Jacob Kruger and Robert Manuel in hunting between the 5th and 8th days of September, A.D. 1973, inclusive, at or near the City of Penticton, in the County of Yale and Province of British Columbia were hunting for food and that the said acts of hunting took place upon unoccupied Crown land which said unoccupied Crown land was and is the traditional hunting ground of the Penticton Indian Band of which Jacob Kruger and Robert Manuel are members.

"7. THAT Jacob Kruger and Robert Manuel, in hunting between September 5th and September 8th, A.D. 1973 inclusive, did not have permits issued to them under the Wildlife Act and or Regulations made pursuant thereto authorizing them to hunt and kill deer for food during the Closed Season."

The principal ground upon which Washington Co. Ct. J. acquitted the respondents was that they were entitled to enjoy the aboriginal right of Indians to hunt on unoccupied land arising from the Royal Proclamation of 1763, which is to be found at R.S.C. 1970, App. II, p. 123.

Under subs. (24) of s. 91 of the B.N.A. Act, 1867, Indians are within the exclusive legislative authority of the Parliament of Canada. Parliament has enacted the Indian Act, R.S.C. 1970, c. I-6, and one of its sections reads:

"88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

This section was considered by the Supreme Court of Canada in *Regina v. George*, 47 C.R. 382, [1966] S.C.R. 267, [1966]

3 C.C.C. 137, 55 D.L.R. (2d) 386, where the judgment of the Court (Cartwright J. dissenting) was delivered by Martland J. At pp. 280-81, referring to s. 87 [of R.S.C. 1952, c. 149], which is now s. 88, he said:

"I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *British North America Act, 1867,* subject to provincial laws of general application . . .

"The incorporation in the section of the words italicized to me makes it clear that when the section refers to 'laws of general application from time to time in force in any province' it did not include in that expression the statute law of Canada . . . . it did not require any express provision in the *Indian Act* to make Indians subject to the provisions of federal statutes . . .

"Accordingly, in my opinion, the provisions of s. 87 do not prevent the application to Indians of the provisions of the *Migratory Birds Convention Act* [R.S.C. 1952, c. 179]."

As I point out in my judgment in *Regina v. Derriksan,* [1975] 4 W.W.R. 761, which is being delivered at the same time as this judgment, the words "No person shall" are of wide application and it is difficult to see how they admit of any exceptions. Certainly a provision that contains them (as does s. 4 of The Wildlife Act) falls within the phrase "laws of general application". Consequently, upon the authority of *Regina v. George,* I am of the opinion that s. 4 of The Wildlife Act applies to the respondents unless they can bring themselves within the opening words of s. 88 or the exceptions stated therein.

I shall deal first with the exceptions. There has not been brought to my attention, nor do I know of, any extent to which s. 4 of The Wildlife Act is inconsistent with the Indian Act, or with any Order, Rule, Regulation or bylaw made thereunder. Nor do I know of any provision made by or under the Indian Act with respect to the matters for which provision is made by s. 4 of The Wildlife Act.

The opening words of s. 88 are:

"Subject to the terms of any treaty and any other Act of the Parliament of Canada, . . . "

The Proclamation of 1763 was entirely unilateral and was not, and cannot be described as, a treaty. Assuming (without expressing any opinion) that the Proclamation has the force of a statute, it cannot be said to be an Act of the Parliament of Canada: there was no Parliament of Canada before 1867 and by no stretch of the imagination can a proclamation made by the Sovereign in 1763 be said to be an Act of a legislative body which was not created until more than 100 years later.

I am, therefore, of the opinion that s. 4 of The Wildlife Act applies to the respondents and that they were properly convicted of a breach of its s. 4. I would allow the appeal and restore the convictions.

ALBERTA SUPREME COURT

Quigley J.

Magnusson v. Magnusson

Divorce and other matrimonial causes — Decree with provision for maintenance — Expiry of appeal period — Entry of decree absolute — Notice of motion to rescind decree nisi — Jurisdiction — The Divorce Act, R.S.C. 1970, c. D-8, ss. 11(2), 17.

Respondent was granted a decree nisi on 26th November 1973, which was made absolute on 5th March 1974. Applicant did not file an answer nor appear at the hearing and he now sought, by notice of motion, to have the decree nisi rescinded, to have that portion rescinded which dealt with maintenance, a stay of the maintenance provisions and other relief. The trial Judge had awarded periodic maintenance as well as a lump sum, none of which had been paid. In the alternative applicant sought a variation of the maintenance provisions pursuant to s. 11(2) of the Divorce Act.

Held, the Court had no jurisdiction to grant the relief sought in the notice of motion, and applicant was, in effect, trying to appeal a finalized judgment long after the time for appealing had gone by and without any reference to the appeal procedure set out in s. 17 of the Divorce Act. As to the application to vary under s. 11(2) the applicant had completely failed to show any change in the condition, means or other circumstances of the respondent; his own financial position had improved and in any event his conduct would disentitle him to any relief: *Hitsman v. Hitsman*, [1970] 2 O.R. 573, 11 D.L.R. (3d) 450; *Gomes v. Gomes*, [1972] 3 W.W.R. 151, 6 R.F.L. 398, 24 D.L.R. (3d) 112 (B.C.) applied.

[Note up with 9 C.E.D. (West. 2nd) *Divorce and Other Matrimonial Causes*, ss. 95, 119.]

H. F. Landerkin, for applicant.

D. L. Dworkin, for respondent. (Calgary S.C. 10681)

11th April 1975. QUIGLEY J.:—The applicant applied by way of notice of motion for one or more of the following orders:

(i) enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or

(ii) order a new trial.

It is to be observed that the term, "no substantial wrong or miscarriage of justice" is not incorporated in this subsection as it is in the situation of an appeal by an accused. However, in this case we think it appropriate to analogize the test, and we would hold that the Crown has satisfied us that it cannot be said that but for the misdirection the verdict of the jury would necessarily have been the same.

As a result, therefore, the appeal will be allowed and a new trial directed.

Appeal allowed.

REGINA v. KRUGER AND MANUEL

County Court of Yale, British Columbia, Washington, Co.Ct.J. July 16, 1974.

Indians — Aboriginal rights — Hunting for sustenance on unoccupied Crown land — Whether right continues to exist in British Columbia — Accused Indian hunting for food on unoccupied Crown land — Whether accused may be convicted of unlawful hunting contrary to provincial statute — Wildlife Act, 1966 (B.C.), c. 55, ss. 4(1), 26(1) — Indian Act (Can.), s. 88 — British North America Act, 1867, s. 91(24).

Indians as defined by the *Indian Act*, R.S.C. 1970, c. I-6 cannot be convicted of hunting game during the closed season or without a permit in respect of game hunted by them for food on unoccupied Crown land, traditionally the hunting ground of their Indian Band. The Royal Proclamation of 1763 applicable throughout British Columbia, which assured the Indians' aboriginal right to do so, continues in effect in the absence of federal legislation pursuant to s. 91 (24) of the *British North America Act, 1867*, taking away the aboriginal right of Indians to hunt for sustenance, and the right cannot be affected by mere provincial legislation. Section 88 of the *Indian Act* incorporating "provincial laws of general application" expressly makes such incorporation subject to "[*inter alia*] any act of the Parliament of Canada", and the Proclamation was an Executive Order having the force and effect thereof.

[*R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 [affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi]; *R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, folld; *Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, consd; *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267, 47 C.R. 382, distd; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485, not folld; *Quinn v. Leatham*, [1901] A.C. 495; *Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd.*, [1914] A.C. 25; *Lorentzen v. Lydden & Co. Ltd.*, [1942]

2 K.B. 202; *R. v. Daniels* (1966), 57 D.L.R. (2d) 365, 49 C.R. 1, 56 W.W.R. 234; affd [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1, [1968] S.C.R. 517, 4 C.R.N.S. 176, 64 W.W.R. 385; *R. v. Lady McMaster*, [1926] Ex. C.R. 68; *Johnson v. McIntosh* (1823), 8 Wheaton 543; *R. v. Sikyea*, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, 46 W.W.R. 65; *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, refd to]

Courts — Stare decisis — Courts of concurrent jurisdiction — Liberty of subject necessitating earlier decision not being followed where reasoning not persuasive — Wildlife Act, 1966 (B.C.), c. 55, ss. 4(1), 26(1).

[*R. v. Northern Electric Co. Ltd. et al.* (1955), 111 C.C.C. 241, [1955] 3 D.L.R. 449, [1955] O.R. 431; *R. v. Thornton* (1971), 2 C.C.C. (2d) 225, [1971] 1 O.R. 691, 14 C.R.N.S. 198; *R. v. Taylor*, [1950] 2 All E.R. 170, refd to]

Evidence — Judicial notice — Court entitled to take judicial notice of facts of history past or contemporaneous — Court entitled to rely on own historical knowledge and researches — Wildlife Act, 1966 (B.C.), c. 55, ss. 4(1), 26(1).

[*Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196; *Read v. Bishop of Lincoln*, [1892] A.C. 644, refd to]

APPEAL by the accused by way of trial *de novo* from their convictions for unlawful hunting contrary to s. 4(1) (*c*) of the *Wildlife Act* (B.C.).

R. W. Rutherford, for accused, appellants.
D. N. Anderson, for the Crown, respondent.

WASHINGTON, CO.CT.J.:—The two appellants appeal the conviction made in the Provincial Court by His Honour District Judge Denroche on December 13, 1973, upon count 2 of the charge contained in the information, reading as follows:

> ... that Jacob Kruger and Robert Manuel, being then and there together, between the 5th day and the 8th day of September, A.D. 1973 inclusive, at or near the City of Penticton, in the County of Yale, Province of British Columbia:
>
> *COUNT #1.* did unlawfully hunt big game during the closed season.
>
> *COUNT #2.* did unlawfully kill big game during the closed season, to wit: four deer,
>
> CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED.

It is my understanding that pursuant to the request of Crown counsel and by agreement with defence counsel, count 1 was considered only as an alternative to count 2.

D. N. Anderson, Esq., counsel for the Crown (respondent), agreed with me that the notice of appeal was in order and the hearing proceeded by way of trial *de novo*.

Crown counsel advised that the charge was laid pursuant to s. 4(1)(*c*) [am. 1971, c. 69, s. 3] of the *Wildlife Act*, 1966 (B.C.), c. 55, which reads as follows:

> 4(1) No person shall hunt, trap, wound, or kill game
>
> (*c*) at any time not within the open season;

Section 26(1) of the *Wildlife Act* provides as follows:

> 26(1) The Director or his authorized representative may ... by the issuance of a permit, authorize any person to do anything ... that he is prohibited from doing by this Act ... subject to and in accordance with whatever conditions, limits, and period or periods (if any) are prescribed by the Director or his authorized representative and set forth in the permit ...

Since certain of the judgments which will later be referred to deal with the *Game Act*, R.S.B.C. 1960, c. 160, it should be noted historically that the *Wildlife Act* in 1966 replaced the previous *Game Act*, of British Columbia.

Counsel advised me that they had agreed upon certain facts, seven in number, which counsel had reduced to writing and signed and which are reproduced herein as follows:

> Counsel acting as agent for Her Majesty the Queen in Right of the Province of British Columbia and Counsel for the Defence hereby agree and admit the following facts:
>
> 1. THAT Jacob Kruger and Robert Manuel, being then and there together, between the 5th day of September, A.D. 1973 and the 8th day of September, A.D. 1973, inclusive, at or near the City of Penticton, in the County of Yale and Province of British Columbia did hunt deer.
>
> 2. THAT deer are big game as defined by the Wildlife Act, S.B.C. 1966, Chapter 55 and amendments thereto.
>
> 3. THAT the days between the 5th and 8th days of September, A.D. 1973, inclusive, were during the closed season for hunting.
>
> 4. THAT Jacob Kruger and Robert Manuel being then and there together, between the 5th and 8th days of September A.D. 1973, inclusive, at a place near the City of Penticton, County of Yale and Province of British Columbia, did kill big game during the closed season, to wit: four (4) deer.
>
> 5. THAT Jacob Kruger and Robert Manuel are Indians as defined by the Indian Act, Revised Statutes of Canada 1970, Chapter 1-6.
>
> 6. THAT Jacob Kruger and Robert Manuel in hunting between the 5th and 8th days of September, A.D. 1973, inclusive, at or near the City of Penticton, in the County of Yale and Province of British Columbia were hunting for food and that the said acts of hunting took place upon unoccupied Crown land which said unoccupied Crown land was and is the traditional hunting ground of the Penticton Indian Band of which Jacob Kruger and Robert Manuel are members.
>
> 7. THAT Jacob Kruger and Robert Manuel, in hunting between September 5th and September 8th A.D. 1973 inclusive, did not have

permits issued to them under the Wildlife Act and or Regulations made pursuant thereto authorizing them to hunt and kill deer for food during the Closed Season.

After the above admission of facts had been entered as ex. 1, Mr. Rutherford, as counsel for the appellants, admitted that, pursuant to the provisions of s. 26(1) of the *Wildlife Act* both appellants had in fact in the past attended and obtained such permits but purposely did not do so in this instance.

The Crown then called as its only witness one Gary F. H. Purchase, a Provincial Conservation Officer of the Fish and Wildlife Branch. After being sworn, he identified both appellants and testified that he met them on September 8, 1973, near the Shingle Creek area, which in turn is near the City of Penticton, and then laid the charge against them.

The Conservation Officer was also asked to testify as to the procedure used to issue permits to local native Indians under the provisions of the *Wildlife Act*. The officer testified that what is known as a "pre-permit program" was in use at the time and this consisted of a procedure whereby the Chief of the Penticton Indian Band is given a number of blank pre-permits by the Fish and Wildlife Branch. Then, if members of the band apply to the Chief *and* satisfy him that they are in need of food for sustenance, the Chief then issues them a "pre-permit" with the Chief's signature on it. This pre-permit is then brought to the Penticton Fish & Wildlife Branch office where, according to the evidence of Officer Purchase, the party possessing the signed pre-permit is then issued a British Columbia Government permit to hunt deer. The officer stated that the Indian Chief's decision is never questioned and the permit is automatically issued.

To illustrate his evidence, the officer produced two documents, both dated December 17, 1971, one of which was a "pre-permit" issued by Adam Eneas, Administrator of the Penticton Indian Band, to one of the appellants herein, Jacob Kruger, together with a carbon copy of the permit issued by the Fish and Wildlife Branch office in Penticton, B.C., on the strength of the pre-permit. These two documents were entered as ex. 2.

While no useful purpose would be served in reproducing these documents in their entirety, it is, I think, interesting to note that the "pre-permit", *prepared by the Government*, contains these two paragraphs:

The Applicant also understands that any deer killed must be used for food for himself and his family and cannot under any circumstances be sold.

> The permit does not entitle the holder to hunt on private property unless so authorized by the person who controls the property.

In this connection, it will be noted (fact No. 6, *supra*) that the two appellants:

> were hunting for food and that the said acts of hunting took place upon unoccupied Crown land, which said unoccupied Crown land was and is the traditional hunting ground of the Penticton Indian Band of which Jacob Kruger and Robert Manuel are members.

Exhibits 1 and 2, together with the evidence of Conservation Officer Purchase, concluded the evidence for the Crown and the appellants called no evidence and relied upon the admission of facts as above set forth.

I should state at this point that I have accepted in total the evidence which I have already set forth.

I have never before been called upon to judicially determine a legal matter of this nature and during the extensive verbal argument which referred to a long line of cases from many different Courts, I became keenly aware of the profound importance and intricacy of the matters at issue and also of the delicate judicial situation which now exists in the light of the decision (or "non-decision") of the Supreme Court of Canada in *Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1 (hereinafter respectfully referred to as "the *Calder* case".) Accordingly, to make certain that I had a complete and exact record of the points relied upon by each counsel, I requested both counsel to supply me with supplementary, written arguments setting forth precisely their respective submissions and also listing the statutes and decided cases upon which they were relying for support of their submissions. In view of some of the submissions of appellants' counsel I also requested both counsel to let me have their submissions on the principle of *stare decisis*. At this stage I would like to extend my thanks and gratitude to both counsel for complying so completely and so adequately with my request.

Appellants' counsel made four submissions as follows:

> 1. It is respectfully submitted that the APPELLANTS, being native Indians, have an aboriginal right to hunt for food upon *unoccupied Crown Land* which forms part of their traditional hunting grounds. The Indians' aboriginal hunting right is usufructuary in nature, and is a burden upon the title of the Crown and is inalienable except to the Crown, and extinguishable only by specific legislative enactment by the Parliament of Canada.
>
> 2. It is respectfully submitted that the Royal Proclamation of 1763 applying to "of the land territories lying to the westward of the source of the rivers which fall into the sea from the west and north-

west" applies to mainland British Columbia, as the framers of the proclamation were well aware that there were territories to the west of the sources of these rivers and thereby intended to include those lands west of the Rocky Mountains. Accordingly, the Royal Proclamation of 1763 protects the hunting rights of the Indians throughout British Columbia.

3. It is respectfully submitted that the Royal Proclamation of 1763 applies to protect the aboriginal hunting rights of all native Indians in Canada by the fact that it has been carried forward into Section 91(24) British North America Act 1867.

4. It is respectfully submitted that the decision of Judge Schultz, a Judge of the County Court of Vancouver, in *Regina vs Discon and Baker*, (1968), 67 D.L.R. (2nd), 619, is not an authority which is binding upon this court in the case at Bar as Judge Schultz failed to give proper consideration and weight to the reasons of Norris, J.A., in his reasons for judgment in *Regina vs White and Bob*, (1965) 50 D.L.R. (2nd), 613 wherein he stated that aboriginal rights have existed in favour of Indians from time immemorial.

Counsel for the respondent made three basic submissions as follows:

1) The onus of proving that an exception or exemption prescribed by law operates in favour of the Appellants is upon the Appellants under Section 68 of the Summary Convictions Act R.S.B.C. 1960 Chapter 373 and that the Appellants have failed to show that the Wildlife Act does not apply to them.

2) The Royal Proclamation of 1763 does not apply to the Appellants.

3) The Wildlife Act applies to the Appellants by virtue of Section 88 of the Indian Act, Revised Statutes of Canada, 1970 Chapter I-6, thereby extinguishing any aboriginal right which may have existed.

The first case relied upon by the Crown respondent was that of *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485 (hereinafter referred to as "*Discon and Baker* case") which is a decision of His Honour Judge Schultz, now Judge of the County Court of Vancouver. The Crown submitted that this case is "on all fours" with the case at bar and that the issues to be decided are exactly the same here as there. As a matter of fact, the three basic submissions made by the Crown counsel are taken verbatim from the *Discon and Baker* case — see p. 622 thereof.

The Crown also relies on the case of *R. v. Noll Derriksan*, an unreported decision of His Honour Judge Collver of the Provincial Court of British Columbia, Penticton, B.C. dated August 30, 1971. The accused was charged with violation of three Regulations made pursuant to the *Fisheries Act*, R.S.C. 1952, c. 119. His Honour Judge Collver in a six-page judgment stated that:

For the reasons advanced by Schultz, County Court Judge in *R. v.*

> *Discon & Baker* ... and the British Columbia Court of Appeal in *Calder v. A.-G. B.C.* ... I must conclude that no aboriginal right can be so recognized.

It must be noted that according to my information, the case of *R. v. Noll Derriksan* has been appealed by way of stated case to the Supreme Court of British Columbia and again, according to my information as of this date, no decision has been handed down.

I should have stated earlier perhaps that His Honour Judge Denroche has advised me personally that in deciding the case now before me on appeal, he concluded that he was bound by the decision of Schultz, Co.Ct.J., in *R. v. Discon and Baker* and the British Columbia Court of Appeal decision in the *Calder* case.

In view of the care with which I shall have to deal with the *Discon and Baker* case and in view of the fact that, for reasons I shall hope to make logical and clear, I have concluded that I shall have to not only distinguish it but also reluctantly disagree with some of the conclusions of His Honour Judge Schultz and form conclusions different to the conclusions he formed, I shall, as far as reasonably possible, deal with the facts and arguments in the same order as he has done.

I am well aware of the penultimate paragraph of Judge Schultz's judgment which sets forth quite clearly:

> This judgment relates only to the appellants, who are Squamish Indians, and is not to be interpreted as declaratory of the legal status of members of other tribes of Indians in the Province of British Columbia.

I also wish to make it as clear as possible that in reaching conclusions which are completely contrary to the conclusions reached by Judge Schultz, I have had the opportunity of reading and studying the learned judgment of Hall, Spence and Laskin (as he then was — now Chief Justice Laskin), JJ., of the Supreme Court of Canada delivered by Hall, J., in the case of *Calder et al. v. A.-G. B.C., supra*, which judgment was of course not in existence and therefore unavailable to Judge Schultz when he made his decision.

In coming to my conclusions, I have carefully considered my position with regard to the principle of *stare decisis* and in that connection I have read the following, among other, cases, namely: 1. *R. v. Northern Electric Co. Ltd. et al.* (1955), 111 C.C.C. 241, [1955] 3 D.L.R. 449, [1955] O.R. 431 (Ont. H.C.); 2. *R. v. Thornton* (1971), 2 C.C.C. (2d) 225, [1971] 1 O.R. 691, 14 C.R.N.S. 198 (Ont. C.A.); 3 *R. v. Taylor*, [1950] 2 All

E.R. 170 at p. 172 (this is a decision of the English Court of Criminal appeal).

Having read these and other cases, I am satisfied that, however embarrassing it may prove to be to myself or to any other Judge, I must, where the liberty of the subject is involved, express my personal conviction that the conclusions reached by His Honour Judge Schultz in the *Discon and Baker* case are wrong and I feel compelled therefore (with the greatest respect to His Honour), to follow my own judgment as hereinafter set forth and refuse to follow this decision.

As previously set forth, Crown counsel before me submitted that the *Discon and Baker* case "is on all fours with the case at Bar". With respect to that submission, I must point out that there are some facts before me which differ materially from the facts that were before His Honour Judge Schultz. First of all, in the *Discon and Baker* case there was no evidence as to legal title of the land on which the Indians were hunting, whereas in the case before me there is accepted evidence that the Indians were hunting on unoccupied Crown land which was and is the traditional hunting ground of the Penticton Indian Band. Another point is that there is no evidence before me that either of the appellants were gainfully employed in any trade or occupation, skilled or otherwise. Furthermore, there is no evidence before me as in the *Discon and Baker* case that the appellants lied to the police.

Since one of the facts before me is that the two appellants were hunting on unoccupied Crown land which was and is "the traditional hunting ground of the Penticton Indian Band", it is perhaps wise to look at the dictionary definition of the word "traditional". This is defined in Webster's New World Dictionary, Concise Edition, at p. 785 as: "of, handed down by, or conforming to tradition". The word "tradition" in the same dictionary is defined as: 1. The handing down orally of customs, beliefs, etc. from generation to generation ... 3. A long established custom that has the effect of an unwritten law.

It may be argued that these distinctions in facts are of no real legal importance, but personally I feel that they are of factual significance in that they distinguish the case before me from the *Discon and Baker* case before His Honour Judge Schultz and should be recited in fairness to the appellants, Kruger and Manuel.

A second important conclusion which I have come to, after full reflection and consideration, is that the recent split decision in the *Calder* case, *supra*, in the Supreme Court of

348

Canada, though it is not on exactly the same point, has nevertheless so explicitly dealt with aboriginal or Indian title and the Royal Proclamation of 1763 that it must be considered by me in deciding this appeal. Having so concluded, I have further concluded that this split decision in the Supreme Court of Canada has had a profound and far-reaching effect on the law throughout Canada and particularly in British Columbia.

It seems to me that the two opposing judgments have brought the law, at least in British Columbia on this issue (namely, aboriginal rights of Indians to hunt for food on unoccupied Crown land) to a crossroads and an absolute "stalemate". Three learned Judges of the Supreme Court of Canada agreed with the conclusions of the Court of Appeal of British Columbia, while three equally learned Judges of the Supreme Court of Canada disagreed with the Court of Appeal of British Columbia. The seventh Judge, in his judicial wisdom, chose not to deal with the issues and stated [34 D.L.R. (3d) 145 at p. 226]: ". . . I have to hold that the preliminary objection that the declaration prayed for, being a claim of title against the Crown . . . the Court has no jurisdiction to make it in the absence of a fiat . . .".

Pigeon, J., therefore dismissed the appeal on that technical ground. The same preliminary objection was dealt with in some detail in the judgment delivered by Hall, J.

It is my firm judicial opinion that under no circumstances can this present judicial state of affairs be regarded as satisfactory by either of the parties involved. It seems to me also that this decision leaves "in limbo" all the previous decisions of British Columbia Courts dealing with the Royal Proclamation of 1763 and with aboriginal rights such as the case of *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 [affirmed 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi], the *Discon and Baker* case, *supra*, and of course the *Calder* case, *supra*, both in the British Columbia Supreme Court and British Columbia Court of Appeal. At least in British Columbia we are, it seems, "back to square one".

A further and hopefully final definitive judgment would appear to be essential and preferably a definitive and declaratory judgment by the Supreme Court of Canada. At this moment in time however it is incumbent upon me to decide this appeal. What happens thereafter is of course speculative and beyond my control.

Because of the importance and the far-reaching effect of the decision which I am called upon to make, I have given scrupulous consideration to each of the judgments in the

Supreme Court of Canada in the *Calder* case. In the hope that I would gain a clearer and better understanding of the full scope of the matter at issue before me I not only read all 114 pages of the report of the *Calder* case (and many pages many times over), I have also read every case and statute and text referred to in the *Calder* case judgments and available to me here in Penticton, British Columbia. Many American cases and many documents referred to are, of course, unavailable to me.

It goes without saying that I have the greatest of respect for their Lordships Martland, Judson and Ritchie on the one hand and their Lordships Hall, Spence and Laskin (now Chief Justice Laskin) on the other hand.

Having prepared myself for delivering these reasons as herein set forth, I feel that I appreciate to the full the obvious care and attention given to their judgments and delivered by their Lordships Judson and Hall respectively.

I therefore find myself in a position analogous to a Judge's having heard two learned expert witnesses in a case before him give two absolutely contradictory expert opinions on the crucial point in issue. It is of course impossible for the Judge to accept the opinions of both such expert witnesses, however learned they may be. He must, in order to reach a decision, assess the weight and credibility and then accept the opinion of one expert and reject the opinion of the other.

Regrettably, I am in a somewhat similar position here because, quite obviously and with respect I cannot, in deciding the issue before me, accept and apply both the judgment pronounced by His Lordship Mr. Justice Judson and also that of His Lordship Mr. Justice Hall. In the absence of a technicality before me, neither can I, with respect, as I perceive it, give any meaningful consideration to the reasons given by His Lordship Mr. Justice Pigeon.

I am in the delicate and unwanted position, therefore, that whatever I do and whatever decision I make in the discharge of my judicial duty will presumably appear to three of the learned Judges in the *Calder* case (and perhaps many other learned Judges of all ranks) as being at best unreasoned and at worst presumptuous. I sincerely hope (and feel) that my reasoning is consistent and logical and I state most emphatically that I have approached the issue before me with a sincere sense of humility and with a grateful appreciation of the "Reasons for Judgment" of many learned Judges which I have read and considered with painstaking care in preparation for delivering this judgment of mine.

350

Having read and reread the judgments delivered in the *Calder* case and after giving prolonged and most careful consideration to all of the arguments and points, I have finally had no hesitation whatsoever in coming to the conclusion that I should and I do accept and follow the exhaustive, learned, logical and consistent, judgment of Hall, Spence and Laskin, JJ., delivered by Mr. Justice Hall. The erudition is abundantly evident and, in my judgment and with respect, beyond dispute. The research is, in my humble opinion, demonstrably thorough and painstaking and a model of judicial determination and fortitude.

It would be both hypocritical and piratical of me to go on in these reasons and to expound at great length why I have come to the conclusions I have, because in doing so it would be necessary for me either to quote directly or to paraphrase page after page of the judgment delivered by Hall, J., in the *Calder* case. A Court of Appeal Judge, quite properly, when considering the judgment of a Judge of the Court below, can state whether or not in his opinion that learned Judge below has dealt fully and properly and correctly with the issues involved, but, equally properly and understandably, a Judge in the Court below cannot do the same in reverse. It would be extremely ill-mannered, presumptuous and time-wasting of me to go on, page after page, paraphrasing the judgment delivered by Mr. Justice Hall. There is no way whatsoever that I could in any way improve upon the language or logic or the manner chosen to deal chronologically with both the historical facts and the law.

However, of necessity, I feel I must and I will refer to many passages and will quote only part thereof and give page reference as to where the entire passage can be found. Accordingly, I would respectfully suggest that anyone reading this judgment from here on should have, for ready reference, the *1973 Canada Supreme Court Reports* so that the relevant passages may be quickly referred to and read if desired. This will save a great deal of time and space and will ensure that the partial quotes made by me are understood in their full and complete context. The judgment delivered by Hall, J., commences at p. 345 S.C.R., p. 168 D.L.R.

Having completed this lengthy but in my opinion very necessary diversion, I now come back to a detailed consideration of the decision in the *Discon and Baker* case and give my reasons for distinguishing it and with respect disagreeing with a considerable portion of it.

I have already set forth the differences in fact between the *Discon and Baker* case and the case I am dealing with here.

In his reasons for judgment at p. 622, Judge Schultz quotes a passage from the case of *Quinn v. Leatham*, [1901] A.C. 495 at p. 506, part of which reads as follows:

> "... there are two observations ... one is ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

Judge Schultz then quotes two further eminent jurists, namely, Haldane, L.C., in *Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd.*, [1914] A.C. 25 at p. 40 [at pp. 622-3]:

> "To look for anything except the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance."

and the final quotation of Atkinson, J., in *Lorentzen v. Lydden & Co. Ltd.*, [1942] 2 K.B. 202 at p. 210:

> "Again and again judges have been told by the Court of Appeal and the House of Lords that words used in previous cases must be interpreted with reference to the facts before the court and the issues with which it was dealing."

It is always refreshing to read these often-quoted passages. However, it is true to say that these salutary admonitions are, obviously, too often read and instantly forgotten or "distinguished" by some lawyers and some Judges everywhere in preparing arguments and judgments.

The first submission His Honour Judge Schultz had to deal with in *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485, is set forth at p. 622 of his judgment and reads as follows:

> 1. The appellants, being Squamish Indians, have an aboriginal *right* to hunt for food for their own use on ancient tribal territory; namely, at or near Culliton Creek in the Squamish Valley.

His Honour said at p. 621:

> The land upon which the appellants were hunting was described as unoccupied, reforested, bushland. The land is not within an Indian Reserve. *The evidence did not disclose the legal title of this land.*

(My emphasis.)

It will be noted at once that this submission is substantially different from the first submission made by the appellants

before me in that the submission before me does not seek to embrace "ancient tribal territory" but strictly limits the submitted area of right to "*unoccupied Crown Land which forms part of their traditional hunting grounds*".

After revealing that both appellants before him had been steadily employed as a mill worker and a millwright respectively, His Honour, surprisingly, I think, in view of the admonitions of *Quinn v. Leatham*, etc., chose to quote a short excerpt from the case of *R. v. Daniels* (1966), 57 D.L.R. (2d) 365 at p. 372, 49 C.R. 1 at p. 5, 56 W.W.R. 234, [affirmed *infra*], as follows:

> . . . hunting for food no longer means the difference between life and death for the Indian and his family, especially nowadays, with all the social security measures available for all Canadian citizens, as well as others available only to Indians.

With respect, I feel that this quotation is taken out of context and that the two previous sentences immediately above the quotation should also be included. They read as follows:

> One or the other of these Federal enactments indicates, to a certain degree, a breach of faith. If Indian rights had been taken away by the 1917 *Migratory Birds Convention Act*, then there is a breach of faith to the Indians by virtue of the many old treaties guaranteeing to them such rights of hunting at all seasons. Though one must admit that life is no longer what it was when these treaties were signed, hunting for food no longer means . . ." [etc. as above quoted].

Surely no legal principle is contained in this quotation?

Of considerably more importance, however, is the fact that this whole judgment of *R. v. Daniels* clearly underscores the difference between *provincial game laws* and *federal enactments*. The case went to the Supreme Court of Canada and that is reported in [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1, 64 W.W.R. 385. In view of the present state of the law on the matter of aboriginal rights, the dissenting judgments of Cartwright, C.J.C., at p. 301 C.C.C., p. 3 D.L.R., p. 386 W.W.R., and Ritchie, Hall and Spence, JJ., in my judgment, deserve and merit attention and particularly the judgment of Hall, J., at pp. 310-21 C.C.C., pp. 11-20 D.L.R., pp. 395-405 W.W.R., both inclusive.

Quite apart from the principle of law that was decided in the case of *R. v. Daniels*, the excerpt therefrom quoted by Schultz, Co.Ct.J., is, perhaps, part of a laboured but illogical attempt to explain away or excuse a blatant breach of the faith admitted to exist.

Quoting from the same page as Schultz, Co.Ct.J. — p. 373 D.L.R., p. 5 C.R. — the learned Judge says: "I must find that the rights given to the Indians by their various treaties with

respect to migratory birds were taken away from them by Parliament in the *Migratory Birds Convention Act . . .*". Then, distinguishing the federal enactment from provincial statutes, and specifically considering the *Manitoba Natural Resources Act*, R.S.M. 1954, c. 180, the learned Judge says:

> Further, para. 13 refers only to provincial game laws, and *assures, to Indians only, the right of hunting, trapping, and fishing for food at all seasons of the year, on unoccupied Crown lands and on such other lands to which they have a right of access.*

(My emphasis.)

If, as I am convinced it does, the aboriginal right to hunt on unoccupied Crown lands exists in the case before me, then, despite the quotation by Schultz, Co.Ct.J., that life is no longer what it used to be when the treaties were signed, it will take more than a change in life-styles to remedy the situation and (*B.N.A. Act, 1867*, s. 91(24)) only a specific *federal enactment* can take it away.

Without being facetious, it could as logically be pointed out by me that in 1974, with the rampant inflation in existence and the high cost of all food and meat and fish, deprivation of the Indian right to hunt and fish might well mean, if not the difference between life and death, at least the difference between a properly nourished and semi-starved wife and family of an unemployed and unemployable Indian living on a reservation.

If the Parliament of Canada feels that it is no longer necessary or advisable to allow the Indians to keep their aboriginal rights to hunt for food (*as opposed to commercial or sport hunting*) then it is well within the prerogative of Parliament to pass an enactment similar to the *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12, or to amend s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, which would take away the aboriginal right of Indians to hunt for sustenance only. Such an enactment as far as I can determine has not yet been passed and the law therefore, in my judgment, remains as it has been since the Royal Proclamation of 1763.

I next deal briefly with that part of the judgment of Schultz, Co.Ct.J., dealing with the evidence given before him by Professor William Duff. He says at p. 625: "The weight of the evidence is to be determined by the tribunal of fact which, in this appeal, is the trial Judge." It follows that Judge Schultz was quite within his rights to treat the evidence of Professor Duff as he did as "opinion" and "really a matter of conjecture".

However, it was not disputed that Professor Duff had

impressive qualifications, he being not only a recognized scholar of renown and a noted anthropologist, but also an author of Indian history and an expert on Indian records.

It appears, however, that Schultz, Co.Ct.J., was impressed with the fact (p. 624) that "The 'opinion' of Professor Duff as to the aboriginal right to hunt ... is not based upon *any fact personally* known to the witness"; and, further, that Professor Duff's "opinion" as to the aboriginal right [pp. 624-5] ". . . does not emanate from a hypothetical question upon *any fact adduced in evidence* which the expert witness is asked to assume to be true".

I do not question His Honour's judicial "right" to conclude as he did, but, with respect, I cannot help but wonder at his judicial wisdom in doing so.

Of course, in expressing this wonder, *I* have had the advantage of reading the judgment of Hall, Spence and Laskin, JJ., delivered by Hall, J., in *Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, in which evidence of the same Professor Duff (Dr. Duff) given in the Supreme Court of British Columbia before Gould, J., less than two years later, was carefully and respectfully considered at length. This judgment, of course, was not available to Judge Schultz.

It is well-settled law as quoted by his Lordship Mr. Justice Norris in *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193, and also Mr. Justice Hall in the *Calder* case that a Court trying a matter is entitled "to take judicial notice of facts of history, whether past or contemporaneous: *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196 at p. 234, and a Court is also entitled to rely upon its own historical knowledge and researches: *Read v. Bishop of Lincoln*, [1892] A.C. 644, Lord Halsbury, L.C., at pp. 652-4.

On p. 169 D.L.R., 346 S.C.R., of the *Calder* case judgment, his Lordship Mr. Justice Hall says this:

> The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species.

Continuing on in the judgment, Hall, J., developed the point further by showing that present-day knowledge is far more advanced and accurate than it was at the time many early legal decisions were made and many wrong assessments of the

Indian culture have since been proven to be ill-founded and untrue. Hall, J., further stressed the essential importance of assessing the Indian culture by *modern historical knowledge and research.*

Here, as in the *Discon and Baker* case, there never was a treaty between the Crown and the Penticton Indian Band — nor, *except for the Royal Proclamation of 1763*, any statutory reservation of any aboriginal right. Of even more importance however, there has been no statutory *extinguishment* of any aboriginal right by federal enactment.

In *R. v. Lady McMaster*, [1926] Ex. C.R. 68 at p. 72, Maclean, J., said: "The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed."

Keeping in mind all of the above observations, the first question I must specifically decide is: "Do the appellants, being native Indians, have an aboriginal right to hunt for food upon *unoccupied Crown land* which forms part of their traditional hunting grounds?" Adjoined with this decision is the larger question as to whether or not the Royal Proclamation of 1763 applies to protect the aboriginal hunting rights of all native Indians throughout British Columbia and, more particularly for me here, the Penticton Indian Band. I agree with Schultz, Co.Ct.J., up to a point that the appeal before him (as the appeal before me) is distinguishable from the case of *R. v. White and Bob*, *supra*, hereinafter referred to as "the *White and Bob* case". That case was basically decided upon the existence of a "treaty" which gave the Indians a binding *covenant* that they would be entitled to hunt over unoccupied lands. No such treaty existed to govern the Squamish Indians nor does one exist to cover the Penticton Indians. That is the distinguishing feature. However, for reasons already given and hereafter to be given, in my judgment it is an unassailable fact that the appellants before him (and before me) are, in the absence of any treaty and because of the Royal Proclamation of 1763, *in an even stronger position* than a treaty Indian. The British Columbia Court of Appeal and later the Supreme Court of Canada in the *White and Bob* case said of treaty Indians that because of the treaty the British Columbia *Game Act*, (now superseded by the *Wildlife Act* of British Columbia) did not apply to native Indians by virtue of s. 87 (now s. 88) of the *Indian Act.*

It appears to have been forgotten, except by Norris and Sheppard, JJ.A., that part of the judgment of Swencisky,

Co.Ct.J., in the *White and Bob* case reads as follows [at p. 619]:

> "*I also hold* that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, *which was confirmed to them* by the Proclamation of 1763, *has never been abrogated or extinguished and is still in full force and effect.*"

(My emphasis.)

It also appears to have been forgotten that the appeal against the judgment of Swencisky, Co.Ct.J., was dismissed.

An important aspect which I have been asked to consider by appellants' counsel is that, in his judgment, Schultz, Co.Ct.J., chose to treat that part of the judgment of Norris, J.A., in the *White and Bob* case, dealing with aboriginal rights and the Royal Proclamation of 1763, as being, in his opinion, *obiter dicta.*

It is a fact that Norris, J.A., was with the majority of the Court in dismissing the appeal. It is a further fact that his reasons for judgment occupy 39 pages of the law report. In *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485, Schultz, Co.Ct.J., quoted briefly from p. 629 of the judgment of Norris, J.A., as follows [at p. 624]:

> "*Substantially* for the reasons given by my brother Davey, which I have had the privilege of reading, I am of the opinion that ex. 8 is a "Treaty" within the meaning of s. 87 of the *Indian Act. However, in view of the argument of counsel for the Crown, I think it is proper to add something further on that matter and to deal specifically with the matter of aboriginal rights and the applicability of the Royal Proclamation of 1763.*"

(My emphasis.)

I feel the word "substantially" is of particular importance.

Later, on p. 627 of his judgment, Schultz, Co.Ct.J., says: "Aboriginal rights 'from time immemorial' have been proclaimed by Norris, J.A., in *R. v. White and Bob* but, with respect, his opinion on this subject is *obiter dicta.*"

It is interesting and significant to note, however, that the so-called *obiter dicta* section continues for some 20 pages in length. It also deals in a masterful, scholarly and thoroughly-researched way with the early history, the Imperial, Canadian Colonial and provincial legislation, and the early and historic United States and Canadian cases. Norris, J.A., too, proceeded on the basis as previously quoted, that the Court is entitled to take judicial notice of the facts of history whether past or contemporaneous.

It appears that Schultz, Co.Ct.J., quoted the first of the above-quoted passages from Norris, J.A., to show that Norris,

J.A., agreed with the judgment of his brother (as he then was) Davey, J.A.

It is now interesting and of value to note that in a comparatively short (four and one-half pages) judgment, Davey, J.A., simply found that ex. 8 in the case was in fact a "Treaty" which was included in s. 87 of the *Indian Act* and that s. 87 did not extend the general provisions of the *Game Act* to the respondent Indians.

The last paragraph of the judgment of Davey, J.A., is, I think, significant and it reads as follows [50 D.L.R. (2d) at p. 619]:

> In the result, the right of the respondents to hunt over the lands in question reserved to them by ex. 8 are preserved by s. 87, and remain unimpaired by the *Game Act*, and it follows that the respondents were rightfully in possession of the carcasses. *It becomes unnecessary to consider other aspects of a far-reaching argument addressed to us by the respondents' counsel.*

(My emphasis.)

The other Judge in the majority decision was Sullivan, J.A., whose entire judgment consists of two lines as follows [at p. 566]: "I agree in dismissing the appeal for the reasons given by my brother Davey in which I concur."

Two of the three majority Judges therefore, no doubt quite happily, found it "unnecessary to consider other aspects of a far-reaching argument addressed to us by the respondents' counsel".

However, Mr. Justice Norris decided not to be judicially complacent and clearly stated his reasons for dealing "specifically with the matter of aboriginal rights and the applicability of the *Royal Proclamation of 1763*" by stating that in his judicial opinion, "*in view of the argument of counsel for the Crown*", he thought it was *proper* to address himself to these further matters and he stated at p. 629:

> *On all of these three matters* it is proper to consider the history of the position of the Indians on this continent and in particular on Vancouver Island from the earliest times, the recognition of that position by the nations which sought or obtained dominion over the Indians and over the lands which they occupied and therefore the international treaties by which that dominion became effective and the legislation Imperial, Canadian, and Provincial affecting these rights of Indians. It is most important also to consider the position and authority of the Hudson's Bay Co. and the position and authority of James Douglas as Chief Factor of the Hudson's Bay Co. and Governor of Vancouver's Island, as it was then called.

(My emphasis.)

What were the arguments of Crown counsel which compelled Norris, J.A., to deal further with the matter? These

are found outlined in the Norris judgment at pp. 626-7 and the third and fourth arguments to which he specifically addressed himself are reproduced here as follows:

> 3. That as to the effect of the *Royal Proclamation of 1763*:
>
> (a) This *Proclamation* has never had any application whatsoever to the Indians on Vancouver Island.
>
> (b) If this *Proclamation* did ever apply to Vancouver Island, such application was excluded in 1849 by the Crown grant of Vancouver Island to the Hudson's Bay Company (ex. 6).
>
> (c) In any event, any hunting rights conferred on any Indians on Vancouver Island had on July 7, 1963, the date of the alleged offence, been extinguished by legislation, such legislation being colonial and provincial legislation relating to game and the combined effect of s. 87 of the *Indian Act* and the B.C. *Game Act*.
>
> 4. As to the aboriginal hunting rights these had been by July 7, 1963, the date of the alleged offence, extinguished by colonial and provincial legislation and the combined effect of s. 87 of the *Indian Act* and the British Columbia *Game Act*.

With respect to Schultz, Co.Ct.J., it appears quite obvious that Norris, J.A., did not intend his carefully-researched judicial opinion on the above two arguments, extending over 20 of the 39 pages of his judgment, to be *obiter dicta*. While it is true, as Schultz, Co.Ct.J., points out on p. 624 of his reasons, that the Supreme Court of Canada were unanimously of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, ex. 8, was a "Treaty", *they did not in any way disagree with* any point in the lengthy reasons of Norris, J.A.

It is suggested here by me, that the *entire* judgment of Norris, J.A., be read.

Indeed, in the *Calder* case before the Supreme Court of Canada, the judgment delivered by Hall, J., not only discusses the *White and Bob* case, but specifically at p. 193 D.L.R., p. 382 S.C.R., of his judgment, considers it "pertinent" to quote with approval part of what Norris, J.A., said in the *White and Bob* case concerning a leading United States case, *Johnson v. McIntosh* (1823), 8 Wheaton 543.

At p. 204 D.L.R., p. 396 S.C.R., of the judgment, Hall, J., deals specifically with the applicability of the Royal Proclamation of 1763 and he says in part:

> The point has been before provincial Courts in Canada on a number of occasions but never specifically dealt with by this Court.
>
> It is necessary, therefore, to face the issue as one of first impression *and to decide it with due regard to the historical record and the principles of the common law.*
>
> The Judges of the Court of Appeal of British Columbia have

> disagreed on this important question. *Norris, J.A., in White and Bob dealt exhaustively with the subject at pp. 638 to 648 . . . of his reasons . . .*".

(My emphasis.)

After citing the quotation of Norris, J.A., that in his opinion "*the Royal Proclamation of 1763 was declaratory and confirmatory of the aboriginal rights and applied to Vancouver Island*". etc., Hall, J., found that Norris, J.A., had correctly concluded [at p. 205 D.L.R., p. 397 S.C.R.]: " . . . *that the Proclamation was declaratory of the aboriginal rights and applied to Vancouver Island*" (my emphasis). He went on immediately thereafter to say: "It follows that if it applied to Vancouver Island it also applied to the Indians of the mainland." Hall, J., then said (speaking be it noted of the *White and Bob* case): "This Court upheld the majority judgment but did not deal with the question of whether or not the Proclamation extended to include territory in British Columbia."

This is one instance where the reader of this judgment should turn to p. 204 D.L.R., p. 396 S.C.R., of the judgment delivered by Hall, J., and read from p. 204 D.L.R., p. 396 S.C.R., right through to p. 208 D.L.R., p. 401 S.C.R. In that passage, Hall, J., states, *inter alia*, dealing with the *Calder* case before the Supreme Court of British Columbia [at p. 205 D.L.R., p. 397 S.C.R.]:

> In the judgment under appeal, Gould, J., accepted the views of Sheppard and Lord, JJ.A., in preference to that of Norris, J.A. In my view the opinion of Sheppard, J.A. in *White and Bob was based on incomplete research as to the state of knowledge of the existence of the land mass between the Rocky Mountains and the Pacific Ocean in 1763.*"

(My emphasis.)

The judgment then cites with approval the decision of Johnson, J.A., in *R. v. Sikyea*, [1964] 2 C.C.C. 325 at p. 327, 43 D.L.R. (2d) 150 at p. 152, 46 W.W.R. 65 at p. 66, where that learned Judge of Appeal said:

> "The right of Indians to hunt and fish for food *on unoccupied Crown lands* has always been recognized in Canada — in the early days as an incident of their "ownership" of the land, *and later by the treaties by which the Indians gave up their ownership right in these lands.*"

(My emphasis.)

The above quotation continues on much more extensively, as does the rest of the passage referred to and should be read completely. Hall, J., then makes the pertinent comment that the Supreme Court of Canada expressed its agreement with the views of Johnson, J.A., in *Sikyea v. The Queen* as quoted,

supra. (This case was referred to by Schultz, Co.Ct.J., in *Discon and Baker* at p. 206 D.L.R., p. 626 S.C.R.)

In a most compelling sequence beginning at p. 266 D.L.R., p. 399 S.C.R., the judgment delivered by Hall, J., in my opinion, completely refutes the finding of Sheppard, J.A., in *White and Bob* that the areas of British Columbia west of the Rockies were *terra incognita.* After stating: "Such a view is not at all flattering to the explorers and rulers of England in 1763." the judgment goes on at considerable length to cite this most compelling historical sequence of events, which should be read in full, after which he says at the bottom of pp. 207-8 D.L.R., pp. 400-1 S.C.R.:

> Accordingly it cannot be challenged that while the west coast lands were mostly unexplored as of 1763, they were certainly known to exist and that fact is borne out by the wording ... in the proclamation ...

I cannot believe that the Supreme Court of Canada judgment would deal as exhaustively and extensively with the judgment of Norris, J.A., in the *White and Bob* case if it had been considered to be mere *obiter dicta.*

With respect, I cannot agree with or accept that part of the judgment of Schultz, Co.Ct.J., to the effect that the opinion of Norris, J.A., on this subject is *obiter dicta.* I feel satisfied that Norris, J.A., intended that part of his judgment dealing with aboriginal rights of native Indians and the Royal Proclamation of 1763 to be a declaratory judgment given in direct and specific response to the *arguments* three and four of Crown counsel, reproduced, *supra,* and the "far-reaching argument addressed to us by the respondents' counsel" as referred to by Davey, J.A., *supra.*

The phrase *obiter dictum* is defined in Wharton's Law-Lexicon & Judicial Dictionary, 10th ed., p. 543 as follows:

> Obiter dictum (a saying by the way), an opinion of a judge not necessary to the judgment given of record, in contradistinction to a judicial dictum which is necessary to the judgment.
>
> This last is of much greater authority than the former, *because delivered upon deliberation, under sanction of the Judge's oath,* while an extra-judicial opinion is no more than the prolatum or saying of him who gives it, a gratis dictum.

(My emphasis.)

In my judgment, using the above definition, that part of the judgment of Norris, J.A., was much more than an "extra-judicial opinion" or a *gratis dictum.* In my judgment it was a declaratory judgment. For those reasons and with respect, I feel that on the facts of the appeal before him in *Discon and Baker,* Schultz, Co.Ct.J., should not have concluded that

Norris, J.A.'s opinion on this subject was *obiter dicta*. The fact that three of the Judges in the Supreme Court of Canada obviously considered the Norris judgment with care and agreed with it has impressed me judicially and I, too, have considered it and have applied the principles contained therein to the facts before me.

On p. 628 of his judgment, Schultz, Co.Ct.J., says: "At the date of the *Royal Proclamation of 1763*, the whole of the Province of British Columbia, including Squamish Valley, was *terra incognita*." and at the top of p. 629, he says: "My view on the *Royal Proclamation* is in accord with that of Sheppard, J.A., in *R. v. White and Bob* . . .".

I have already quoted partly the passage in the Supreme Court of Canada judgment delivered by Hall, J., refuting the finding of Sheppard, J.A., in *White and Bob*. In my opinion, that learned and logical judgment deals a mortal blow to this formerly widely-held judicial fallacy of *terra incognita*. Hopefully, the matter has now been decided once and for all.

I feel that I should not leave this aspect of the matter without posing a question which, with respect, has puzzled me.

If Schultz, Co.Ct.J., chose to treat that part of the Norris, J.A., judgment dealing with aboriginal rights simply as *obiter dicta* and presumably dismissed that learned Judge's opinion as such, why would he consider that he should pay any attention to the opinion expressed in a minority judgment concerning the Royal Proclamation which deals with the very same subject — aboriginal rights? With respect, he appears to have done just that by making part of the Sheppard, J.A., judgment part of his judgment (see top of p. 629 partly quoted above).

Schultz, Co.Ct.J., finally deals with the third submission of the appellants in the *Discon and Baker* case, namely, that [at p. 622] "Section 87 [now s. 88] of the *Indian Act* does not operate to make the *Wildlife Act* applicable to the appellants".

In refusing to accept this argument, Schultz, Co.Ct.J., refers to the case of *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267. It must be recognized immediately, however, that this case deals with a *federal enactment* — namely, the *Migratory Birds Convention Act*. In essence, all that that case decided was that the provisions of the federal enactment of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179, were not, by s. 87 of the *Indian Act*, made subordinate to the treaty of July 10, 1827. To quote more extensively from the judgment in *R. v. George*, Martland, J.,

who gave the majority judgment, said at p. 150 C.C.C., p. 397 D.L.R., (speaking of s. 87, now s. 88 of the *Indian Act*) :

> In my opinion, it was not the purpose of s. 87 to make *any legislation of the Parliament of Canada subject to the terms of any treaty.* I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *B.N.A. Act*, subject to provincial laws *of general application.*

(My emphasis.) It appears that that is the gist of the judgment in *R. v. George* upon which Schultz, Co.Ct.J., concluded that it was authority to refute the third submission of the appellants above stated. Presumably, he based it upon a concession of the appellants in the *Discon and Baker* case which Schultz, Co.Ct.J., sets out as follows on p. 629 [67 D.L.R. (2d)]:

> Counsel for the appellants concedes that there is neither "treaty" nor "any other Act of the Parliament of Canada", specified in the introductory words of s. 87, applicable to the Squamish Indians, and that none of the exceptions in the latter portion of s. 87 applies to this appeal.

No such concession is before me.

It would appear, with respect, that in the *Discon and Baker* case, both counsel for the appellants and Schultz, Co.Ct.J., neglected to pay attention to the key words in s. 87 (now s. 88) which reads:

> 87. Subject to the terms of any treaty *and any other Act of the Parliament of Canada* ...

(My emphasis.)

Schultz, Co.Ct.J., did not quote the next paragraph of the Martland judgment which says [at p. 150 C.C.C., pp. 397-8 D.L.R.]:

> *The application of provincial laws to Indians was*, however, made subject to "the terms of any treaty *and any other Act of the Parliament of Canada*" (the italics are mine). *In addition, provincial laws inconsistent with the Indian Act*, or any order, rule, regulation or by-law made thereunder, or making provision for any matter for which provision is made under that Act, *do not apply.*

(My emphasis.)

It is further of great significance that on p. 151 C.C.C., p. 398 D.L.R., of the *R. v. George* case, Martland, J., says: "I can see no valid distinction between the present case and that of *Sikyea v. The Queen*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642 . . .".

Turning to that Supreme Court Report we find, interestingly enough, that the judgment in that case in the Su-

preme Court of Canada was given by Hall, J., and *it dealt with a treaty Indian* at Yellowknife in the Northwest Territories killing a migratory bird during the closed season in violation of a Migratory Bird Regulation and contrary to a section of the *Migratory Birds Convention Act, supra.* The appeal was dismissed and the Indian was in fact found guilty, *but* at p. 131 C.C.C., pp. 82-3 D.L.R., p. 645 S.C.R., of his reasons for judgment in *Sikyea v. The Queen,* [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642, Hall, J., said:

> The substantial question argued on the hearing of this appeal was whether the provisions of the *Migratory Birds Convention Act* and the Regulations made thereunder apply to Treaty Indians in the Northwest Territories hunting and killing ducks for food at any time of the year.

The Court found the Act *did* abrogate any *treaty rights* but Schultz, Co.Ct.J., like me, was dealing with non-treaty Indians.

Then at p. 132 C.C.C., p. 84 D.L.R., p. 646 S.C.R., the penultimate paragraph of the judgment, *supra,* Hall, J., says:

> On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson, J.A., in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

It now becomes necessary to go to that case, *R. v. Sikyea,* which is reported in [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, 46 W.W.R. 65. At pp. 327-8 C.C.C., p. 152 D.L.R., p. 66 W.W.R., of that report, Johnson, J.A., says as follows:

> The right of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada — in the early days as an incident of their "ownership" of the land, and later by the treaties by which the Indians gave up their ownership right in these lands. McGillivray, J.A., in *R. v. Wesley,* 58 C.C.C. 269, [1932] 4 D.L.R. 774, 26 A.L.R. 433, [1932] 2 W.W.R. 337, discussed quite fully the origin, history and nature of *the right of the Indians both in the lands and under the treaties by which these were surrendered* and it is unnecessary to repeat what he has said. It is sufficient to say that these rights had their origin in the *Royal Proclamation* ... that followed the *Treaty of Paris* in 1763. By that Proclamation it was declared that the Indians "... should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, *not having been ceded to or purchased by Us are reserved to them or any of them, as their Hunting Grounds".*

(My emphasis.) After stating in his judgment that the Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the Proclamation and expressing some doubt if the Indians of the western part of the Northwest Territories could claim any rights under the Proclamation be-

cause of the possibility that the lands "at the time were *terra incognita* and lay to the north and not 'to the westward of the sources of the river which fall into the sea from the west or northwest'." Johnson, J.A., made this very important statement at p. 328 C.C.C., p. 152 D.L.R., p. 67 W.W.R.:

> That fact is not important because the Government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson Bay Company, as having an interest in the lands that required a treaty to effect its surrender [and see *White and Bob* case as well].

We have now come back full circle to the case of *R. v. George, supra.* The learned Judge, Martland, J., in the Supreme Court of Canada in *R. v. George* said: "I can see no valid distinction between the present case and that of Sikyea v. The Queen ..." and in *Sikyea v. The Queen* in the Supreme Court of Canada the Judges accepted in total the views of Johnson, J.A., in the Court of Appeal which have been partially quoted as above and which have been set forth at some length in the passage in the judgment delivered by Hall, J., in the *Calder* case previously referred to, at pp. 204-8 D.L.R., pp. 396-401 S.C.R.

Once again, I point out the significance of the fact that the cases of *R. v. George* and *R. v. Sikyea* both dealt with a federal enactment, namely, the *Migratory Birds Convention Act* and both concluded only that the provisions of s. 87 (now s. 88) "do not prevent the application to Indians of the provisions of the *Migratory Birds Convention Act*".

In his learned reasons in the Court of Appeal in the *Sikyea* case, Johnson, J.A., referred to the case of *R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337. It is both interesting and significant to note that this case dealt with a provincial law, namely, the Alberta *Game Act.* On p. 284 C.C.C., p. 789 D.L.R., p. 352 W.W.R., McGillivray, J.A., says the following:

> It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds *for food on unoccupied Crown land.*"

(My emphasis.)

Later, on the same page [C.C.C. and W.W.R., p. 790 D.L.R.], the learned Judge says:

> If, as Crown counsel contends, s. 12 taken as a whole gives rise to apparent inconsistency and is capable of two meanings then I still

> have no hesitation in saying in the light of all the external circumstances relative to Indian rights in this Dominion to which I have alluded, that the lawmakers in 1930 were in the making of this proviso, aiming at assuring to the Indians covered by the section, an unrestricted right to hunt for food in those unsettled places where game may be found, described in s. 12.
>
> This does not in any wise imply that the Game Act of this Province is *ultra vires*. I merely hold that it has no application to the Indians hunting for food in the places mentioned in this section.

I cannot resist quoting the first paragraph on p. 285 C.C.C., p. 790 D.L.R., p. 353 W.W.R., of the judgment, which reads as follows:

> It is satisfactory to be able to come to this conclusion and not to have to decide that "the Queen's promises" have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be "convinced of our justice and determined resolution to remove all reasonable cause of discontent".

It is also interesting to note that this is the paragraph which Johnson, J.A., was unable to quote in coming to his decision against a *treaty Indian* under a *federal* enactment as opposed to a non-treaty Indian and a provincial statute: *see also* the case of *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2 at p. 5, [1964] S.C.R. 81, 46 W.W.R. 121 at p. 124, which distinguishes hunting for food from hunting for sport or commerce.

The decision of the Supreme Court of Canada in *R. v. White and Bob* (1965), 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi, which said in part:

> We are all of the opinion that the majority in the Court of Appeal were right in their conclusion . . . We therefore think that in the circumstances of the case, the operation of s. 25 of the *Game Act* . . . was excluded by reason of the existence of that treaty.

is now beyond dispute.

Schultz, J., says at p. 629 of his reasons: "Section 87 was examined and considered in *R. v. George*". That same section was examined and considered in the cases *R. v. Sikyea*; *R. v. Wesley*, and *R. v. White and Bob*, and I am satisfied that it is these latter cases that are the definitive judgments on that section of the *Indian Act*.

On p. 200 D.L.R., p. 390 S.C.R., of the judgment delivered by Hall, J., in the *Calder* case, he says: "The aboriginal Indian title does not depend on treaty, executive order or legislative enactment." He also quotes Duff, J., speaking for the Privy Council in *A.-G. Que. v. A.-G. Can. (Re Indian Lands)* (1920), 56 D.L.R. 373, [1921] 1 A.C. 401, as saying that the Indian right was a " 'usufructuary right only and a personal right in

366

the sense that it is in its nature *inalienable except by surrender to the Crown'* " (my emphasis).

While *the entire judgment* delivered by Hall, J., should be perused for many of the points already made and a few points remaining to be made, I quote now from p. 202 D.L.R., p. 394 S.C.R., of his judgment where with simple historical logic he says:

> Surely the Canadian treaties, made with much solemnity on behalf of the Crown, *were intended to extinguish the Indian title.* What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed.

(My emphasis.) Later, on the same page, S.C.R., p. 203 D.L.R., dealing with Treaty No. 8, made in 1899 and entered into on behalf of Queen Victoria and the representatives of Indians in a section of British Columbia and the Northwest Territories, Hall, J., again with unassailable logic, asks the question: "If there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?" I have not been able to find any logical answer to that question.

Another important excerpt from the judgment delivered by Hall, J., which I am satisfied applies in law to the case before me as much as it did in the *Calder* case, is found at p. 203 D.L.R., pp. 394-5, S.C.R. In order to ensure that the reader can appreciate this quotation in its full context, I would urge that the judgment be read in its entirety from pp. 202-9 D.L.R., pp. 394-401 S.C.R.

The somewhat lengthy excerpt above referred to reads as follows:

> Paralleling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question is the guarantee of Indian rights contained in the Proclamation of 1763. This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne, J., in *St. Catherine's Milling* case at p. 652 [14 App. Cas. 46; affg 13 S.C.R. 577] as the "Indian Bill of Rights": see also *Campbell v. Hall* [(1774), 1 Cowp. 204, 98 E.R. 1045]. Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories. It follows, therefore, that the *Colonial Laws Validity Act*, 1865 (U.K.), c. 63, applied to make the Proclamation the law of British Columbia. That it was regarded as being the law of England is clear from the fact that when it was deemed advisable to amend it the amendment was effected by an Act of Parliament, namely the *Quebec Act* of 1774 . . .

With grateful humility, I accept the reasoning of that learned judgment that the Proclamation of 1763 was an Exec-

utive Order *having the force and effect of an Act of Parliament.*

Now I go to p. 208 D.L.R., p. 401 S.C.R., of the *Calder* case, where the judgment, having concluded that the Proclamation of 1763 had the force and effect of an Act of Parliament, asks the question as follows: "This important question remains: were the rights either at common law or under the Proclamation extinguished?" This, of course, is very important under the provisions of s. 88 of the *Indian Act.* Hall, J., then quotes Tysoe, J.A., in the British Columbia Court of Appeal decision of the *Calder* case as saying: " 'It is true, as the appellants have submitted, *that nowhere can one find express words extinguishing the Indian title . . .*' (emphasis added)."

Again, I invite the reader of this judgment to turn to p. 208 D.L.R., p. 401 S.C.R., of the judgment delivered by Hall, J., and read from there to p. 210 D.L.R., p. 404 S.C.R., to get the full context of several short quotes which I now make from that judgment.

At p. 208 D.L.R., p. 401 S.C.R. it says: "Once aboriginal title is established, it is presumed to continue until the contrary is proven."

At p. 211 D.L.R., p. 406 S.C.R., it says: "Once it is apparent that the Act of State doctrine has no application, the whole argument of the respondent that there must be some form of "recognition" of aboriginal rights falls to the ground."

At this stage, the reader is again requested to read verbatim the judgment delivered by Hall, J., from pp. 211-8 D.L.R., pp. 406-16 S.C.R., where it deals in a meticulous manner with the actions of Governors Douglas and Seymour and the Council of British Columbia and substantiates beyond dispute that Governor Douglas was well aware of his instructions to the effect that he had no right to take Indian lands without some form of compensation. The entire passage must be read to appreciate the consistency and logic of Hall, J.'s thinking.

It is perhaps pertinent at this time to draw attention to the *Canadian Bill of Rights*, 1960 (Can.), c. 44 [now R.S.C. 1970, App. III], assented to August 10, 1960, and particularly the preamble thereto and s. 1(*a*), 5 and 6 thereof.

In concluding this judgment I must now deal with the submissions of the Crown respondent before me. These have already been set forth in the early part of this judgment.

In reply to the first submission before me, the answer is twofold. The onus on the appellants has been completely fulfilled and the appellants have shown beyond question that the *Wildlife Act* of British Columbia does not apply to them as far

as hunting for food on unoccupied Crown land is concerned (as opposed to hunting for sport or commerce).

The second and third submissions already have been amply considered, discussed and dismissed.

It is I think salutary to repeat here that part of the judgment of Swencisky, Co.Ct.J., on the *White and Bob* case on appeal before him when he said [50 D.L.R. (2d) 613 at p. 619]:

> I *also hold* that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, which was confirmed to them by the Proclamation of 1763, has never been abrogated or extinguished and *is still in full force and effect.*

(My emphasis.)

It is also salutary to point out that the appeal from this judgment was dismissed both in the Court of Appeal of British Columbia and in the Supreme Court of Canada.

For all of the above reasons the appeal herein is allowed.

Appeal allowed.

REGINA v. SLOAN

British Columbia Court of Appeal, Bull, Seaton and McIntyre, JJ.A. July 16, 1974.

Robbery — Attempted robbery — Proof of offence — Charge alleging attempt to steal while armed with imitation of gun — Accused not armed — Accused merely simulating conduct of armed man with finger — Conviction quashed on appeal — "Imitation" not including simulated actions — Crown bound by charge as particularized — Cr. Code, s. 302.

Indictment and information — Particulars of charge as alleged — Charge of attempted robbery alleging attempt to steal while armed with imitation of gun — Accused not armed — Accused merely simulating conduct of armed man with finger — Conviction quashed on appeal — "Imitation" not including simulated actions — Crown bound by charge as particularized — Cr. Code, s. 302.

APPEAL by the accused from his conviction for attempted robbery contrary to s. 302(*d*) of the *Criminal Code.*

S. Goldberg, for accused, appellant.
R. M. Paris, for the Crown, respondent.

The judgment of the Court was delivered by

MCINTYRE, J.A.:—The appellant was convicted before a Provincial Court Judge on an information alleging an attempted robbery in these terms:

that the City of Vancouver was in the Province of British Columbia. Counsel for the Crown met that submission by referring to s. 732 of the Criminal Code which provides in subs. (1):

"732. (1) An objection to an information for a defect apparent on its face shall be taken by motion to quash the information before the defendant has pleaded, and thereafter only by leave of the summary conviction court before which the trial takes place."

Counsel for the applicant then sought to contend that the Provincial Court Judge should be deemed to have consented to the applicant making such a motion at this stage because he had signed the stated case. I find that submission untenable.

For these reasons I answer the questions contained in the stated case as follows:

1) No.

2) No.

3) No.

4) No.

5) Yes.

The appeal is dismissed.

BRITISH COLUMBIA COUNTY COURT

Washington Co. Ct. J.

Regina v. Kruger and Manuel

Indians — Aboriginal right to hunt for food on unoccupied Crown lands.

Game laws — Applicability to members of Penticton Indian Band hunting for food on unoccupied Crown land — The Indian Act, R.S.C. 1970, c. I-6 — The Wildlife Act, 1966 (B.C.), c. 55.

Appellants, Indians as defined by the Indian Act, and members of the Penticton Indian Band, were convicted of killing game, namely, four deer, during the closed season; they killed the deer for their own consumption on unoccupied Crown land which was in the traditional hunting grounds of the Penticton Indian Band, and they did so without having obtained permits under The Wildlife Act or Regulations.

Held, the appeal should be allowed and the convictions quashed: the appellants had satisfied the onus of proving that The Wildlife Act

of British Columbia did not apply to them as far as hunting for food on unoccupied Crown lands was concerned: *Calder v. A.G. B.C.*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145, affirming 74 W.W.R. 481, 13 D.L.R. (3d) 64; *Regina v. White* (1965), 52 W.W.R. 193, 50 D.L.R. (2d) 613, affirmed 52 D.L.R. (2d) 481n (Can.); *Regina v. Sikyea*, 46 W.W.R. 65, 43 C.R. 83, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, affirmed [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 265, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80 applied; *Regina v. Dixon* (1968), 63 W.W.R. 485, 67 D.L.R. (2d) 619 (B.C.) distinguished and disagreed with.

[Note up with 13 C.E.D. (West. 2nd) *Indians*, s. 22; 12 C.E.D. (West. 2d) *Game Laws*, s. 2.]

R. W. Rutherford, for appellants.

D. N. Anderson, for the Crown.

16th July 1974. WASHINGTON Co. Ct. J.:—The two appellants appeal the conviction made in the Provincial Court by Denroche D.J. on 13th December 1973 upon count 2 of the charge contained in the information, reading as folows:

" . . . that Jacob Kruger and Robert Manuel, being then and there together, between the 5th day and the 8th day of September, A.D. 1973 inclusive, at or near the City of Penticton, in the County of Yale, Province of British Columbia:

"COUNT #1. did unlawfully hunt big game during the closed season.

"COUNT #2. did unlawfully kill big game during the closed season, to wit: four dear,

"CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED."

It is my understanding that pursuant to the request of Crown counsel and by agreement with defence counsel, count 1 was considered only as an alternative to count 2.

D. N. Anderson, counsel for the Crown (respondent), agreed with me that the notice of appeal was in order and the hearing proceeded by way of trial de novo.

Crown counsel advised that the charge was laid pursuant to s. 4(1)(*c*) of The Wildlife Act, 1966 (B.C.), c. 55, which reads as follows:

"4. (1) No person shall hunt, trap, wound, or kill game . . .

"(*c*) at any time not within the open season".

Section 26(1) of The Wildlife Act provides as follows:

"26. (1) The Director or his authorized representative may . . . by the issuance of a permit, authorize any person to do

anything . . . that he is prohibited from doing by this Act . . . subject to and in accordance with whatever conditions, limits, and period or periods (if any) are prescribed by the Director or his authorized representative and set forth in the permit".

Since certain of the judgments which will later be referred to deal with The Game Act, R.S.B.C. 1960, c. 160, it should be noted historically that The Wildlife Act in 1966 replaced the previous Game Act of British Columbia.

Counsel advised me that they had agreed upon certain facts, seven in number, which counsel had reduced to writing and signed and which are reproduced herein as follows:

"Counsel acting as agent for Her Majesty the Queen in Right of the Province of British Columbia and Counsel for the Defence hereby agree and admit the following facts:

"1. THAT Jacob Kruger and Robert Manuel, being then and there together, between the 5th day of September, A.D. 1973 and the 8th day of September, A.D. 1973, inclusive, at or near the City of Penticton, in the County of Yale and Province of British Columbia did hunt deer.

"2. THAT deer are big game as defined by the Wildlife Act, S.B.C. 1966, Chapter 55 and amendments thereto.

"3. THAT the days between the 5th and 8th days of September, A.D. 1973, inclusive, were during the closed season for hunting.

"4. THAT Jacob Kruger and Robert Manuel being then and there together, between the 5th and 8th days of September A.D. 1973, inclusive, at a place near the City of Penticton, County of Yale and Province of British Columbia, did kill big game during the closed season, to wit: four (4) deer.

"5. THAT Jacob Kruger and Robert Manuel are Indians as defined by the Indian Act, Revised Statutes of Canada 1970, Chapter I-6.

"6. THAT Jacob Kruger and Robert Manuel in hunting between the 5th and 8th days of September, A.D. 1973, inclusive, at or near the City of Penticton, in the County of Yale and Province of British Columbia were hunting for food and that the said acts of hunting took place upon unoccupied Crown land which said unoccupied Crown land was and is the traditional hunting ground of the Penticton Indian Band of which Jacob Kruger and Robert Manuel are members.

"7. THAT Jacob Kruger and Robert Manuel, in hunting between September 5th and September 8th A.D. 1973 inclusive.

did not have permits issued to them under the Wildlife Act and or Regulations made pursuant thereto authorizing them to hunt and kill deer for food during the Closed Season."

After the above admission of facts had been entered as Ex. 1, Mr. Rutherford, as counsel for the appellants, admitted that, pursuant to the provisions of s. 26(1) of The Wildlife Act, both appellants had in fact in the past attended and obtained such permits but purposely did not do so in this instance.

The Crown then called as its only witness one Gary F. H. Purchase, a provincial conservation officer of the Fish and Wildlife Branch. After being sworn, he identified both appellants and testified that he met them on 8th September 1973 near the Shingle Creek area, which in turn is near the City of Penticton, and then laid the charge against them.

The conservation officer was also asked to testify as to the procedure used to issue permits to local native Indians under the provisions of The Wildlife Act. The officer testified that what is known as a "pre-permit program" was in use at the time and this consisted of a procedure whereby the chief of the Penticton Indian Band is given a number of blank pre-permits by the Fish and Wildlife Branch. Then, if members of the band apply to the chief *and* satisfy him that they are in need of food for sustenance, the chief then issues them a "pre-permit" with the chief's signature on it. This pre-permit is then brought to the Penticton Fish and Wildlife Branch office where, according to the evidence of Officer Purchase, the party possessing the signed pre-permit is then issued a British Columbia Government permit to hunt deer. The officer stated that the Indian chief's decision is never questioned and the permit is automatically issued.

To illustrate his evidence, the officer produced two documents, both dated 17th December 1971, one of which was a "pre-permit" issued by Adam Eneas, administrator of the Penticton Indian Band, to one of the appellants herein, Jacob Kruger, together with a carbon copy of the permit issued by the Fish and Wildlife Branch office in Penticton, British Columbia, on the strength of the pre-permit. These two documents were entered as Ex. 2.

While no useful purpose would be served in reproducing these documents in their entirety, it is, I think, interesting to note that the "pre-permit", *prepared by the government*, contains these two paragraphs:

373

"The Applicant also understands that any deer killed must be used for food for himself and his family and cannot under any circumstances be sold.

"The permit does not entitle the holder to hunt on private property unless so authorized by the person who controls the property."

In this connection, it will be noted (fact No. 6, supra) that the two appellants:

" . . . were hunting for food and that the said acts of hunting took place upon unoccupied Crown land which said unoccupied Crown land was and is the traditional hunting ground of the Penticton Indian Band of which Jacob Kruger and Robert Manuel are members."

Exhibits 1 and 2, together with the evidence of Conservation Officer Purchase, concluded the evidence for the Crown and the appellants called no evidence and relied upon the admission of facts as above set forth.

I should state at this point that I have accepted in total the evidence which I have already set forth.

I have never before been called upon to judicially determine a legal matter of this nature and during the extensive verbal argument which referred to a long line of cases from many different courts, I became keenly aware of the profound importance and intricacy of the matters at issue and also of the delicate judicial situation which now exists in the light of the decision (or "non-decision") of the Supreme Court of Canada in *Calder v. A.G. B.C.*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 (hereinafter respectfully referred to as "the *Calder* case"). Accordingly, to make certain that I had a complete and exact record of the points relied upon by each counsel, I requested both counsel to supply me with supplementary written arguments setting forth precisely their respective submissions and also listing the statutes and decided cases upon which they were relying for support of their submissions. In view of some of the submissions of appellants' counsel I also requested both counsel to let me have their submissions on the principle of "stare decisis". At this stage I would like to extend my thanks and gratitude to both counsel for complying so completely and so adequately with my request.

Appellants' counsel made four submissions as follows:

"1. It is respectfully submitted that the APPELLANTS, being native Indians, have an aboriginal right to hunt for food upon

unoccupied Crown Land which forms part of their traditional hunting grounds. The Indians' aboriginal hunting right is usufructuary in nature, and is a burden upon the title of the Crown and is inalienable except to the Crown, and extinguishable only by specific legislative enactment by the Parliament of Canada.

"2. It is respectfully submitted that the Royal Proclamation of 1763 applying to 'of the land territories lying to the westward of the source of the rivers which fall into the sea from the west and north-west' applies to mainland British Columbia, as the framers of the proclamation were well aware that there were territories to the west of the sources of these rivers and thereby intended to include those lands west of the Rocky Mountains. Accordingly, the Royal Proclamation of 1763 protects the hunting rights of the Indians throughout British Columbia.

"3. It is respectfully submitted that the Royal Proclamation of 1763 applies to protect the aboriginal hunting rights of all native Indians in Canada by the fact that it has been carried forward into Section 91(24) British North America Act 1867.

"4. It is respectfully submitted that the decision of Judge Schultz, a Judge of the County Court of Vancouver, in *Regina v. Discon* (1968), 63 W.W.R. 485, 67 D.L.R. (2d) 619, is not an authority which is binding upon this court in the case at Bar as Judge Schultz failed to give proper consideration and weight to the reasons of Norris, J.A., in his reasons for judgment in *Regina v. White* (1965), 52 W.W.R. 193, 50 D.L.R. (2d) 613, affirmed 52 D.L.R. (2d) 481n (Can.), wherein he stated that aboriginal rights have existed in favour of Indians from time immemorial."

Counsel for the respondent made three basic submissions as follows:

"1) The onus of proving that an exception or exemption prescribed by law operates in favour of the Appellants is upon the Appellants under Section 68 of the Summary Convictions Act R.S.B.C. 1960 Chapter 373 and that the Appellants have failed to show that the Wildlife Act does not apply to them.

"2) The Royal Proclamation of 1763 does not apply to the Appellants.

"3) The Wildlife Act applys [sic] to the Appellants by virtue of Section 88 of the Indian Act, Revised Statutes of Canada, 1970

Chapter I-6, thereby extinguishing any aboriginal right which may have existed."

The first case relied upon by the Crown respondent was that of *Regina v. Discon*, supra (hereinafter referred to as "the *Discon* case") which is a decision of Judge Schultz, now Judge of the County Court of Vancouver. The Crown submitted that this case is "on all fours" with the case at bar and that the issues to be decided are exactly the same here as there. As a matter of fact, the three basic submissions made by the Crown counsel are taken verbatim from the *Discon* case: see p. 622 thereof.

The Crown also relies on the case of *Regina v. Derriksan*, B.C., 30th August 1971, Collver Prov. J. (not yet reported). The accused was charged with violation of three Regulations made pursuant to the Fisheries Act of Canada, R.S.C. 1952, c. 119, now R.S.A. 1970, c. F-14. Collver Prov. J. in a six-page judgment stated that:

"For the reasons advanced by Schultz Co. Ct. J. in *Regina v. Discon* [supra] . . . and the British Columbia Court of Appeal in *Calder v. A.G. B.C.*, 74 W.W.R. 481, 13 D.L.R. (3d) 64, affirmed [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 . . . I must conclude that no aboriginal right can be so recognized."

It must be noted that, according to my information, the case of *Regina v. Derriksan* has been appealed by way of stated case to the Supreme Court of British Columbia and again, according to my information as of this date, no decision has been handed down.

I should have stated earlier perhaps that Denroche D.J. has advised me personally that, in deciding the case now before me on appeal, he concluded that he was bound by the decision of Schultz Co. Ct. J. in *Regina v. Discon* and the British Columbia Court of Appeal decision in the *Calder* case.

In view of the care with which I shall have to deal with the *Discon* case and in view of the fact that, for reasons I shall hope to make logical and clear, I have concluded that I shall have to not only distinguish it but also reluctantly disagree with some of the conclusions of Schultz Co. Ct. J. and form conclusions different to the conclusions he formed, I shall, as far as reasonably possible, deal with the facts and arguments in the same order as he has done.

I am well aware of the penultimate paragraph of Schultz Co. Ct. J.'s judgment which sets forth quite clearly [p. 629]:

"This judgment relates only to the appellants, who are Squamish Indians, and is not to be interpreted as declaratory of the legal status of members of other tribes of Indians in the Province of British Columbia."

I also wish to make it as clear as possible that in reaching conclusions which are completely contrary to the conclusions reached by Schultz Co. Ct. J., I have had the opportunity of reading and studying the learned [dissenting] judgment of Hall, Spence and Laskin (as he then was — now Laskin C.J.C.) JJ. of the Supreme Court of Canada delivered by Hall J. in the case of *Calder v. A.G. B.C.* commencing at p. 345, which judgment was of course not in existence and therefore unavailable to Schultz Co. Ct. J. when he made his decision.

In coming to my conclusions, I have carefully considered my position with regard to the principle of stare decisis and in that connection I have read the following, among other, cases, namely: *Regina v. Northern Electric Co.*, [1955] O.R. 431, 21 C.R. 45, 111 C.C.C. 241, [1955] 3 D.L.R. 449; *Regina v. Thornton*, [1971] 1 O.R. 691, 14 C.R.N.S. 198, 2 C.C.C. (2d) 225 (C.A.); *Rex v. Taylor*, [1950] 2 K.B. 368, [1950] 2 All E.R. 170 at 172 (this is a decision of the English Court of Criminal Appeal).

Having read these and other cases, I am satisfied that, however embarrassing it may prove to be to myself or to any other Judge, I must, where the liberty of the subject is involved, express my personal conviction that the conclusions reached by Schultz Co. Ct. J. in the *Discon* case are wrong, and I feel compelled therefore (with the greatest respect to His Honour) to follow my own judgment as hereinafter set forth and refuse to follow this decision.

As previously set forth, Crown counsel before me submitted that the *Discon* case "is on all fours with the case at bar". With respect to that submission, I must point out that there are some facts before me which differ materially from the facts that were before Schultz Co. Ct. J. First of all, in the *Discon* case there was no evidence as to legal title of the land on which the Indians were hunting, whereas in the case before me there is accepted evidence that the Indians were hunting on unoccupied Crown land which was and is the traditional hunting ground of the Penticton Indian Band. Another point is that there is no evidence before me that either of the appellants was gainfully employed in any trade or occupation, skilled or otherwise. Furthermore, there is no evidence before me as in the *Discon* case that the appellants lied to the police.

Since one of the facts before me is that the two appellants were hunting on unoccupied Crown land which was and is "the traditional hunting ground of the Penticton Indian Band", it is perhaps wise to look at the dictionary definition of the word "traditional". This is defined in Webster's New World Dictionary, Concise Edition, at p. 785 as: "of, handed down by, or conforming to tradition". The word "tradition" in the same dictionary is defined as: "1. The handing down orally of customs, beliefs, etc. from generation to generation . . . 3. A long established custom that has the effect of an unwritten law."

It may be argued that these distinctions in facts are of no real legal importance, but personally I feel that they are of factual significance in that they distinguish the case before me from the *Discon* case before Schultz Co. Ct. J. and should be recited in fairness to the appellants. Kruger and Manuel.

A second important conclusion which I have come to after full reflection and consideration is that the recent split decision in the *Calder* case, supra. in the Supreme Court of Canada, though it is not on exactly the same point, has nevertheless so explicitly dealt with aboriginal or Indian title and the Royal Proclamation of 1763 that it must be considered by me in deciding this appeal. Having so concluded, I have further concluded that this split decision in the Supreme Court of Canada has had a profound and far-reaching effect on the law throughout Canada and particularly in British Columbia.

It seems to me that the two opposing judgments have brought the law, at least in British Columbia, on this issue (namely, aboriginal rights of Indians to hunt for food on unoccupied Crown land) to a crossroads and an absolute "stalemate". Three learned Judges of the Supreme Court of Canada agreed with the conclusions of the Court of Appeal of British Columbia, while three equally learned Judges of the Supreme Court of Canada disagreed with the Court of Appeal of British Columbia. The seventh Judge, in his judicial wisdom, chose not to deal with the issues and stated [p. 426]:

" . . . I have to uphold the preliminary objection that the declaration prayed for, being a claim of title against the Crown . . . the Court has no jurisdiction to make it in the absence of a fiat".

Pigeon J. therefore dismissed the appeal on that technical ground. The same preliminary objection was dealt with in some detail in the judgment delivered by Hall J.

It is my firm judicial opinion that under no circumstances can this present judicial state of affairs be regarded as satisfactory by either of the parties involved. It seems to me also that this decision leaves "in limbo" all the previous decisions of British Columbia courts dealing with the Royal Proclamation of 1763 and with aboriginal rights such as the case of *Regina v. White* (1965), 52 W.W.R. 193, 50 D.L.R. (2d) 613, affirmed 52 D.L.R. (2d) 481n (Can.); the *Discon* case, supra; and of course the *Calder* case, supra, both in the British Columbia Supreme Court and British Columbia Court of Appeal. At least in British Columbia we are, it seems, "back to square one".

A further and hopefully final definitive judgment would appear to be essential and preferably a definitive and declaratory judgment by the Supreme Court of Canada. At this moment in time however it is incumbent upon me to decide this appeal. What happens thereafter is of course speculative and beyond my control.

Because of the importance and the far-reaching effect of the decision which I am called upon to make, I have given scrupulous consideration to each of the judgments in the Supreme Court of Canada in the *Calder* case. In the hope that I would gain a clearer and better understanding of the full scope of the matter at issue before me I not only read all 114 pages of the report of *Calder* case (and many pages many times over), I have also read every case and statute and text referred to in the *Calder* case judgments and available to me here in Penticton, British Columbia. Many American cases and many documents referred to are, of course, unavailable to me.

It goes without saying that I have the greatest of respect for their Lordships Martland, Judson and Ritchie on the one hand and their Lordships Hall, Spence and Laskin (now Chief Justice Laskin) on the other hand.

Having prepared myself for delivering these reasons as herein set forth, I feel that I appreciate to the full the obvious care and attention given to their judgments by Judson and Hall JJ. respectively.

I therefore find myself in a position analogous to that of a judge having heard two learned expert witnesses in a case before him give two absolutely contradictory expert opinions on the crucial point in issue. It is of course impossible for the judge to accept the opinions of both such expert witnesses, however learned they may be. He must, in order to reach

379

a decision, assess the weight and credibility and then accept the opinion of one expert and reject the opinion of the other.

Regrettably, I am in a somewhat similar position here because quite obviously and with respect I cannot, in deciding the issue before me, accept and apply both the judgment pronounced by Judson J. and also that of Hall J. In the absence of a technicality before me, neither can I, with respect, as I perceive it, give any meaningful consideration to the reasons given by Pigeon J.

I am in the delicate and unwanted position, therefore, that whatever I do and whatever decision I make in the discharge of my judicial duty will presumably appear to three of the learned Judges in the *Calder* case (and perhaps many other learned judges of all ranks) as being at best unreasoned and at worst presumptuous. I sincerely hope (and feel) that my reasoning is consistent and logical and I state most emphatically that I have approached the issue before me with a sincere sense of humility and with a grateful appreciation of the "reasons for judgment" of many learned judges which I have read and considered with painstaking care in preparation for delivering this judgment of mine.

Having read and re-read the judgments delivered in the *Calder* case and after giving prolonged and most careful consideration to all of the arguments and points, I have finally had no hesitation whatsoever in coming to the conclusion that I should and I do accept and follow the exhaustive, learned, logical and consistent judgment of Hall, Spence and Laskin JJ. delivered by Hall J. The erudition is abundantly evident and, in my judgment and with respect, beyond dispute. The research is, in my humble opinion, demonstrably thorough and painstaking and a model of judicial determination and fortitude.

It would be both hypocritical and piratical of me to go on in these reasons and to expound at great length why I have come to the conclusions I have, because in doing so it would be necessary for me either to quote directly or to paraphrase page after page of the judgment delivered by Hall J. in the *Calder* case. A court of appeal judge, quite properly, when considering the judgment of a judge of the court below, can state whether or not in his opinion that learned judge below has dealt fully and properly and correctly with the issues involved, but, equally properly and understandably, a judge in the court below cannot do the same in reverse! It would be extremely ill-mannered, presumptuous and time-wasting of me

to go on, page after page, paraphrasing the judgment delivered by Hall J. There is no way whatsoever that I could in any way improve upon the language or logic or the manner chosen to deal chronologically with both the historical facts and the law.

However, of necessity, I feel I must and I will refer to many passages and will quote only part thereof and give page reference as to where the entire passage can be found. Accordingly, I would respectfully suggest that anyone reading this judgment from here on should have, for ready reference, the 1973 Canada Supreme Court Reports so that the relevant passages may be quickly referred to and read if desired. This will save a great deal of time and space and will ensure that the partial quotes made by me are understood in their full and complete context. The judgment delivered by Hall J. commences at p. 345.

Having completed this lengthy but in my opinion very necessary diversion, I now come back to a detailed consideration of the decision in *Regina v. Discon* (1968), 63 W.W.R. 485, 67 D.L.R. (2d) 619 (B.C.), and give my reasons for distinguishing it and with respect disagreeing with a considerable portion of it.

I have already set forth the differences in fact between the *Discon* case and the case I am dealing with here.

In his reasons for judgment at p. 622, Schultz Co. Ct. J. quotes a passage from the case of *Quinn v. Leathem*, [1901] A.C. 495 at 506, part of which reads as follows:

" . . . there are two observations . . . one is . . . every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

Schultz Co. Ct. J. then quotes two further eminent jurists, namely Haldane L.C. in *Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd.*, [1914] A.C. 25 at 40:

"To look for anything except the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful

381

for edification, but it can rarely yield authoritative guidance", and the final quotation of Atkinson J. in *Lorentzen v. Lydden & Co. Ltd.*, [1942] 2 K.B. 202 at 210:

"Again and again judges have been told by the Court of Appeal and the House of Lords that words used in previous cases must be interpreted with reference to the facts before the court and the issues with which it was dealing."

It is always refreshing to read these often-quoted passages. However, it is true to say that these salutary admonitions are, obviously, too often read and instantly forgotten or "distinguished" by some lawyers and some judges everywhere in preparing arguments and judgments.

The first submission Schultz Co. Ct. J. had to deal with in *Discon* is set forth at p. 622 of his judgment and reads as follows:

"1. The Appellants, being Squamish Indians, have an aboriginal *right* to hunt for food for their own use on ancient tribal territory; namely, at or near Culliton Creek, in the Squamish Valley."

His Honour said at p. 621:

"The land upon which the appellants were hunting was described as unoccupied, reforested, bushland. The land is not within an Indian reserve. *The evidence did not disclose the legal title of this land.*" (The italics are mine.)

It will be noted at once that this submission is substantially different from the first submission made by the appellants before me in that the submission before me does not seek to embrace "ancient tribal territory" but strictly limits the submitted area of right to "*unoccupied Crown Land which forms part of their traditional hunting grounds*". (The italics are mine.)

After revealing that both appellants before him had been steadily employed as a mill worker and a millwright respectively, His Honour, surprisingly, I think, in view of the admonitions of *Quinn v. Leathem*, etc., chose to quote a short excerpt from the case of *Regina v. Daniels*, 56 W.W.R. 234, 49 C.R. 1 at 5, 57 D.L.R. (2d) 365 (Man. C.A.), as follows:

" . . . hunting for food no longer means the difference between life and death for the Indian and his family, especially nowadays, with all the social security measures available for all Canadian citizens, as well others available only to Indians."

With respect, I feel that this quotation is taken out of context and that the two previous sentences immediately above the quotation should also be included. They read as follows:

"One or the other of these Federal enactments indicates, to a certain degree, a breach of faith. If Indian rights had been taken away by the 1917 Migratory Birds Convention Act [1917 (Can.), c. 18], then there is a breach of faith to the Indians by virtue of the many old treaties guaranteeing to them such rights of hunting at all seasons. Though one must admit that life is no longer what it was when these treaties were signed, hunting for food no longer means . . . " (as above quoted).

Surely no legal principle is contained in this quotation?

Of considerably more importance, however, is the fact that this whole judgment of *Regina v. Daniels* clearly underscores the difference between *provincial game laws* and *federal enactments*. The case went to the Supreme Court of Canada (sub nom. *Daniels v. White*) and that is reported in [1968] S.C.R. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 209, 2 D.L.R. (3d) 1. In view of the present state of the law on the matter of aboriginal rights, the dissenting judgments of Cartwright C.J., at p. 386, and Ritchie, Hall and Spence JJ., in my judgment, deserve and merit attention and particularly the judgment of Hall J. at pp. 395 to 405, both inclusive.

Quite apart from the principle of law that was decided in the case of *Regina v. Daniels*, the excerpt therefrom quoted by Schultz Co. Ct. J. is, perhaps, part of a laboured but illogical attempt to explain away or excuse a blatant breach of the faith admitted to exist.

Quoting from the same page as Schultz Co. Ct. J. — p. 5 — the learned Judge says:

"I must find that the rights given to the Indians by their various treaties with respect to migratory birds were taken away from them by Parliament in the Migratory Birds Convention Act".

Then, distinguishing the federal enactment from provincial statutes, and specifically considering The Manitoba Natural Resources Act, R.S.M. 1954, c. 180, the learned Judge says:

"Further, s. 13 refers only to provincial game laws, and *assures, to Indians only, the right of hunting, trapping, and fishing for food at all seasons of the year, on unoccupied Crown*

lands and on such other lands to which they have a right of access." (The italics are mine.)

If, as I am convinced it does, the aboriginal right to hunt on unoccupied Crown lands exists in the case before me, then, despite the quotation by Schultz Co. Ct. J., that life is no longer what it used to be when the treaties were signed, it will take more than a change in life-styles to remedy the situation and (the B.N.A. Act, 1867, s. 91(24)) only a specific *federal enactment* can take it away!

Without being facetious, it could as logically be pointed out by me that in 1974, with the rampant inflation in existence and the high cost of all food and meat and fish, deprivation of the Indian right to hunt and fish might well mean, if not the difference between life and death, at least the difference between a properly nourished and semi-starved wife and family of an unemployed and unemployable Indian living on a reservation!

If the Parliament of Canada feels that it is no longer necessary or advisable to allow the Indians to keep their aboriginal rights to hunt for food (*as opposed to commercial or sport hunting*) then it is well within the prerogative of Parliament to pass an enactment similar to The Migratory Birds Convention Act [now R.S.C. 1970, c. M-12], or to amend s. 88 of the Indian Act, which would take away the aboriginal right of Indians to hunt for sustenance only. Such an enactment as far as I can determine has not yet been passed and the law therefore, in my judgment, remains as it has been since the Royal Proclamation of 1763.

I next deal briefly with that part of the judgment of Schultz Co. Ct. J. dealing with the evidence given before him by Professor William Duff. He says at p. 625: "The weight of the evidence is to be determined by the tribunal of fact which, in this appeal, is the trial Judge." It follows that Schultz Co. Ct. J. was quite within his rights to treat the evidence of Professor Duff as he did as "opinion" and "really a matter of conjecture".

However, it was not disputed that Professor Duff had impressive qualifications, he being not only a recognized scholar of renown and a noted anthropologist, but also an author of Indian history and an expert on Indian records.

It appears, however, that Schultz Co. Ct. J. was impressed with the fact (p. 624) that "The 'opinion' of Professor Duff as to the aboriginal right . . . to hunt . . . is not based upon

any fact personally known to the witness"; and, further, that Professor Duff's "opinion" as to the aboriginal right "does not emanate from a hypothetical question predicated upon *any fact adduced in evidence* which the expert witness is asked to assume to be true."

I do not question His Honour's judicial "right" to conclude as he did, but, with respect, I cannot help but wonder at his judicial wisdom in doing so.

Of course, in expressing this wonder I have had the advantage of reading the judgment of Hall, Spence and Laskin JJ. delivered by Hall J. in the *Calder* case, in which evidence of the same Professor Duff (Dr. Duff), given in the Supreme Court of British Columbia before Gould J. less than two years later, was carefully and respectfully considered at length This judgment, of course, was not available to Schultz Co. Ct. J.

It is well settled law as quoted by Norris J.A. in *White*, supra, and also Hall J. in the *Calder* case that a court trying a matter is entitled "to take judicial notice of the facts of history, whether past or contemporaneous": *Monarch SS. Co. v. A B Karlshamns Oljefabriker*, [1949] A.C. 196 at 234, [1949] 1 All E.R. 1, and a court is also entitled to rely upon its own historical knowledge and researches: *Read v. Bishop of Lincoln*, [1892] A.C. 644, per Lord Halsbury at pp. 652-54.

On p. 346 of the *Calder* case judgment, Hall J. says this:

"The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species."

Continuing on in the judgment, Hall J. developed the point further by showing that present-day knowledge is far more advanced and accurate than it was at the time many early legal decisions were made and many wrong assessments of the Indian culture have since been proven to be ill-founded and untrue. Hall J. further stressed the essential importance of assessing the Indian culture by *modern historical knowledge and research*.

Here, as in the *Discon* case, there never was a treaty between the Crown and the Penticton Indian Band — nor, *except for the Royal Proclamation of 1763*, any statutory reservation of

any aboriginal right. Of even more importance however, there has been no statutory *extinguishment* of any aboriginal right by federal enactment!

In *Rex v. Lady McMaster*, [1926] Ex. C.R. 63 at 72, Maclean J. said: "The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed."

Keeping in mind all of the above observations, the first question I must specifically decide is: Do the appellants, being native Indians, have an aboriginal right to hunt for food upon *unoccupied Crown land* which forms part of their traditional hunting grounds? Adjoined with this decision is the larger question as to whether or not the Royal Proclamation of 1763 applies to protect the aboriginal hunting rights of all native Indians throughout British Columbia and, more particularly for me here, the Penticton Indian Band. I agree with Schultz Co. Ct. J. up to a point that the appeal before him (as the appeal before me) is distinguishable from the case of *Regina v. White*, supra, hereinafter referred to as "the *White* case". That case was basically decided upon the existence of a "treaty" which gave the Indians a binding *covenant* that they would be entitled to hunt over unoccupied lands. No such treaty existed to govern the Squamish Indians nor does one exist to cover the Penticton Indians. That is the distinguishing feature. However, for reasons already given and hereafter to be given, in my judgment it is an unassailable fact that the appellants before him (and before me) are, in the absence of any treaty and because of the Royal Proclamation of 1763, *in an even stronger position* than a treaty Indian! The British Columbia Court of Appeal and later the Supreme Court of Canada in the *White* case said of treaty Indians that because of the treaty the British Columbia Game Act (now superseded by The Wildlife Act of British Columbia) did not apply to native Indians by virtue of s. 87 (now s. 88) of the Indian Act, R.S.C. 1952, c. 149, now R.S.C. 1970, c. I-6.

It appears to have been forgotten, except by Norris and Sheppard JJ.A., that part of the judgment of Swencisky Co. Ct. J. in the *White* case reads as follows [see 50 D.L.R. (2d) 613 at 619]:

> "*I also hold* that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, *which was confirmed to them* by the Proclamation of 1763, *has never been abrogated or extinguished and is still in full force and effect.*" (The italics are mine.)

It also appears to have been forgotten that the appeal against the judgment of Swencisky Co. Ct. J. was dismissed!

An important aspect which I have been asked to consider by appellants' counsel is that, in his judgment, Schultz Co. Ct. J. chose to treat that part of the judgment of Norris J.A. in the *White* case dealing with aboriginal rights and the Royal Proclamation of 1763 as being, in his opinion, "obiter dicta".

It is a fact that Norris J.A. was with the majority of the Court in dismissing the appeal. It is a further fact that his reasons for judgment occupy 39 pages of the [D.L.R.] law report. In the *Discon* case, Schultz Co. Ct. J. quoted briefly from the fifth page [p. 629] of the judgment of Norris J.A. as follows:

"*Substantially* for the reasons given by my brother Davey, which I have had the privilege of reading, I am of the opinion that ex. 8 is a 'Treaty' within the meaning of s. 87 of the Indian Act. *However, in view of the argument of counsel for the Crown, I think it is proper to add something further on that matter and to deal specifically with the matter of aboriginal rights and the applicability of the Royal Proclamation of 1763.*" (The italics are mine.)

I feel the word "substantially" is of particular importance.

Later, on p. 627 of his judgment, Schultz Co. Ct. J. says: "Aboriginal rights 'from time immemorial' have been proclaimed by Norris, J.A., in *Regina v. White* but, with respect, his opinion on this subject is *obiter dicta*."

It is interesting and significant to note, however, that the so-called "obiter dicta" section continues for some 20 pages in length! It also deals in a masterful, scholarly and thoroughly-researched way with the early history, the Imperial, Canadian colonial and provincial legislation, and the early and historic United States and Canadian cases. Norris J.A., too, proceeded on the basis, as previously quoted, that the court is entitled to take judicial notice of the facts of history whether past or contemporaneous.

It appears that Schultz Co. Ct. J. quoted the first of the above-quoted passages from Norris J.A. to show that Norris J.A. agreed with the judgment of his brother (as he then was) Davey J.A.

It is now interesting and of value to note that in a comparatively short (4½ pages) judgment, Davey J.A. simply found that Ex. 8 in the case was in fact a "Treaty" which

387

was included in s. 87 of the Indian Act and that s. 87 did not extend the general provisions of The Game Act to the respondent Indians.

The last paragraph of the judgment of Davey J.A. is, I think, significant and it reads as follows [p. 619]:

"In the result, the right of the respondents to hunt over the lands in question reserved to them by ex. 8 are preserved by s. 87, and remain unimpaired by the *Game Act*, and it follows that the respondents were rightfully in possession of the carcasses. *It becomes unnecessary to consider other aspects of a far-reaching argument addressed to us by the respondents' counsel.*" (The italics are mine.)

The other Judge in the majority decision was Sullivan J.A., whose entire judgment consisted of two lines as follows [p. 666]: "I agree in dismissing the appeal for the reasons given by my brother Davey in which I concur."

Two of the three majority Judges therefore, no doubt quite happily, found it "unnecessary to consider other aspects of a far-reaching argument addressed to us by the respondents' counsel."

However, Norris J.A. decided not to be judicially complacent and clearly stated his reasons for dealing "specifically with the matter of aboriginal rights and the applicability of the Royal Proclamation of 1763" by stating that in his judicial opinion, "*in view of the argument of counsel for the Crown*", he thought it was *proper* to address himself to these further matters and he stated at p. 629:

"*On all of these three matters* it is proper to consider the history of the position of the Indians on this continent and in particular on Vancouver Island from the earliest times, the recognition of that position by the nations which sought or obtained dominion over the Indians and over the lands which they occupied and therefore the international treaties by which that dominion became effective and the legislation Imperial, Canadian, and Provincial affecting these rights of Indians. It is most important also to consider the position and authority of the Hudson's Bay Co. and the position and authority of James Douglas as Chief Factor of the Hudson's Bay Co. and Governor of Vancouver's Island, as it was then called." (The italics are mine.)

What were the arguments of Crown counsel which compelled Norris J.A. to deal further with the matter? These are found

outlined in the Norris judgment at pp. 626-27 and the third and fourth arguments to which he specifically addressed himself are reproduced here as follows:

"3. That as to the effect of the *Royal Proclamation of 1763*:

"(a) This *Proclamation* has never had any application whatsoever to the Indians on Vancouver Island.

"(b) If this *Proclamation* did ever apply to Vancouver Island, such application was excluded in 1849 by the Crown grant of Vancouver Island to the Hudson's Bay Company (ex. 6).

"(c) In any event, any hunting rights conferred on any Indians on Vancouver Island had on July 7, 1963, the date of the alleged offence, been extinguished by legislation, such legislation being colonial and provincial legislation relating to game and the combined effect of s. 87 of the *Indian Act* and the B.C. *Game Act*.

"4. As to aboriginal hunting rights these had been by July 7, 1963, the date of the alleged offence, extinguished by colonial and provincial legislation and the combined effect of s. 87 of the *Indian Act* and the British Columbia *Game Act*."

With respect to Schultz Co. Ct. J., it appears quite obvious that Norris J.A. did not intend his carefully-researched judicial opinion on the above two arguments, extending over 20 of the 39 pages of his judgment, to be obiter dicta! While it is true, as Schultz Co. Ct. J. points out on p. 624 of his reasons, that the Supreme Court of Canada were unanimously of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, Ex. 8, was a "Treaty", *they did not in any way disagree with* any point in the lengthy reasons of Norris J.A.

It is suggested here by me that the *entire* judgment of Norris J.A. be read.

Indeed, in the *Calder* case before the Supreme Court of Canada, the judgment delivered by Hall J. not only discusses the *White* case, but specifically, at p. 382, considers it "pertinent" to quote with approval part of what Norris J.A. said in the *White* case concerning a leading United States case, *Johnson v. McIntosh* (1823), 21 U.S. (8 Wheaton) 543, 5 L. Ed. 681.

At p. 386 of the judgment, Hall J. deals specifically with the applicability of the Royal Proclamation of 1763 and he says in part:

"The point has been before provincial Courts in Canada on a number of occasions but never specifically dealt with by this Court.

"It is necessary, therefore, to face the issue as one of first impression *and to decide it with due regard to the historical record and the principles of the common law.*

"The judges of the Court of Appeal of British Columbia have disagreed on this important question. *Norris J.A. in White dealt exhaustively with the subject* at [52 W.W.R. 193 at] *pp. 218 to 232 of his reasons*". (The italics are mine.)

After citing the quotation of Norris J.A. [52 W.W.R. 193 at 218] that in his opinion "*the royal proclamation of 1763 was declaratory and confirmatory of the aboriginal rights and applied to Vancouver Island*", etc., Hall J. found [p. 397] that Norris J.A. had correctly concluded: "*that the Proclamation was declaratory of the aboriginal rights and applied to Vancouver Island.*" (The italics are mine.) He went on immediately thereafter to say: "It follows that if it applied to Vancouver Island it also applied to the Indians of the mainland."

Hall J. then said (speaking be it noted of the *White* case): "This Court upheld the majority judgment but did not deal with the question of whether or not the Proclamation extended to include territory in British Columbia."

This is one instance where the reader of this judgment should turn to p. 396 of the judgment delivered by Hall J. and read from p. 396 right through to p. 401. In that passage Hall J. states inter alia, dealing with the *Calder* case before the Supreme Court of British Columbia:

"In the judgment under appeal, Gould J. accepted the views of Sheppard and Lord JJ.A. in preference to that of Norris J.A. In my view, the opinion of Sheppard J.A. in *White was based on incomplete research as to the state of knowledge of the existence of the land mass between the Rocky Mountains and the Pacific Ocean in 1763.*" (The italics are mine.)

The judgment then cites with approval the decision of Johnson J.A. in *Regina v. Sikyea*, 46 W.W.R. 65 at 66, 43 C.R. 83, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, affirmed [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 236, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, where that learned Judge of Appeal said:

"The right of Indians to hunt and fish for food *on unoccupied crown lands* has always been recognized in Canada — in the early days as an incident of their 'ownership' of the

land, *and later by the treaties by which the Indians gave up their ownership right in these lands.*" (The italics are mine.)

The above quotation continues on much more extensively, as does the rest of the passage referred to, and should be read completely. Hall J. then makes the pertinent comment that the Supreme Court of Canada expressed its agreement with the views of Johnson J.A. in *Sikyea v. The Queen* as quoted supra. (This case was referred to by Schultz Co. Ct. J. in *Dixon* at p. 626.)

In a most compelling sequence beginning at p. 399, the judgment delivered by Hall J., in my opinion, completely refutes the finding of Sheppard J.A. in *White* that the areas of British Columbia west of the Rockies were "terra incognita". After stating, "Such a view is not at all flattering to the explorers and rulers of England in 1763", the judgment goes on at considerable length to cite this most compelling historical sequence of events, which should be read in full, after which he says at the bottom of p. 400: "Accordingly, it cannot be challenged that while the west coast lands were mostly unexplored as of 1763, they were certainly known to exist and that fact is borne out by the wording . . . in the Proclamation".

I cannot believe that the Supreme Court of Canada judgment would deal as exhaustively and extensively with the judgment of Norris J.A. in the *White* case if it had been considered to be mere "obiter dicta".

With respect, I cannot agree with or accept that part of the judgment of Schultz Co. Ct. J. to the effect that the opinion of Norris J.A. on this subject is obiter dicta. I feel satisfied that Norris J.A. intended that part of his judgment dealing with aboriginal rights of native Indians and the Royal Proclamation of 1763 to be a declaratory judgment given in direct and specific response to the arguments 3 and 4 of Crown counsel, reproduced supra, and the "far-reaching argument addressed to us by the appellants' counsel" as referred to by Davey J.A., supra [p. 619]:

The phrase "obiter dictum" is defined in Wharton's Law Lexicon and Judicial Dictionary, 10th ed., at p. 543, as follows:

"Obiter dictum (a saying by the way), an opinion of a judge not necessary to the judgment given of record, in contradistinction to a judicial dictum which is necessary to the judgment.

"This last is of much greater authority than the former, *because delivered upon deliberation, under sanction of the Judge's oath*, while an extra-judicial opinion is no more than the prolatum or saying of him who gives it, a gratis dictum." (The italics are mine.)

In my judgment, using the above definition, that part of the judgment of Norris J.A. was much more than an "extra-judicial opinion" or a "gratis dictum". In my judgment it was a declaratory judgment. For those reasons and with respect, I feel that on the facts of the appeal before him in *Discon*, Schultz Co. Ct. J. should not have concluded that Norris J.A.'s opinion on this subject was obiter dicta. The fact that three of the Judges in the Supreme Court of Canada obviously considered the Norris judgment with care and agreed with it has impressed me judicially and I, too, have considered it and have applied the principles contained therein to the facts before me.

On p. 628 of his judgment, Schultz Co. Ct. J. says: "At the date of the *Royal Proclamation of 1763*, the whole of the Province of British Columbia, including Squamish Valley, was *terra incognita*." And at the top of p. 629 he says: "My view on the *Royal Proclamation* is in accord with that of Sheppard, J.A., in *Regina v. White*".

I have already quoted partly the passage in the Supreme Court of Canada judgment delivered by Hall J. refuting the finding of Sheppard J.A. in *White*. In my opinion, that learned and logical judgment deals a mortal blow to this formerly widely-held judicial fallacy of "terra incognita"! Hopefully, the matter has now been decided once and for all.

I feel that I should not leave this aspect of the matter without posing a question which, with respect, has puzzled me: If Schultz Co. Ct. J. chose to treat that part of the Norris judgment dealing with aboriginal rights simply as "obiter dicta" and presumably dismissed that learned Judge's opinion as such, why would he consider that he should pay any attention to the opinion expressed in a minority judgment concerning the Royal Proclamation which deals with the very same subject — aboriginal rights? With respect, he appears to have done just that by making part of the Sheppard J.A. judgment part of his judgment (see top of p. 629 partly quoted above).

Schultz Co. Ct. J. finally deals with the third submission of the appellants in the *Discon* case [p. 622], namely, that "Sec-

tion 87 (now s. 88) of the *Indian Act* does not operate to make the *Wildlife Act* applicable to the appellants."

In refusing to accept this argument, Schultz Co. Ct. J. refers to the case of *Regina v. George*, [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386. It must be recognized immediately, however, that this case deals with a *federal enactment*, namely, the Migratory Birds Convention Act, R.S.C. 1952, c. 179. In essence, all that that case decided was that the provisions of the federal enactment of the Migratory Birds Convention Act were not, by s. 87 of the Indian Act, made subordinate to the Treaty of 10th July 1827. To quote more extensively from the judgment in *Regina v. George*, Martland J., who gave the majority judgment, said at p. 150 (speaking of s. 87 (now s. 88) of the Indian Act):

"In my opinion, it was not the purpose of s. 87 to make *any legislation of the Parliament of Canada subject to the terms of any Treaty.* I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *B.N.A. Act* subject to provincial laws *of general application.*" (The italics are mine.)

It appears that that is the gist of the judgment in *Regina v. George* upon which Schultz Co. Ct. J. concluded that it was authority to refute the third submission of the appellants above stated. Presumably, he based it upon a concession of the appellants in the *Discon* case which Schultz Co. Ct. J. sets out as follows on p. 629:

"Counsel for the appellants concedes that there is neither 'treaty' nor 'any other Act of the Parliament of Canada', specified in the introductory words of s. 87, applicable to the Squamish Indians, and that none of the exceptions in the latter portion of s. 87 applies to this appeal."

No such concession is before me.

It would appear, with respect, that in the *Discon* case both counsel for the appellants and Schultz Co. Ct. J. neglected to pay attention to the key words in s. 87 (now s. 88) which reads: "Subject to the terms of any treaty *and any other Act of the Parliament of Canada . . .*" (The italics are mine.)

Schultz Co. Ct. J. did not quote the next paragraph of the Martland J. judgment which says [[1966] 3 C.C.C. 137 at 150]:

"*The application of provincial laws to Indians was*, however, made subject to 'the terms of any treaty and any other

Act of the Parliament of Canada'. *In addition, provincial laws inconsistent with the Indian Act* or any order, rule, regulation or by-laws made thereunder, or making provision for any matter for which provision is made under that Act, *do not apply.*" (The italics are mine.)

It is further of great significance that on p. 151 of the *Regina v. George* case, Martland J. says: "I can see no valid distinction between the present case and that of *Sikyea v. The Queen*, [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80".

Turning to that Supreme Court Report we find, interestingly enough, that the judgment in that case in the Supreme Court of Canada was given by Hall J. and *it dealt with a treaty Indian* at Yellowknife in the Northwest Territories killing a migratory bird during the closed season in violation of a Migratory Bird Regulation and contrary to a section of the Migratory Birds Convention Act. The appeal was dismissed and the Indian was in fact found guilty, *but* at p. 645 of his reasons for judgment in the *Sikyea* case, Hall J. said:

"The substantial question argued on the hearing of this appeal was whether the provisions of the *Migratory Birds Convention Act, supra*, and the Regulations made thereunder apply to Treaty Indians in the Northwest Territories hunting and killing ducks for food at any time of the year."

The Court found the Act *did* abrogate any *treaty rights* but Schultz Co. Ct. J., like me, was dealing with non-treaty Indians.

Then at p. 646, the penultimate paragraph of the judgment, Hall J. says:

"On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson, J.A., in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal settings and there is nothing which I can usefully add to what he has written."

It now becomes necessary to go to that case, which is reported in 46 W.W.R. 65, 43 C.R. 83, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150 (N.W.T. C.A.). At p. 66 of that report, Johnson J.A. says as follows:

"The right of Indians to hunt and fish for food on unoccupied crown lands has always been recognized in Canada — in the early days as an incident of their 'ownership' of the land, and later by the treaties by which the Indians gave up

their ownership right in these lands. McGillivray, J.A. in *Rex v. Wesley*, [1932] 2 W.W.R. 337, 58 C.C.C. 269, [1932] 4 D.L.R. 744 (Alta. C.A.), discussed quite fully the origin, history and nature of *the right of the Indians both in the lands and under the treaties by which these were surrendered* and it is unnecessary to repeat what he has said. It is sufficient to say that these rights had their origin in the royal proclamation that followed the *Treaty of Paris* in 1763. By that proclamation it was declared that the Indians

"'. . . should not be molested or disturbed in the possession of such parts of Our Dominions and Territories as, *not having been ceded to or purchased by Us are reserved to them or any of them as their hunting grounds.*'" (The italics are mine.)

After stating in his judgment that the Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the Proclamation and expressing some doubt if the Indians of the western part of the Northwest Territories could claim any rights under the Proclamation because of the possibility that the lands [p. 67] "at the time were *terra incognita* and lay to the north and not 'to the westward of the sources of the river which fall into the sea from the west or northwest'", Johnson J.A. made this very important statement at p. 67:

"That fact is not important because the government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson Bay Company, as having an interest in the lands that required a treaty to effect its surrender."

(And see the *White* case as well.)

We have now come back full circle to the case of *Regina v. George*. The learned Judge Martland J. in the Supreme Court of Canada in *Regina v. George* said [p. 151]: "I can see no valid distinction between the present case and that of *Sikyea v. The Queen*", and in *Sikyea v. The Queen* in the Supreme Court of Canada the Judges accepted in total the views of Johnson J.A. in the Court of Appeal which have been partially quoted as above and which have been set forth at some length in the passage in the judgment delivered by Hall J. in the *Calder* case previously referred to, at pp. 396 to 401.

Once again, I point out the significance of the fact that the cases of *Regina v. George* and *Regina v. Sikyea* both dealt with a federal enactment, namely, the Migratory Birds Convention Act, and both concluded only that the provisions of s. 87 (now

s. 83) "do not prevent the application to Indians of the provisions of the Migratory Birds Convention Act."

In his learned reasons in the Court of Appeal in the *Sikyea* case, Johnson J.A. referred to the case of *Rex v. Wesley*, supra. It is both interesting and significant to note that this case dealt with a provincial law, namely, The Game Act, R.S.A. 1922, c. 70. On p. 352 of the report, McGillivray J.A. says the following:

"It is true that Government regulations in respect of hunting are contemplated in the treaty but considering that treaty in its proper setting I do no think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds *for food on unoccupied Crown land*." (The italics are mine.)

Later, on the same page, the learned Judge says:

"If, as Crown counsel contends, sec. 12 [of The Alberta Natural Resources Act, 1930 (Alta.), c. 21] taken as a whole gives rise to apparent inconsistency and is capable of two meanings then I still have no hesitation in saying, in the light of all the external circumstances relative to Indian rights in this Dominion to which I have alluded, that the law makers in 1930 were, in the making of this proviso, aiming at assuring to the Indians covered by the section an unrestricted right to hunt for food in those unsettled places where game may be found, described in sec. 12.

"This does not in any wise imply that *The Game Act* of this province is *ultra vires*. I merely hold that it has no application to Indians hunting for food in the places mentioned in this section."

I cannot resist quoting the first paragraph on p. 353 of the judgment, which reads as follows:

"It is satisfactory to be able to come to this conclusion and not to have to decide that 'the Queen's promises' have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be 'convinced of our justice and determined resolution to remove all reasonable cause of discontent.'"

It is also interesting to note that this is the paragraph which Johnson J.A. was unable to quote in coming to his decision against a treaty Indian under a *federal enactment* as opposed to a non-treaty Indian and a provincial statute. *See also* the

case of *Prince and Myron v. The Queen*, [1964] S.C.R. 81, 46 W.W.R. 121 at 124, 41 C.R. 403, [1964] 3 C.C.C. 1, which distinguishes hunting for food from hunting for sport or commerce.

The decision of the Supreme Court of Canada in the *White* case, which said in part [52 D.L.R. (2d) 481n (Can.)]:

"We are all of the opinion that the majority in the Court of Appeal were right in their conclusion . . . We therefore think that in the circumstances of the case, the operation s. 25 of the *Game Act* [R.S.B.C. 1960, c. 160] was excluded by reason of the existence of that treaty",

is now beyond dispute.

Schultz Co. Ct. J. says at [67 D.L.R. (2d) 619 at] 629 of his reasons: "Section 87 was examined and considered in *Regina v. George*." That same section was examined and considered in the cases *Regina v. Sikyea, Rex v. Wesley,* and *Regina v. White*, and I am satisfied that it is these latter cases that are the definitive judgments on that section of the Indian Act.

On p. 390 of the judgment delivered by Hall J. in the *Calder* case, he says: "The aboriginal Indian title does not depend on treaty, executive order or legislative enactment." He also quotes Duff J. speaking for the Privy Council in *A.G. Que. v. A.G. Can.*, [1921] 1 A.C. 401 at 408, 56 D.L.R. 373, as saying that the Indian right was a "usufructuary right only and a personal right in the sense that it is in its nature *inalienable except by surrender to the Crown*." (The italics are mine.)

While *the entire judgment* delivered by Hall J. should be perused for many of the points already made and a few points remaining to be made, I quote now from the top of p. 394 of his judgment where with simple historical logic he says:

"Surely the Canadian treaties, made with much solemnity on behalf of the Crown, *were intended to extinguish the Indian title*. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed." (The italics are mine.)

Later, on the same page, dealing with Treaty No. 8, made in 1899 and entered into on behalf of Queen Victoria and the representatives of Indians in a section of British Columbia and the Northwest Territories, Hall J., again with unassailable logic, asks the question: "If there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?" I have not been able to find any logical answer to that question.

Another important excerpt from the judgment delivered by Hall J., which I am satisfied applies in law to the case before me as much as it did in the *Calder* case, is found at the bottom of p. 394 and the top of p. 395. In order to ensure that the reader can appreciate this quotation in its full context, I would urge that the judgment be read in its entirety from p. 394 to p. 401.

The somewhat lengthy excerpt above referred to reads as follows:

"Paralleling and supporting the claims of the Nishgas that they have a certain right or title to the lands in question is the guarantee of Indian rights contained in the Proclamation of 1763. This Proclamation was an Executive Order having the force and effect of an Act of Parliament was was described by Gwynne J. in *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, affirmed 14 App. Cas. 46, at p. 652 as the 'Indian Bill of Rights': see also *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045. Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories. It follows, therefore, that the *Colonial Laws Validity Act* applied to make the Proclamation the law of British Columbia. That it was regarded as being the law of England is clear from the fact that when it was deemed advisable to amend it the amendment was effected by an Act of Parliament, namely the Quebec Act of 1774."

With grateful humility, I accept the reasoning of that learned judgment that the Proclamation of 1763 was an executive order *having the force and effect of an Act of Parliament*.

Now I go to p. 401 of the *Calder* case, where the judgment, having concluded that the Proclamation of 1763 had the force and effect of an Act of Parliament, asks the question as follows: "This important question remains: were the rights either at common law or under the Proclamation extinguished?" This, of course, is very important under the provisions of s. 88 of the Indian Act. Hall J. then quotes Tysoe J.A. in the British Columbia Court of Appeal decision of the *Calder* case as saying [74 W.W.R. 481 at 518, 13 D.L.R. (3d) 64]: "It is true, as the appellants have submitted, *that nowhere can one find express words extinguishing Indian title*".

Again, I invite the reader of this judgment to turn to p. 401 of the judgment delivered by Hall J. and read from there to p. 404 to get the full context of several short quotes which I

now make from that judgment. At p. 401, it says: "Once aboriginal title is established, it is presumed to continue until the contrary is proven." At p. 406, it says:

"Once it is apparent that the Act of State doctrine has no application, the whole argument of the respondent that there must be some form of 'recognition' of aboriginal rights falls to the ground."

At this stage, the reader is again requested to read verbatim the judgment delivered by Hall J. from p. 406 to p. 416, where it deals in a meticulous manner with the actions of Governors Douglas and Seymour and the Council of British Columbia and substantiates beyond dispute that Governor Douglas was well aware of his instructions to the effect that he had no right to take Indian lands without some form of compensation. The entire passage must be read to appreciate the consistency and logic of Hall J.'s thinking.

It is perhaps pertinent at this time to draw attention to the Canadian Bill of Rights, 1960 (Can.), c. 44, assented to 10th August 1960, and particularly the preamble thereto and ss. 1(*a*), 5 and 6 thereof.

In concluding this judgment I must now deal with the submissions of the Crown respondent before me. These have already been set forth in the early part of this judgment.

In reply to the first submission before me, the answer is twofold. The onus on the appellants has been completely fulfilled and the appellants have shown beyond question that The Wildlife Act of British Columbia does not apply to them as far as hunting for food on unoccupied Crown land is concerned (as opposed to hunting for sport or commerce).

The second and third submissions already have been amply considered, discussed and dismissed.

It is I think salutary to repeat here that part of the judgment of Swencisky Co. Ct. J. on the *White* case on appeal before him when he said [quoted in 30 D.L.R. (2d) 613 at 619]:

"I *also hold* that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, which was confirmed to them by the Proclamation of 1763, has never been abrogated or extinguished and *is still in full force and effect.*" (The italics are mine.)

It is also salutary to point out that the appeal from this judgment was dismissed both in the Court of Appeal of British Columbia and in the Supreme Court of Canada.

For all of the above reasons the appeal herein is allowed.

Hinkson J. decided, as a matter of law, that the Provincial Court Judge was wrong in holding that a notice given before the swearing of the information on which conviction results can be sufficient to satisfy the summary conviction court that a defendant was notified within the meaning of s. 740. With respect, I can find no good reason for imputing such a restriction upon a summary conviction court in the performance of its function. So far as the time of giving the notification is concerned, the statute provides only: "before making his plea". When notice is given before an information is sworn, the judge should no doubt be satisfied that in the circumstances the defendant was made aware of the offence in respect of which, if convicted, the prosecutor intends to ask for greater punishment by reason of previous conviction. This is a question of fact, not of law. The notification relates to an offence, not a charge.

I am accordingly of the opinion that the summary conviction Court did not err in law when finding that the notice given to the respondent on 4th January 1971 was a sufficient notification for the purposes of s. 740.

I would grant leave, allow the appeal and remit the case to the Provincial Court Judge to be dealt with accordingly. I would make no order as to costs.

NORTHWEST TERRITORIES TERRITORIAL COURT

Morrow J.

Regina v. Kupiyana

Game laws — Constitutional validity of s. 11(2) of the Migratory Birds Regulations — Burden of proving exception.

Appeal by way of stated case from a conviction of unlawfully having in possession migratory birds, contrary to s. 11(2) of the Migratory Birds Regulations, an offence by virtue of s. 12(1) of the Migratory Birds Convention Act, R.S.C. 1952, c. 179.

Held, on a review of the relevant legislation, that s. 11(2) of the Migratory Birds Regulations was ultra vires; the subsection was to be construed so as to make possession of migratory birds an offence subject to an exception which placed upon the accused the burden of proving that he fell within the exception: *Regina v. Appleby*, [1971] 4 W.W.R. 601, 16 C.R.N.S. 35, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325 (Can.) followed.

[Note up with 12 C.E.D. (2nd ed.) *Game Laws*, ss. 1, 3.]

C. G. Sutton, for appellant.

P. Asselin, for the Crown.

6th January 1972. MORROW J.:—This matter came on for argument before me at Yellowknife by way of a stated case of de Weerdt, Magistrate.

The accused, an Eskimo, was charged that he:

"on or about the 1st day of May, 1971, at or near Mile Two Hundred and Seven on Highway Number Three in the Northwest Territories, did unlawfully have migratory birds in his possession, in violation of section 11(2) of the Migratory Birds Regulations, thereby committing an offence contrary to section 12(1) of the Migratory Birds Convention Act, chapter 179, R.S.C. 1952."

During the hearing before the learned Magistrate, counsel for the accused, appellant, argued against conviction, submitting two general grounds in opposition:

(1) Subsection (2) of s. 11 of the Migratory Birds Regulations was ultra vires.

(2) The provisions of that subsection were absurd as being without a reasonable meaning.

In ruling against the above contentions the learned Magistrate found that there was no reasonable doubt but that on 1st May 1971, at approximately Mile 207 on Highway 3 of the Northwest Territories, some 10 miles southwards from the City of Yellowknife, the accused, appellant, was in possession of two freshly killed mallards, that they were migratory game birds under the Act and Regulations, and that the accused, appellant, knew these birds had just been taken by a companion while hunting in the Northwest Territories. He then reasoned from these facts that the application of Sched. A, Pt. XI, Table A to "open season" as contained and defined in the Regulations constituted these birds to have been killed out of season and hence not "lawfully killed" within the meaning of subs. 11(2). Applying s. 730 of the Criminal Code, R.S.C. 1970, c. C-34, the learned Magistrate then found, "on the whole of the evidence before me, there was no reasonable doubt as to the facts which might be raised in favour of the" accused, who had called no evidence on his behalf.

In the hearing before me the questions submitted for consideration by the learned Magistrate were:

"(a) Was I right in holding that subsection 11(2) of the said Regulations was *intra vires* the said Act?

"(b) Was I right in holding that the said subsection was not void for absurdity?

"(c) Was I right in holding that the said subsection was to be construed so as to make possession of migratory birds an offence subject to an exception which placed upon the party accused the burden of proving that he fell within the terms of the exception?"

Arising out of, and forming part of the argument submitted to me on behalf of counsel for the accused, was the argument that, in holding as he did, the learned Magistrate applied a construction that in effect destroyed the presumption of innocence in contravention of s. 2(*f*) of the Canadian Bill of Rights, 1960, c. 44.

(a) *Was I right in holding that subsection 11(2) of the said Regulations was intra vires the said Act?*

The pertinent parts of s. 11(2) of the Migratory Birds Regulations, as in force at the time, are:

"(2) No person shall, in an area named in this subsection, have in his possession the carcass of a migratory bird at any time except during the authorized possession period for that area which period begins on the day that the migratory bird is lawfully killed and ends . . .

"(b) in the case of the Yukon Territory, the Northwest Territories and the Provinces of British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario and Saskatchewan, on the 31st day of August next following."

Section 4 of the Migratory Birds Convention Act, R.S.C. 1952, c. 179, provides for the Governor in Council making Regulations. It states:

"4. (1) The Governor in Council may make such regulations as are deemed expedient to protect the migratory game, migratory insectivorous and migratory nongame birds that inhabit Canada during the whole or any part of the year.

"(2) Subject to the provisions of the said Convention, such regulations may provide,

"(*a*) the periods in each year or the number of years during which any such migratory game, migratory insectivorous or migratory nongame birds shall not be killed, captured, injured, taken, molested or sold, or their nests or eggs injured, destroyed, taken or molested;

"(*b*) for limiting the number of migratory game birds that may be taken by a person in any specified time during the season when the taking of such birds is legal, and providing

the manner in which such birds may then be taken and the appliances that may be used therefor;

"(*c*) the periods in each year during which a person may have in possession migratory game birds killed during the season when the taking of such birds was legal;

"(*d*) for the granting of permits to kill or take migratory game, migratory insectivorous or migratory nongame birds, or their nests or eggs;

"(*e*) for the prohibition of the shipment or export of migratory game, migratory insectivorous or migratory nongame birds or their eggs from any province during the close season in such province, and the conditions upon which international traffic in such birds shall be carried on;

"(*f*) for the prohibition of the killing, capturing, taking, injuring or molesting of migratory game, migratory insectivorous or migratory nongame birds, or the taking, injuring, destruction or molestation of their nests or eggs, within any prescribed area, and for the control and management of such area; and

"(*g*) for any other purpose that may be deemed expedient for carrying out the intentions of this Act and the said Convention, whether such other regulations are of the kind enumerated in this section or not."

It is to be noted that s. 4(2) contains the phrase, "Subject to the provisions of the said Convention, such regulations may provide".

An examination of the Convention which was signed in 1916 and is published as a Schedule to the statute discloses a general purpose to "adopt some uniform system of protection" for birds making annual migrations over parts of Canada and the United States. This general purpose is to be effected generally by establishment of close seasons, restricted hunting, and the prohibition of shipment or export of migratory birds or their eggs.

In reaching his decision under this heading the learned Magistrate relied on the broad objectives and general terms of the Convention and the wide generality of s. 4(2)(*g*) of the Act. Accordingly he did not think it "unreasonable to regulate possession of bird carcasses as well as other aspects of hunting".

Throughout the nine articles making up the Convention the signing parties seem to be clearly agreed that to effect the

general purpose of the Convention as outlined above they will establish "close seasons during which no hunting shall be done except for scientific or propagating purposes": art. II; "close season on migratory birds shall be": art. II(1); "close season on migratory insectivorous birds shall continue": art. II(2); "there shall be a continuous close season on": art. III; "special protection shall be given the wood duck": art. IV; "The taking of nests or eggs . . . shall be prohibited": art. V; "the international traffic in any birds or eggs . . . shall be likewise prohibited": art. VI; and many other such phrases. Hunting and killing and taking is to be prevented or regulated. Except where the shipment or export or international traffic referred to in art. VI may lead one to infer that here at least the bird has been reduced to possession, there is no reference anywhere to "possession" as such.

Section 11(2) of the Regulations purports to prohibit possession of a "carcass of a migratory bird at any time" in general terms but then goes on to introduce or make provision for an exception. It seems to be clear to me here that the prohibition and resultant offence is one of "possession", not of hunting or killing or taking as is contemplated in the Convention.

The Migratory Birds Convention Act is the ratifying statute as contemplated by the Convention. In its language the power and authority for the Regulations must be found. Section 4(1)(*c*) purports to empower the making of Regulations providing for periods when a person may have possession of migratory birds killed during the season "when the taking of such birds was legal". But the "carcass" forming the basis of the present charge can in no sense be said to come from a legal killing. The learned Magistrate agreed with this but chose to rely on s. 4(1)(*g*) quoted above.

It seems to me that the critical words in s. 4(1)(*g*) are "expedient for carrying out the intentions of this Act *and the said Convention.*" (The italics are mine.) This clause must be read in conjunction with the phrase "Subject to the provisions of the said Convention, such regulations may provide". Taking this in conjunction with subs. (1) of s. 4, which again uses language that is generally declaratory of the objectives of the Convention, it seems to me that the dominant condition throughout the legislation is to regulate or control hunting, killing or taking and not possession. Admittedly the enforcement may be made easier by recourse to Regulations whereby possession is made an offence. In my opinion s. 11 (2) of the Regulations is really a disguised attempt at obtain-

ing the objectives of the statute and Convention by shifting the normal burden of proof to an accused person by requiring that person to explain or justify his possession. This can be done by Parliament but, in my view of the legislation as set forth above, the present effect cannot succeed. I would therefore state here that the learned Magistrate was wrong and that the Regulation is ultra vires.

(b) *Was I right in holding that the said subsection was not void for absurdity?*

If I had not already answered in the "negative" with respect to Q. (a) above I would have answered in the affirmative here. I cannot improve on the reasoning of the learned Magistrate under this head.

(c) *Was I right in holding that the said subsection was to be construed so as to make possession of migratory birds an offence subject to an exception which placed upon the party accused the burden of proving that he fell within the terms of the exeption?*

My answer with respect to Q. (a) above answers this question as well, save that I agree with the reasoning of the learned Magistrate with respect to the effect of the exception.

I should point out here that s. 2(*f*) of the Bill of Rights was raised as a further argument against the conclusion reached by the learned Magistrate. As I read and understand the judgment recently pronounced by the Supreme Court of Canada in *Regina v. Appleby*, [1971] 4 W.W.R. 601, 16 C.R.N.S. 35, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, it would seem to be a complete answer to the above contention. Had the point come originally before me I might have had difficulty reaching the same result but certainly I am bound to follow this authority and so do.

In conclusion therefore I would answer, with respect to Q. (a), "No"; Q. (b), "Yes"; and Q. (c), "Yes".

The conviction is thereby set aside without costs.

(c)	Loss of future earnings	nil
(d)	Loss of "seniority rights"	$10,000

If the plaintiff is entitled to "pre-judgment interest", which has not been argued, he will receive interest at the rate of 8¾ per cent per annum on the sum of $29,500.

SASKATCHEWAN QUEEN'S BENCH

Bence C.J.Q.B.

Regina v. Laprise

Game laws — Non-treaty Indian charged with possession of untagged game — Not an "Indian" within meaning of Game Act — The Game Act, 1967 (Sask.), c. 78, ss. 8(1), 38(1) — The Indian Act, R.S.C. 1927, c. 98, s. 2(d), (g), (h) — The Indian Act, R.S.C. 1952, c. 149 (now R.S.C. 1970, c. I-6).

The accused, a non-treaty Indian, was charged with having in his possession untagged game, contrary to The Game Act. On an appeal by way of a stated case, the question was whether he was an Indian within the meaning of The Game Act.

Held, he was not. The Game Act did not apply to non-treaty Indians which, according to the definitions of Indians in both the Indian Act of 1927 and the Indian Act enforced at the time The Game Act was passed, the accused was.

[Note up with 12 C.E.D. (West. 2nd) *Game Laws*, s. 2; 13 C.E.D. (West. 2nd) *Indians*, s. 1.]

S. Kujawa, Q.C., for the Crown.

I. S. Buckwold, for respondent.

(Regina Q.B. No. 228)

25th February 1977. BENCE C.J.Q.B.:—This is an appeal by way of stated case.

Deshaye J.M.C. stated the following case:

"1. On the 26th day of February, A.D. 1976, an Information was laid by the above named Constable George Cumming, alleging that the said George Laprise did on the 23rd day of February A.D. 1976, at La Loche, Saskatchewan, have untagged game in his possession contrary to Section 38(1) of The Game Act, 1967.

"2. On the 21st day of October A.D. 1976, the matter came on for Judgment at which time I held that the Accused was an Indian within the meaning of The Game Act, 1967, and also that the Accused was hunting for food within the meaning of the said Act and dismissed the charge; but at the request of

406

Counsel for the Crown I state the following case for the consideration of this Honourable Court:

"IT WAS SHEWN before me and I found that :

"1. On February 23, 1976, the Accused, George Laprise, was found in possession of three caribou carcasses which bore no tags. The animals were shot by the accused in the Province of Saskatchewan, near Uranium City, on unoccupied Crown land.

"2. The accused was born at Garson Lake, Saskatchewan, and is 38 years of age. His father was a 'non-treaty' Indian and his mother a 'treaty' Indian; they were lawfully married at the time of the Accused's birth. The accused is a native of Chipewyan origin and lives in a predominantly Chipewyan community. The Accused is not an 'Indian' within the meaning of the Indian Act, R.S.C. 1970, c. I-6.

"3. Since a young age the Accused hunted, trapped and fished for his livelihood. At the age of 28 the Accused moved his family to La Loche, Saskatchewan, and has been variously employed gainfully by the Department of Northern Saskatchewan and the Local Community Authority of La Loche, and was in receipt of an income at the time of the alleged offence.

"4. Although the accused does not need to depend on wildlife for his sustenance, yearly he makes a practice of hunting wild game that he uses for food for himself and his family; in the past he has sometimes shared meat with other members of the community in which he lives.

"5. The cost of making the trip to Uranium City for the purpose of hunting the caribou was in excess of the value of the meat as a commodity, yet the carcasses in the Accused's possession were intended to be used for food.

"6. The Accused, being a member of an aboriginal race, is an 'Indian' within the meaning of The Game Act, 1967, and as such cannot be convicted of an offence contrary to Section 38 of the said Game Act.

"Learned Counsel for the Crown desires to question the validity of the said dismissal on the grounds that it is erroneous in point of law, the questions submitted for the Judgment of this Honourable Court being:

"(a) Is my decision that the Accused is an Indian within the meaning of The Game Act, 1967, erroneous in point of law?

"(b) Is my decision that the Accused was hunting for food within the meaning of The Game Act, 1967, erroneous in point of law?"

Section 8(1) of The Game Act, 1967, is:

"8.—(1) Notwithstanding anything in this Act, and in so far only as is necessary in order to implement the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the *Statutes of Saskatchewan, 1930*, Indians within the province may hunt for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Section 12 of the agreement between the province of Saskatchewan and the Dominion of Canada made on 20th March 1930, whereby control over the natural resources in the province was transferred to the province by the Dominion government and ratified by 1930 (Sask.), c. 87, is:

"12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

The definitions of "Indian" and of "non-treaty Indian" are contained in the Indian Act, 1927, being R.S.C. 1927, c. 98, s. 2(*d*), the relevant part of which is:

"(*d*) 'Indian' means

"(i) any male person of Indian blood reputed to belong to a particular band,

"(ii) any child of such person,

"(iii) any woman who is or was lawfully married to such person; . . .

"(*g*) 'irregular band' means any tribe, band or body of persons of Indian blood who own no interest in any reserve or lands of which the legal title is vested in the Crown, who possess no common fund managed by the Government of Can-

ada, and who have not had any treaty relations with the Crown;

"(*h*) 'non-treaty Indian' means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even if such person is only a temporary resident in Canada".

The definition of "Indian" was changed and that which applied at the time of the passing of The Game Act, 1967 (Sask.), c. 78, was that an Indian is one registered as an Indian or entitled to be registered as an Indian: see the Indian Act, R.S.C. 1952, c. 149 (now R.S.C. 1970, c. I-6).

It is quite apparent that, whether for the purposes of The Game Act the definition of an Indian is taken from the statute of 1927 or that which was in force at the time of the passing of The Game Act, the appellant comes within neither definition.

If the legislature of this province had intended that The Game Act would apply to non-treaty Indians, then I believe it would have specifically so stated.

It is my view that the appellant does not come within the definition of the word "Indian" as contained in The Game Act and consequently is not entitled to hunt game during those seasons of the year which are prohibited by that Act.

Consequently, Q. 1 is answered in the affirmative. The accused is not an Indian within the meaning of The Game Act.

There is no necessity for me to answer Q. 2.

The case will be remitted back to the magistrate for his adjudication based on this opinion.

No costs.

BRITISH COLUMBIA COUNTY COURT

MacKinnon Co. Ct. J.

Regina v. Di Salvo et al.

Evidence — Interception of communications — Provincial Attorney General granted authorization for offences under both provincial and federal jurisdictions — Those under federal jurisdiction substantively defective — Authorization not severable — The Criminal Code, R.S.C. 1970, c. C-34, ss. 178.12 (as enacted by 1973-74, c. 50, s. 2), 186(e).

one year's limitation provision in the Act to say nothing of the added expense and costs.

The court had the right under the *Administration Act,* RSBC, 1948, ch. 6, to appoint Ronald if the necessary consents were filed even though he was not one of the next-of-kin. It is to be noted that the son Edwin, who has now reached his majority, joins with Ronald in this petition which seeks a further amendment to the letters of administration by adding Edwin as an administrator.

In *In the Goods of Loveday* [1900] P 154, 69 LJP 48, Sir Francis Jeune, P. said:

> "After all, the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto."

In *Tristram and Coote,* 20th ed., p. 396, it is stated that "alterations have been allowed in the relationship and status of the grantee." The court has a wide power of amendment as set out in M.R. 316.

I think it to be in the interests of the estate that the petition be granted. Under P.R. 23 the administration bond should also be amended.

ALBERTA

SUPREME COURT — APPELLATE DIVISION

Before Ford, C.J.A., Macdonald, McBride, Porter and Johnson, JJ.A.

Regina v. Little Bear

Indians — Hunting Game Out of Season off Reserve — Permission of Land Owner — Alberta Natural Resources Act, S. 12 — "Right of Access" — Applicability of Game Act, S. 6.

[Note up with 4 CED (2nd ed.) *Constitutional Law,* sec. 44; 2 CED (CS) *Game Laws,* sec. 16; *Indians,* secs. 6, 7, 8, 20; 3 CED (CS) *Words and Phrases* (1946-1957 Supps.).]

D. V. Hartigan, for Crown, appellant.

A. Beaumont, Q.C., for accused, respondent.

October 7, 1958.

Appeal from the judgment of Turcotte, D.C.J., (1958) 25 WWR 580, quashing the conviction by Macleod, P.M. The appeal was dismissed with costs for the reasons given by Turcotte, D.C.J. and other reasons. No written reasons.

ALBERTA

DISTRICT COURT TURCOTTE, D.C.J.

Regina v. Little Bear

Indians— Hunting Game Out of Season off Reserve — Permission of Land Owner — Alberta Natural Resources Act, S. 12 — "Right of Access" — Applicability of Game Act, S. 6.

Appellant, an Indian, shot a deer for food out of season on land belonging to a white man who had given the Indian permission to hunt thereon. He was convicted under sec. 6 of *The Game Act*, RSA, 1955, ch. 126, and appealed.

Held, allowing the appeal, that the words "right of access" in sec. 12 of *The Alberta Natural Resources Act*, 1930, ch. 21 (Can.) include a right in an Indian to enter privately owned land with the consent of the owner or occupant of the land for the purpose of hunting. *Indian Act*, RSC, 1952, ch. 149, sec. 87; Treaty No. 7 (1877); *The Game Act*, RSA, 1955, ch. 126, sec. 142; *Rex v. Shade* (1951-52) 4 WWR (NS) 430, 14 CR 56, 5 Abr Con (2nd) 1230; *Rex v. Wesley* [1932] 2 WWR 337, 22 Can Abr 490; *Rex v. Smith* [1935] 2 WWR 433, 22 Can Abr 490, considered.

[Note up with 4 CED (2nd ed.) *Constitutional Law*, sec. 44; 2 CED (CS) *Game Laws*, sec. 16; *Indians*, secs. 6, 7, 8, 20.]

A. Beaumont, Q.C., for appellant.

D. V. Hartigan, for Crown, respondent.

June, 1958.

TURCOTTE, D.C.J. — This is an appeal from a conviction made by W. A. Macleod, P.M., whereby the appellant was convicted

> "for that he being a Treaty Indian on the Blood Indian Reserve, Alberta, at the Waterton Park District Alberta on or about the 26 day of April 1958 did unlawfully kill big game, to wit: a mule deer at a place within the Province other than in a place from time to time prescribed by the Lieutenant-Governor in Council contrary to sec. 6 of *The Game Act*, 1948, RSA, 1955, and amendments thereto."

On the hearing of the appeal, counsel agreed that the evidence taken before the magistrate should be deemed to be the evidence given on the appeal and counsel further agreed that the evidence disclosed the following facts: (1) The appellant is an Indian within the definition set out in the *Indian Act*, RSC, 1952, ch. 149; (2) The appellant shot a deer for food out of season; (3) The deer was shot on land owned by a white man named Wellman who lived on adjoining land with his father; (4) The owner of the land gave the appellant permission to hunt on the land.

Counsel for the appellant contends that if an Indian receives permission from a land owner in Alberta to hunt on the owner's

land, an Indian can hunt and kill big game for food on the owner's land 365 days in the year without regard to closed seasons as provided for in *The Game Act,* RSA, 1955, ch. 126.

Jurisdiction over laws affecting Indians is reserved to the government of Canada under the provisions of sec. 91 (24) of the *B.N.A. Act, 1867.*

Provisions in the *Indian Act* dealing with hunting and fishing by Indians have been changed from time to time.

Sec. 69 of the *Indian Act,* RSC, 1927, ch. 98, read as follows:

> "The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories as the case may be, or to Indians in such parts thereof as to him seems expedient."

By sec. 2 ch. 28, 1936, sec. 69 was repealed and the following substituted therefor:

> "(1) The Superintendent General, subject to the approval of the Governor in Council, may, as in this section provided, make regulations which, upon publication thereof in the *Canada Gazette,* shall apply with the same force as if the terms of such regulations had been herein enacted.
>
> * * *
>
> "(3) Without restricting the generality of the provisions of subsection one of this section, the regulations may provide, *inter alia,* for the incorporation by reference, as part of such regulations, of any specific and indicated law or regulation of and in force within any province of Canada, and in particular, and whether or not by way of the incorporation by reference of provincial laws or regulations, such regulations may provide—
>
> "(*a*) With relation to Indians within the province of Manitoba, Saskatchewan or Alberta, or within the Territories, as the case may be, or to Indians in such parts of such provinces and territories as to him seems expedient, that laws, either in the same terms as, or in like terms to, or in other terms than, those in force in such provinces and territories respectively with relation to game in general or to specific game, shall apply upon publication thereof in the *Canada*

412

Gazette, with the same force as if enacted in this Act, to such Indians as such regulations shall prescribe."

The *Indian Act* was completeiy revised in 1951 and the new Act, ch. 29 (now RSC, 1952, ch. 149) contains sec. 87 which reads as follows:

"Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act, or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

It is to be noted that the references to game, fish, hunting and fishing contained in sec. 69 of the 1927 Act as amended in 1936 are no longer contained in the *Indian Act.*

Judge (now Chief Judge) E. B. Feir pointed out in *Rex v. Shade* (1951-52) 4 WWR (NS) 430, 14 CR 56, that the cases dealing with fishing and hunting decided prior to 1951 must now be read with the changes made in the 1951 Act being kept in mind.

Sec. 87 of the *Indian Act* provides that the application of provincial laws to Indians is subject to the terms of any treaty.

On September 22, 1877, the last of the Indian Treaties between Canada and the Plain Indians was made at Blackfoot Crossing, near Calgary. This completed the series of treaties extending from Lake Superior to the slopes of the Rocky Mountains. This treaty, known as Treaty No. 7, covered the lands now situated in the southern part of the province of Alberta, and which were inhabited by the Blackfoot, Blood, Piegan, Sarcee and Stony Indians.

The Wellman land on which Little Bear shot the deer in this case is situated within the tract of land covered by Treaty No. 7.

The treaty provided for hunting rights on behalf of the Indians as follows:

"And Her Majesty the Queen hereby agrees with her said Indians that they shall have right to pursue their vocations of hunting throughout the tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty; and saving and except such

tracts as may be required and taken up from time to time for settlement, mining, trading, or other purposes by her Government of Canada, or by any of Her Majesty's subjects duly authorized therefor by the said Government."

It is clear that, without more, the treaty of 1877 did not give Little Bear the right to kill a deer on the Wellman land, because the Wellman land "had been taken up for settlement by one of Her Majesty's subjects duly authorized thereof by the said Government."

However sec. 87 further provided that the application of provincial laws to Indians is also subject to the terms of any other Act of Parliament of Canada.

On December 14, 1929, an agreement between Canada and Alberta transferred the natural resources to the province. This agreement was ratified by the legislature of Alberta and by the Parliaments of Canada and the United Kingdom.

Sec. 12 of the agreement as found in *The Alberta Natural Resources Act*, 1930, ch. 21 (Can.) (RSA, 1955, vol. 5, p. 5695) reads as follows:

"In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Sec. 142 of *The Game Act* of Alberta reads as follows:

"(1) Where a fur-bearing animal is taken by an Indian for food during the close season for such animal, the pelt shall

"(*a*) be the property of the Crown

"(*b*) not be sold or otherwise disposed of by the Indian, and

"(*c*) delivered by him forthwith on demand to a constable or game officer.

"(2) Where a big game animal is taken by an Indian the skin or hide of such animal shall not be sold or otherwise disposed of, until such skin or hide has been manufactured

414

into articles of wearing apparel by the Indian or a member of his immediate family.

"(3) Subsection (2) shall not be construed as forbidding an Indian from selling, trading or bartering any such skin or hide to an Indian school engaged in the manufacture of wearing apparel or other Indian crafts.

"(4) For the purpose of this section, all lands set aside or designated as game preserves, Provincial parks, bird sanctuaries, registered trap-lines and fur rehabilitation blocks, shall be deemed to be occupied Crown lands and not lands to which an Indian has a right of access.

"(5) Subsection (4) shall not be construed as forbidding an Indian from hunting, taking or killing big game animals for food at all seasons of the year on lands set aside or designated as registered trap-lines."

A deer is a big game animal as defined in sec. 2 (*b*) (11) of *The Game Act*.

The rights of Indians with reference to hunting have been considered by the Courts of Appeal in Alberta and Saskatchewan.

In *Rex v. Wesley* [1932] 2 WWR 337, 26 Alta LR 433, 58 CCC 269, an Indian was convicted of shooting a deer having antlers less than four inches in length contrary to *The Game Act* of Alberta. It was agreed that the offence took place on unoccupied Crown land.

On appeal by stated case the court quashed the conviction. Lunney and McGillivray, JJ.A., reviewed the history of the hunting rights of Indians.

Lunney, J.A. said at p. 341:

"The treaties with the Indians and the subsequent legislation treat with the rights of Indians to hunt, and until definite legislation is passed by a competent body, the Indian is, in my opinion, entitled to hunt on 'all unoccupied Crown lands and on any other lands' to which he may have a right of access."

Lunney, J.A. goes on to point out that at that time sec. 69 of the *Indian Act* provided that the superintendent general might declare that the laws respecting game in force in Alberta shall apply to Indians. However this section is no longer in the Act. Its place is taken by sec. 87 of the 1951 *Indian Act* which states that provincial laws applicable to Indians shall be subject to their

treaty rights or rights given under any other Act of the Parliament of Canada.

McGillivray, J.A. in referring to *The Alberta Natural Resources Act* (1930, ch. 21) said at p. 344:

> "It seems to me that the language of sec. 12 is unambiguous and the intention of Parliament to be gathered therefrom clearly is to assure to the Indians a supply of game in the future for their support and subsistence by requiring them to comply with the laws of the province, subject however to the express and dominant proviso that care for the future is not to deprive them of the right to satisfy their present need for food by hunting and trapping game, using the word 'game' in its broadest sense, at all seasons on unoccupied Crown lands or other lands to which they may have a right of access.
>
> * * *
>
> "I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

And at p. 345:

> "It seems to me that the enacting of the section subjecting Indians to the game laws of the province in general terms is subject to a clear excepting and qualifying proviso in favour of Indians who are hunting for food to whom the game laws of the province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access."

And at p. 352:

> "This does not in any wise imply that *The Game Act* of this province is *ultra vires*. I merely hold that it has no application to Indians hunting for food in the places mentioned in this section. It is satisfactory to be able to come to this conclusion and not have to decide that 'the Queen's promises' have not been fulfilled."

In *Rex v. Smith* [1935] 2 WWR 433, an Indian was convicted on a charge of carrying fire-arms on Fort a La Corne game

preserve in the province of Saskatchewan contrary to *The Game Act*, RSS, 1930, ch. 208.

The appeal against the conviction was dismissed by the Saskatchewan Court of Appeal on a stated case.

Sec. 12 of the agreement between Canada and Saskatchewan with reference to the transfer of natural resources in 1930 is in the exact wording of sec. 12 of the agreement with Alberta.

Treaty No. 6 entered into at Fort Carlton on August 23, 1876, between Her Majesty the Queen and the Plain and the Wood Cree Tribes of Indians contained the same provisions for hunting and fishing as were later contained in Treaty No. 7 (above referred to).

The Court of Appeal held that the game preserve was not "Unoccupied Crown land" and that the Indian did not have a right of access to it.

Turgeon, J.A. said at p. 438:

> "So I take it that when the Crown, in the right of the province appropriates or sets aside certain areas for special purposes, as for game preserves, such areas can no longer be deemed to be 'unoccupied Crown lands' within the meaning of par. 12 of the agreement.
>
> "But it is also urged that the land of this game preserve is land to which the Indians have a right of access and that they are authorized to shoot on it because of that right. Any so-called 'right' of access which the Indians may enjoy in respect to this preserve is, so far as we were shown, merely the privilege accorded to all persons to enter the preserve without carrying fire-arms. We were not told of any special, peculiar right of access to this preserve conferred upon or enjoyed by the Indians. The Indians assuredly have a peculiar right of access to certain Crown lands, as, for instance, the reservation upon which they live and which are vested in the Crown, but it does not appear that they have any similar right of access to the land comprising this preserve."

Martin, J.A. said at p. 441:

> "The Fort a La Corne game preserve is not therefore 'unoccupied Crown lands.' It was argued however that the accused had a right of access to the game preserve. Indians undoubtedly have a right of access to certain reserves set apart for them and upon which they reside, but they have

no right of access to game preserves beyond that accorded to all other persons and they are subject as all persons are, to the provisions of sec. 69 of *The Game Act.*"

At p. 436 Turgeon, J.A. said:

"For the purposes of the present inquiry we can confine ourselves to Crown lands (excluding lands owned by individuals as to which some other question might arise) because this game preserve is Crown land."

It should be noted that the decision of the Saskatchewan Court of Appeal has been incorporated into *The Game Act* of Alberta in sec. 142 (4).

After reviewing the two cases decided by the Courts of Appeal of Alberta and Saskatchewan, it appears to me that the question to be decided in this case is as follows:

Did Little Bear have a right of access to the land on which he shot the deer?

If he did have a right of access, then he had the right to shoot the deer out of season.

Turgeon, J.A. in *Rex v. Smith, supra,* said that some other question might arise where lands owned by individuals were concerned.

Little Bear was given permission to shoot by the owner of the land.

Did this permission give him a right of access to the owner's land within the meaning of sec. 12 of *The Alberta Natural Resources Act?*

Did Canada and Alberta intend by the provisions of *The Alberta Natural Resources Act* to give to Indians greater hunting rights than the rights contained in the Treaties?

No one can shoot big game on occupied land in Alberta without first obtaining the consent of the owner or occupant of the land (*The Game Act,* as amended by 1956, ch. 17, sec. 3).

Once a person obtains the consent of an owner or occupant of land in Alberta, he has the right of access to hunt on that land. However as pointed out by McGillivray, J.A. in *Rex v. Wesley, supra,* the provisions of *The Game Act* do not apply to an Indian when he is hunting big game for the purpose of food. If an Indian claims a right of access to land under the provisions of *The Game Act* for the purpose of hunting, then right of

418

access must be subject to the other provisions of *The Game Act* and one of these provisions is that big game cannot be hunted in a closed season. Therefore under the provisions of *The Game Act* there is no right of access to occupied land for the purpose of hunting in a closed season.

There are certain rights of access at common law, e.g., the right of access to a highway by the owner of abutting land; the right of access to the sea, lake or river by a riparian owner.

An example of a statute giving a right of access is *The Law of Property Act,* Imp., 1925, ch. 20, sec. 193, which gives the public a right to access to commons and waste lands for the purposes of air and exercise.

What did the Parliament of Canada mean when it gave Indians a right to hunt on other lands to which the said Indians may have a right of access? What lands are referred to in addition to unoccupied Crown lands? There is a suggestion in the judgments of the members of the Court of Appeal in Saskatchewan in the case of *Rex v. Smith, supra,* that the wording referred to "Indian reserves" as being the only lands to which Indians have a right of access. But it seems to me that if Parliament wished to restrict hunting rights of Indians to unoccupied Crown lands and Indians reserves, it would have said so.

I cannot call to mind any other lands to which an Indian would have the right of access for the purpose of hunting by reason of common law or statute. I have therefore come to the conclusion that the words "right of access" include a right to enter privately owned land with the consent of the owner or occupant of the land.

The appeal will be allowed and the conviction set aside. The fine, costs and deposit for security for costs will be returned to counsel for the appellant. The game under seizure will be returned to the appellant.

COUNTY COURT SWANSON, C.C.J.

Rex v. McLeod

Constitutional Law—"Indians and Lands Reserved for Indians"—Provincial Game Act—Validity of with Respect to White Man's Killing of Game on Reserve.

The fact that the Dominion Parliament has exclusive legislative authority over "Indians and lands reserved for Indians" does not prevent a provincial game protection Act which prohibits the killing of game out of season from being applied to the killing of game on an Indian reserve where the offender is a white man (*Rex v. Jim*, 22 B.C.R. 106, 25 C.C.C. 236, distinguished).

[Note up with 2 C.E.D., *Constitutional Law*, sec. 52; 4 C.E.D., *Game Laws*, sec. 1; *Indians*, sec. 6.]

H. L. Moricy, for appellant.

J. R. Archibald, for respondent.

April 23, 1930.

Swanson, C.C.J.

SWANSON, C.C.J.—This is an appeal from a conviction made by the stipendiary magistrate for the county of Yale on March 27, 1930, whereby the appellant Ewen McLeod, the Indian agent for the Kamloops Indian Agency in this county, was convicted on the charge that he did on November 2 last at the Kamloops Indian Reserve in this county unlawfully kill a pheasant contrary to sec. 9 of the provincial *Game Act*, R.S.B.C., 1924, ch. 98. The facts in the case were all admitted before me, the sole ground of appeal being that the *Game Act*, a provincial Act, is *ultra vires* in so far as it seeks to legislate with respect to offences committed on an Indian reserve, the latter being alleged to be under the exclusive legislative jurisdiction of the Dominion Parliament under subsec. 24 of sec. 91 of the *B.N.A. Act, 1867*, ch. 3.

As this case is one *primae impressionis*, there being no record of the point having been previously raised in this province as far as my knowledge goes, and as the case is one of general interest in the county I have seen fit to commit my reasons for judgment to writing.

Under subsec. 24 of sec. 91 of *The B.N.A. Act*, exclusive legislative jurisdiction over "Indians and lands reserved for Indians" is conferred on the Dominion.

It is contended by the counsel for the appellant that subsec. 24 ousts the jurisdiction of the province to enact a game Act which shall be effective to penalize a person either Indian or white man for shooting game out of season on an Indian

B.C.
1930

REX
v.
MCLEOD

Swanson, C.C.J.

reserve. The *Game Act* is an Act of general application, and does not in my opinion infringe upon any of the legislative powers of the Dominion. The only reference in the *Game Act* to Indians is in sec. 6:

> No Indian who is not a resident shall hunt or kill game in the Province at any time.

The legislative validity of this section does not enter into the case now before me. Mr. Archibald submits that the legislation in question is competent under the authority of subsec. 13 of sec. 92—"Property and civil rights in the Province." It may be also justified under subsec. 16—"Generally all matters of a merely local or private nature in the Province." Lord Herschell in giving the judgment of the Privy Council in *Atty.-Gen. for Can. v. Attys.-Gen. for Ont., Quebec and N.S.* [1898] A.C. 700, at 716, 67 L.J.P.C. 90, says that the terms and conditions upon which the fisheries, the property of the province, may be granted are proper subjects for provincial legislation *either* under subsec. 5 of sec. 92—"The management and sale of Public Lands"—*or* under subsec. 13—"Property and Civil Rights." The general validity of the *Game Act* is not questioned. Stress was laid upon a decision of the late Chief Justice Hunter in *Rex v. Jim* (an Indian) (1915) 22 B.C.R. 106, 26 C.C.C. 236. It was there held that as the exclusive legislative authority over "Indians and lands reserved for Indians" is vested in the Dominion Parliament the *Game Protection Act* of B.C. [R.S.B.C., 1911, ch. 95] was not effective as regards an Indian reserve to prohibit an Indian there resident from hunting and killing a deer on the reservation for his own use. That decision is an authority for what it *specifically decides*, namely, that the *Game Act* does not apply to the case of an Indian resident on the reserve killing game for his own use and is no authority to exculpate others than Indians killing game out of season on an Indian reserve. See *Quinn v. Leathem* [1901] A.C. 495, at 506, 70 L.J.P.C. 76 [quotation from (1901) A.C. at 506].

Reference was made by Chief Justice Hunter to the case in the Privy Council of *Madden v. Nelson and Fort Sheppard Ry.* [1899] A.C. 626, 68 L.J.P.C. 148. In that case the provision of the B.C. *Cattle Protection Act, 1891*, as amended in 1895 to the effect that a Dominion railway company unless they erect fences on their railway shall be responsible for cattle injured or killed thereon was held *ultra vires* of the provincial Legislature, distinguishing the case of *C.P.R. v.*

Notre Dame de Bonsecours Parish [1899] A.C. 367, 68 L.J. P.C. 54. The Lord Chancellor said: [quotation from 68 L.J. P.C. 148, at 149].

With all respect these authorities do not seem to me to justify the contention that the *Game Act* must be held to be *ultra vires* in so far as it seeks to punish a white man who unlawfully kills game out of season simply because the place where such game is killed happens to be upon "lands reserved for Indians."

Lord Watson in the *C.P.R. v. Bonsecours* case, *supra*, at p. 372, ([1899] A.C.) said: [quotation].

Reference was made by counsel on the argument before me to the case in the Privy Council of *St. Catherine's Milling Co. v. Reg.* (1889) 14 App. Cas. 46, 58 L.J.P.C. 54. The question in appeal in that case was whether certain Indian lands admittedly situated in Ontario belonged to that province or to the Dominion. The appellants cut timber on the lands which are Crown lands without authority from the province of Ontario which accordingly sued for an injunction and for damages. The appellants justified by setting up a licence from the Dominion Government. The Canadian Courts decided in favour of the province, and the judgments were sustained by the Privy Council [the historical side of the case was here referred to].

As Lord Herschell said in the above case of *Atty.-Gen. for Can. v. Attys.-Gen. for Ont., Quebec, and N.S.* at p. 709:

> It must be borne in mind that there is a *broad distinction between proprietary rights and legislative jurisdiction.* The fact that such jurisdiction in respect to a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it.

The Court of Appeal of Ontario held in case of *Rex v. Hill* (1907) 15 O.L.R. 406, that a treaty Indian residing on an Indian reserve was lawfully convicted for having practised medicine for hire in Ontario but not upon the Indian reserve without being registered pursuant to the provisions of the Ontario *Medical Act*. It was held that the Indian was thus subject to the provincial *Medical Act*. Mr. Justice Maclaren at p. 411 says:

> The claim is made on the broad ground that because sec. 91 of *The British North America Act* gives to Dominion Parliament exclusive legislative authority over "Indians and lands reserved for Indians" no provincial legislation can affect Indians or Indian lands. This is a somewhat

B.C.
1930
REX
v.
McLEOD
Swanson, C.C.J.

startling discovery to make forty years after the passing of the Act, while the parties affected, the legal profession, and the Courts have been, during all these years, assuming the contrary to be the fact, * * * Let us see where such an interpretation of the *B.N.A. Act* would land us. By subsec. 7 of sec. 91 the Dominion is given exclusive authority to legislate respecting the "Militia." It would be somewhat startling to hear it gravely argued that no legislation of the Province can apply to or affect militiamen. By subsec. 25 the subject of "Aliens" is assigned exclusively to the Dominion. According to the argument on appeal, no provincial legislation applies to an alien. A militiaman, or an alien, or a member of any of the other clases mentioned in sec. 91, may violate any provincial law without incurring any penalty, and cannot avail himself of any benefit or advantage conferred by provincial legislation. So with regard to banks, bills of exchange, and other matters assigned exclusively to Dominion.

The learned Judge at pp. 412-13 says:

The question of legislation being passed as falling under one subject, and its being contended that it really comes under another, has frequently come before the Courts. A very recent instance is the case of *G.T. Ry. v. Atty.-Gen. for Can.* in the Privy Council [1907] A.C. 65, 76 L.J.P.C. 23. At p. 67 [A.C.] it is said: [quotation].

The Privy Council has held in *Cunningham v. Tomey Homma* [1903] A.C. 151, 72 L.J.P.C. 23, that while sec. 91, subsec. 25, reserves to the Dominion Parliament exclusive jurisdiction over "*aliens* and *naturalization*," that is a right to determine how naturalization shall be constituted, and the provincial Legislature has the right to determine under sec. 92, subsec. 1, what privileges as distinguished from necessary consequences shall be attached to it. Accordingly the B.C. *Provincial Elections Act*, 1897, ch. 67, sec. 8, which provides that no Japanese, whether naturalized or not, shall have the right to vote is not *ultra vires*.

It was held by Mathers, J. (afterwards Chief Justice) in *Sanderson v. Heap* (1909) 11 W.L.R. 238, at 241, 19 Man. R. 122, that the provincial Act of Manitoba called the *Estoppel Act* applies to an Indian. His Lordship says:

The *Estoppel Act* cannot be said to be legislation concerning Indians. It relates to property and civil rights of those who execute deeds containing certain covenants.

Mr. Justice Lamont (now a Justice of the Supreme Court of Canada) held in *Carter v. Nichol* (1911) 1 W.W.R. 392, 19 W.L.R. 736, 4 Sask. L.R. 382, that the defendant (an Indian agent in charge of an Indian reserve) who permitted a threshing outfit to be operated on an Indian reserve without the appliances *required by the Provincial Act*, the *Prairie Fires Ordinance*, was responsible for damages for fire which broke out.

Rex v. Rodgers [1923] 2 W.W.R. 353, 33 Man. R. 139, is a decision of the Court of Appeal of Manitoba dealing with

the effect of *The Game Protection Act* of Manitoba, 1916, ch. 14, as affecting treaty Indians killing fur-bearing animals on the Indian reserve. I wish to particularly direct attention to the words of Mr. Justice Dennistoun at p. 358 quoting the words of Mr. Justice Riddell (paraphrasing the language used by the Privy Council in the above case of *C.P.R. v. Notre Dame de Bonsecours Parish, supra*, at pp. 372 and 373.)

I also refer to the judgment of the Appellate Division of Ontario in *Rex v. Martin* (1917) 41 O.L.R. 79, 29 C.C.C. 189, in which it was held that an Indian is punishable as other persons are for offences committed outside a reservation against provincial laws, in that case for a violation of the *Ontario Temperance Act*. However, our own Court of Appeal has declined to follow the decision in *Rex v. Martin, supra*. See the decision of our Court of Appeal in *Rex v. Cooper* [1925] 2 W.W.R. 778, 35 B.C.R. 457. The reason for the latter decision is put on the ground that where the field of legislation is covered effectively by Dominion legislation the provincial legislation on the same subject must give way to the Dominion. In the case above reference is made to sec. 135 of the *Indian Act* [then R.S.C., 1906, ch. 81] which deals fully with the offence in question. In this and in a number of kindred sections the *Indian Act* deals fully with the offences of dealing in intoxicants with Indians.

It was submitted in the case at bar that the provincial *Game Act* should for the same reason be held not to apply, as the field is already covered by Dominion legislation, viz., sec. 34 of the *Indian Act*, R.S.C., 1927, ch. 98:

> No person, or Indian other than an Indian of the band, shall without authority of the Superintendent General, reside *or hunt* upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.

This sec. 34 and all sections down to and including 38 are preceded by the words in the heading of this portion of the Act "Trespassing on Reserves." I am of the opinion that sec. 34 is clearly confined to "trespassing" and cannot be called legislation on the part of the Dominion occupying the legislative field of the provincial *Game Act*. I refer to *Maxwell on Interpretation of Statutes*, 3rd ed., at p. 71, as to the effect of a "Heading" prefixed to a section in an Act:

> The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections.

Being such in effect they are part of the statute and "perform the function of a preamble which is to explain what is

B.C.
1930

REX
v.
MCLEOD

Swanson, C.C.J.

ambiguous in an enactment, and it may either restrain or extend it as best suits the intention." See also sec. 69 of *Indian Act* which deals with game laws in Manitoba, Saskatchewan and Alberta but not in British Columbia. I allude to an important decision of the United States Supreme Court, *U.S. v. McBratney* (1882) 104 U.S. 621, 26 Law. Ed. 869, in which it was held that when a state was admitted to the Union and the enabling Act contained no exclusion of state jurisdiction as to *crimes committed on an Indian reservation by others than Indians*, or against Indians, the state Courts were vested with jurisdiction to try and punish such crimes, and that whenever upon the admission of a state into the Union Congress has intended to except out of it an Indian reservation or the sole or exclusive federal jurisdiction over that reservation it has done so by *express words*. See also *Draper v. U.S.* (1896) 164 U.S. 240, 17 Sup. Ct. Rep. 107, 41 Law. Ed. 419.

I allude also to a ruling of Mr. Justice McDonald in *Rex v. Chan Lung Toy* [1924] 3 W.W.R. 196, 34 B.C.R. 194, which was decided before the ruling by our Court of Appeal in *Rex v. Cooper* [1925] 2 W.W.R. 778, 35 B.C.R. 457.

In the light of the principles which I have endeavoured to extract from the above cases I have concluded that our provincial *Game Act* when dealing with an offence such as that in the case at bar is within the legislative competence of the provincial Legislature.

I accordingly affirm the conviction of the appellant and dismiss his appeal.

MANITOBA COURT OF APPEAL

Freedman, Guy and Dickson JJ.A.

Regina v. McPherson

Indians — Treaty Indian killing game for food with prohibited bullet — Whether exempt from prohibition — The Wildlife Act, 1963 (Man.), c. 94, s. 46(1).

Appeal by the Crown from the acquittal of the respondent by Thompson Co. Ct. J., [1971] 1 W.W.R. 299, on a charge of unlawfully killing game with a metal-cased hard-point bullet. Appeal dismissed.

[Note up with 13 C.E.D. (2nd ed.) *Indians*, s. 22.]

J. G. Dangerfield, for the Crown, appellant.

H. I. Pollock, for respondent.

15th February 1971. The judgment of the Court was delivered by

FREEDMAN J.A.:—This is a Crown appeal from a decision of Thompson Co. Ct. J., [1971] 1 W.W.R. 299, in which he dismissed a charge against the accused, a treaty Indian, of shooting a moose, using a hard-point bullet contrary to The Wildlife Act, 1963 (Man.), c. 94, and Regulations thereunder. It is admitted that at the time in question the accused was hunting for food on lands to which he had a right of access.

In our view this case is indistinguishable in principle from the case of *Prince et al. v. The Queen*, [1964] S.C.R. 81, 45 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1. In that case the Court quashed a conviction against an Indian in circumstances essentially similar to those found here. There the Indian was hunting game with the aid of a night light contrary to the Regulations. Here an Indian was hunting game with a hard-point bullet, contrary to the Regulations. In both cases they were hunting for food. The *Price* case has application here and must govern our disposition of the matter.

The appeal is accordingly dismissed.

MANITOBA COUNTY COURT

426

Thompson Co. Ct. J.

Regina v. McPherson

Indians — Treaty Indian killing game for food with prohibited bullet — Whether exempt from prohibition — The Wildlife Act, 1963 (Man.), c. 94, s. 46(1).

By reg. 52/66 made under The Wildlife Act it is made an offence for any person to hunt big game with cartridges described as having a metal-cased hard-point bullet. Appellant, a treaty Indian, shot a moose with such a bullet on land to which he had a right of access.

It was *held* that the appeal must be allowed; appellant had discharged the burden of proving that he was hunting for food and by virtue of s. 46(1) of The Wildlife Act he was outside the prohibition of the regulation under which he was charged: *Prince et al. v. The Queen*, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 2; *Rex v. Wesley*, 26 Alta. L.R. 433, [1932] 2 W.W.R. 337, 58 C.C.C 269, [1932] 4 D.L.R. 774 applied.

[Note up with 13 C.E.D. (2nd ed.) *Indians*, s. 22.]

H. L. Pollock and *A. J. Connor*, for accused, appellant.

J. Guy, for the Crown.

19th October 1970. THOMPSON Co. Ct. J.:—The accused is charged under The Widlife Act: "that he did on or about the end of February, 1969, at or near the Town of Bissett in the Province of Manitoba, unlawfully use metal cased hard point shells for the purpose of hunting big game animals."

Before Duval P.M. at Bissett the accused pleaded guilty and was sentenced to a fine of $25 and costs of $4.75. On appeal to this Court under the provisions of the Criminal Code the accused, who in his plea had not been represented by counsel, was allowed, after testimony was heard, to change his plea to not guilty and the matter was heard as a trial de novo.

Before 9:00 a.m. on 3rd February 1969, the accused was driving his wife's automobile along the road west of Bissett, Manitoba, when a moose appeared off the roadway about 150 feet. He stopped, took his rifle out of the car, where he always carried it, and proceeded to shoot the animal. He says it fell and he thought it was dead. The accused, a treaty Indian, then continued on to the Little Black River Indian Reservation, where he lives, in order that his young son, who was with him at the time, could get to school. Shortly before this incident the accused had driven some bushcutters from the reserve to a point on the far side of Bissett and his son went along for the ride. Father and son were on their way back to the reservation, a few miles west of Bissett, when the moose was shot. About 2:30 p.m. on the same day the accused

returned to get the moose and was met by a conservation officer.

The conservation officer had discovered the moose about 9:30 that morning, wounded but still alive, and had ordered it to be disposed of by a person with him by a shot in the head. The animal had apparently crawled some 60 to 75 feet from the spot where it had been brought down.

The accused admits firing a hard-point bullet, the type prohibited in The Wildlife Act and reg. 52/66 passed under the authority thereof, although he said it was the first time he had used these cartridges and did not know the difference between these and other types. The type of ammunition used apparently does not spread on impact and tends rather to wound than kill unless striking a vital part of the animal and is prohibited for humane purposes.

The Wildlife Act replaces the provisions of The Game and Fisheries Act, R.S.M. 1954, c. 94, pertaining to wildlife. Section 88(26)(*i*) authorizes the passing of regulations pertaining to ammunition. Regulation 52/66 is as follows:

"PART VII

"21. No person shall hunt big game or bear with or have in his possession while hunting, any commercial cartridge, described as having a metal cased hard point bullet, including hard point military type cartridges."

The accused claims that as an Indian hunting for food on lands to which he had the right of access he is not subject to the restrictions and prohibitions of The Wildlife Act by virtue of s. 46(1) thereof, which states as follows:

"46. (1) Nothing in this Act reduces, or deprives any person of, or detracts from, the rights and privileges bestowed upon him under paragraph 13 of the Memorandum of Agreement approved under The Manitoba Natural Resources Act."

Paragraph 13 of the Memorandum of Agreement referred to is as follows:

"13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the law respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, with which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

There is no doubt that the accused is an Indian or that he was on lands to which he had the right of access. The issue of whether he was at the time of the alleged offence hunting for food is the one to be determined. If he was hunting for food I would have no hesitation in finding that he is not subject to the provision of The Wildlife Act with the breach of which he is charged.

The leading authority is the Manitoba case of *Prince et al. v. The Queen*, [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 2, in which Indians charged with the use of a night light while hunting were acquitted. In this decision Hall J. refers with approval to the reasoning of Freedman J.A. in his dissenting judgment in the Manitoba Court of Appeal (40 W.W.R. 234, 39 C.R. 43, [1963] 1 C.C.C. 129), and the reasoning of McGillivray J.A. in *Rex v. Wesley*, 26 Alta. L.R. 433, [1932] 2 W.W.R. 337, 58 C.C.C. 269, [1932] 4 D.L.R. 774.

Freedman J.A. states at p. 242:

"The fundamental fact of this case, as I see it, is that the accused Indians at the time of the alleged offence were hunting for food. It was not a case of hunting for sport or for commercial purposes."

McGillivray J.A. says at p. 345:

"It seems to me that the enacting part of the section subjecting Indians to the game laws of the province in general terms is subject to a clear excepting and qualifying proviso in favour of Indians who are hunting for food to whom the game laws of the province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access."

The accused lives with his wife and five children, ranging in age from 11 years to 10 months, in a five-room, one-storey home on the reservation, containing four bedrooms and a kitchen. He is employed at Dumbarten Mines at Bird Lake, about 100 miles from his home, where he had worked underground for a period of 13 years. He asked for time off about the middle of December 1968. He wanted a change of work to the surface, out of the mine. The accused was unemployed from mid-December 1968, until mid-April 1969, when he returned to his work. During these months, during which the alleged offence was committed, he received unemployment insurance payments. He testified that the unemployment insurance, which paid $96 or $99 every two weeks, was not enough to meet his needs. He says he saved a little for his time off and expected to live on unemployment insurance. The accused

says he could have gone back to work at the mine at any time.

The accused's work was on a contract basis with some days producing nothing, some good. There is no other source of income. His wife does not work. A 1968 Chevrolet car is in his wife's name but was bought with his money and a 1965 Meteor trade-in. The sum of $2,000 was owing on the car.

The accused testified that his main source of food was meat and potatoes. He said he got the meat from the bush, depending on what is available. Of his supply of potatoes he grows a little bit and buys the rest if he runs short. This was the first moose he had shot that year but he had shot deer. He says at the time of the alleged offence food was getting short. The accused always carried his rifle with him.

Was the accused engaged in a quest for food? I am satisfied he was. There is no suggestion that he acted as he did for any other purpose. He shot the moose because he needed food. The evidence does not indicate that he had sufficient food at the time to satisfy his need.

The accused had a source of income, but this is not reason enough, as I find, to deny him the privilege which the law gives to an Indian seeking game for food. He depended on game. To the extent it was available he got his meat from the bush and is entitled to share with all Indians, as distinguished from citizens in general, the benefit and enjoyment of a right which Indians have enjoyed "from time immemorial".

I find that the accused is not subject to the regulation in question and allow the appeal.

SASKATCHEWAN DISTRICT COURT

Maher D.C.J.

Regina v. Park Valley Enterprises Ltd.

Intoxicating liquors — Sales to a minor by hotel employee — Liability of employer — Rebutting presumption of guilt.

Appellant was the licensee of premises including a beverage room in which beer was sold to a person who, from his appearance, was obviously under the age of 21. One of appellant's employees was convicted of the offence and appellant sought to avoid liability as a party under s. 151(1) of The Liquor Licensing Act, R.S.S. 1965, c. 383. It was shown that appellant's manager had read to his employees the rules and regulations issued by the Liquor Licensing Commission, had instructed them to check persons who appeared to be under 21, and had himself often ordered employees to check the ages of customers; there was no evidence that any system had been adopted to ensure that illegal sales were never made.

SASKATCHEWAN

POLICE COURT — LUSSIER, P.M.

Rex v. Mirasty

Indians — Right to Hunt on Provincial Forest Reserve.

The accused, a treaty Indian, was charged with being in possession of the unprime pelt of a beaver contrary to sec. 17 of *The Fur Act, 1936*, ch. 98. The evidence indicated that the pelt had been taken on a provincial forest reserve.

Counsel for the accused argued that the accused, as a treaty Indian, had a right under the Treaty of 1867, between Her Majesty the Queen and the Indians, to hunt any animal for food on the forest reserve.

Held that the accused was guilty of a violation of the Act. The hunting rights of treaty Indians were now governed by the Natural Resources Agreement between the Dominion government and the province of Saskatchewan, s. 12 of which restricted the Indians' hunting rights to "unoccupied Crown lands." A forest reserve which was set up by the province for specific purposes, could not be classified as "unoccupied Crown lands." Hence treaty Indians had no special hunting rights in such a reserve. *Rex v. Smith* [1935] 2 W.W.R. 433, 64 C.C.C. 131, followed; *Rex v. Wesley* [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, 58 C.C.C. 209, distinguished.

[Note up with 2 C.E.D. (C.S.) *Game Laws*, sec. 2; *Indians*, sec. 7.]

G. M. Salter, K.C., for the Crown.

R. Mulcaster, K.C., for accused.

June 13, 1939.

LUSSIER, P.M. — In this case the accused is charged with unlawfully being in possession of the unprime skin or pelt of a certain fur animal, to wit, one beaver, he not being the holder of a permit from the minister authorizing him so to do, in contravention of the provisions of sec. 18 of *The Fur Act, 1936*, ch. 98, and amendments thereto and regulations made thereunder. Lussier, P.M.

Sec. 18 of the Act reads as follows:

"18. No person shall buy, sell, traffic in or have in his possession:

"(*a*) the unprime skin or pelt of any fur animal; or

"(*b*) the skin or pelt of any animal whatsoever, except rabbit, which has been snared;

"unless he is the holder of a permit from the minister authorizing him to do so."

SASK.
1939
REX
v.
MIRASTY
Lussier.
P.M.

The Act defines an "unprime skin or pelt" as one which has been taken other than during the open season and includes any skin or pelt which shows natural markings of a dark or bluish colour on the flesh side.

In substance the following are the material facts established by the evidence: The accused is a treaty Indian of the James Roberts Band at Lac la Ronge. On April 30, 1939, the complainant, a field officer of the Department of Natural Resources of Saskatchewan, met him in company with others in a district which forms part of the Emma Lake Provincial Forest Reserve. They had with them two beaver pelts and the accused admitted shooting and killing one of the animals in question at a spot well inside the limits of the reserve where there is a beaver colony protected and improved by the provincial Government at considerable expense and trouble. The Emma Lake Provincial Forest Reserve is one of many established under *The Forest Act, 1931*, ch. 15.

Possession of an unprime pelt is an offence under the Act whether or not the animal has actually been killed by the possessor of the pelt. Counsel for the defence, however, submits that the accused was at the time hunting for food, that as a treaty Indian he had the right to hunt for food on that reserve. and that he could hunt at any time and kill any kind of animal by any means whatsoever. To support his contention counsel refers to the Treaty of 1867 between Her Majesty the Queen and the Indians and to sec. 12 of the Saskatchewan Natural Resources Act, 1930, ch. 87, embodying the Federal-Provincial Agreement under which Saskatchewan's natural resources were transferred to that province, which was confirmed by Federal Parliament (statutes of Canada, 1930, ch. 41) and subsequently embodied in the *British North America Act* by the Imperial Parliament (20 & 21 Geo. V., ch. 26).

Following is the treaty clause in question:

> "Her Majesty further agrees with Her said Indians that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering and other

purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government."

Sec. 12 of the Natural Resources Agreement reads as follows:

"12. In order to secure to the Indians of the province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

As was pointed out by the Saskatchewan Appeal Court in *Rex v. Smith* [1935] 2 W.W.R. 433, 64 C.C.C. 131, the Natural Resources Agreement is now the instrument which governs the relations of the Indians with provincial game laws and other laws affecting the Indians' supply of fish and game and any bearing the treaty may have in any given case can only be to the extent of throwing some light upon the interpretation of certain words in the agreement. That agreement is now a part of our Constitution and our Courts of law are powerless to interfere with it, being concerned only with a proper interpretation of its clauses.

If counsel's interpretation of both the treaty and the agreement is correct, then sec. 18, which deals with the possession of unprime pelts, can hardly be held to apply to Indians because the right to kill animals must necessarily entail the right to possession of their pelts. In fact on that interpretation I should be compelled to hold that either sec. 18 was not meant to affect the Indians or, if it was, that it is *ultra vires* of the provincial Legislature. In this instance, therefore, I take it that the proper function of the Court is to seek its interpretations out of the legislation which emanated from the Federal-Provincial pact, not with a view to ascertaining whether or not a Legislature and two Parliaments have broken faith with the Indians, but in order to determine the issue raised by counsel and the two possibilities it suggests anent the intention or constitutionality of the section involved.

SASK.
1939
REX
v.
MIRASTY
Lussier, P.M.

Before proceeding along those lines, however, there are certain observations I should like to make in reference to certain stipulations in the treaty and the very gratifying manner in which they were interpreted and implemented in the agreement. It will be noted that while the treaty refers to the right of the Indian to pursue his avocation of hunting and fishing throughout the tract surrendered, the agreement goes yet one step further in that it provides for the securing to the Indian of the continuance of his supply of game and fish. Also while no reference is made in the treaty as to the Indian's privilege to hunt for food *at all seasons of the year*, this is clearly set out in the agreement. And again the agreement further stipulates for the same right to be enjoyed by the Indian over all lands to which he may have a right of access, though this is not particularly mentioned in the treaty. It will be seen therefore that Parliament has cautiously and faithfully enacted in such a manner that the pledge given to our Indians may remain forever inviolate. There is, however, a very potent stipulation in the treaty clause to which it seems to me not sufficient attention has been paid so far. I refer to the words "but subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada." Nothing can demonstrate more clearly than those few words do the intention of the treaty makers to make allowance for future development, which at the time must have been in the minds of all concerned, because here we have at the outset the Indians' own undertaking and their acknowledgment of the fact that their hunting rights and privileges *shall at all times and for all times be subject to Government regulations.* There are a number of instances where Parliament evidenced this original intention of the treaty makers. The *Indian Act*, R.S.C., 1927, ch. 98, sec. 69, declared that the Superintendent-General might, from time to time, by public notice, declare that game laws in force in Manitoba, Saskatchewan, Alberta, or the Territories, should apply to Indians within such provinces or territories as the case might be. This was enacted before the Provincial-Federal Agreement came into existence. Then we have our fishery regulations which provide for closed seasons for fish in certain areas from which even the Indian is barred.

I have mentioned these very important considerations because they are indispensable to a proper interpretation of our many statutes and regulations. Counsel for the prosecution argues that the accused killed game in a provincial forest re-

serve, that such a reserve is not a part of the unoccupied Crown lands referred to in the agreement and that such killing was done during the closed season, in fact that at the time there was no open season anywhere in Saskatchewan for beaver. It will be noted that the clause in the agreement which covers the Indian's hunting and fishing rights is in the form of a proviso. This proviso is specific and dominant and it establishes the rule so far as "unoccupied Crown lands" are concerned. But it goes no further. The moment one steps beyond the bounds of that specific territory the proviso ceases to be applicable. In *Rex v. Wesley* [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, 58 C.C.C. 269, the Alberta Appeal Court quashed a conviction made against an Indian for hunting big game on admittedly unoccupied territory. However, the Court on that occasion made it a point to strongly emphasize not only the Indian's right to hunt at all seasons of the year but also his right, regardless of the provincial *Game Act, 1938*, ch. 74, to kill for food all kinds of wild animals regardless of age or size, and to hunt such animals with dogs or otherwise as they see fit. Because of the intricate laws on our statute books and the extensive regulations made thereunder there has since been a certain amount of speculation in some quarters as to whether or not the Indians' rights have at some time been encroached upon, especially in the segregation of certain areas of our public domain for such purposes, say, as conservation of the natural assets thereon and contained therein. In fact, to my knowledge the suggestion has been made and in some instances brought to judicial notice, as it was in the case at Bar, that if there was no legislative encroachment, then the word "unoccupied" must apply to all Crown lands not actively occupied in the physical sense, even to such as have been set aside for some definite purpose not amounting to a disposition of same or involving their full exploitation. It is out of such contentions that difficulties arise such as I have to face here. In *Rex v. Smith, supra*, wherein the Saskatchewan Appeal Court unanimously upheld a conviction made by me against a treaty Indian for unlawfully carrying fire arms within the confines of a forest and game preserve in contravention of sec. 69 of *The Game Act*, R.S.S., 1930, ch. 208, it was held that a game preserve embodied in a forest reserve is not unoccupied territory within the contemplation of sec. 12 of the agreement. But here I have to deal with a provincial forest reserve which has not been constituted as a game preserve. Is a forest reserve to be classed for all purposes involved here in the same category as

SASK. 1939

REX v. MIRASTY

Lussier, P.M.

a game preserve, or must I hold that it is still unoccupied territory for want of occupancy, or by reason of the purpose for which it has been created or because it is not being put to any sort of practical use? In the last-mentioned case Turgeon, J.A. (later C.J.S.) said:

> "When the treaty was made in 1867, the necessity for game preservation was probably not present in the minds of the parties. Nevertheless it was within reason that the time might come in this, as in all populated countries, when the establishment of game preserves would be beneficial to all interested in hunting and fishing, including the Indians themselves. But a game preserve would be one in name only if the Indians or any other class of people were entitled to shoot in it."

And again on the meaning of the word "unoccupied" His Lordship says:

> "I think that, among its possible uses, the parties to the agreement and the Legislature intended in this case to express those which invoked the idea of 'idle,' 'not put to use,' 'not appropriated,' etc.
>
> " * * * So I take it that when the Crown, in the right of the province, appropriates or sets aside certain areas for special purposes, as for game preserves, such areas can no longer be deemed to be 'unoccupied Crown lands' within the meaning of par. 12 of the agreement."

I am satisfied that if the wording of the agreement leaves room for ambiguity a perusal of our provincial statutes and resultant regulations will supply a quick and indisputable answer to the issue raised, because it is there, and there only, that the intention of both Parliaments must have been expressed, since such legislation was enacted immediately after the conclusion of the Federal-Provincial pact. At the 1931 session of the Saskatchewan Legislature, there were enacted the following statutes: *The Provincial Lands Act, 1931*, ch. 14; *The Forest Act, 1931*, ch. 15; *The Mineral Resources Act, 1931*, ch. 16; *The Water Rights Act, 1931*, ch. 17; *The Water Power Act, 1931*, ch. 18, and *The Provincial Parks and Protected Areas Act, 1931*, ch. 20. The first-mentioned statute embraces all public lands and other natural resources appertaining to the same generally, and it provides for the withdrawal and setting aside of portions of such areas for specific purposes. It was the first legislation enacted by the Legis-

lature to implement the provisions of the agreement and it is the parent Act as regards subsequent statutes since the latter proceed to carry out the intention of that Act by dividing certain classes of natural resources into separate branches or departments, each to be administered under its own statute and regulations. To my mind the most significant feature of this legislative set-up is that it makes clear the intention of Parliament to effectively withdraw such areas from the bulk of public lands so they might be taken up for some definite purpose. Does not this forcibly bring to one's mind the words in the treaty "required or taken up," and "other purposes?"

I quote in part from sec. 15 of the Act:

"15. The Lieutenant Governor in Council may:

* * *

"(*d*) set aside out of the unoccupied provincial lands transferred to the province under the agreement of transfer such areas as the Superintendent General of Indian Affairs in agreement with the minister may select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the province;

"(*e*) set aside provincial lands for use as provincial parks, forest reserves, game reserves, bird sanctuaries, public shooting grounds or public resorts;

"(*f*) set aside provincial lands for the sites of wharves or piers, market places, gaols, court houses, public parks or gardens * * *.

* * *

"(*j*) withdraw from disposition any provincial lands for reasons which shall be set forth in the order effecting the withdrawal; lands so withdrawn to be disposed of only on such terms and subject to such conditions as the Lieutenant Governor in Council may in each case prescribe;

"Provided that at any time, after reasonable notice given, he may cancel the withdrawal and declare the land open for disposition."

Here we have in par. (*d*) the withdrawal and setting aside of certain areas out of the unoccupied Crown lands to the use of the Indians themselves with the result that their future

SASK. 1939

REX v. MIRASTY

Lussier, P.M.

right to hunt and fish thereon does not spring from the treaty clause, but must depend on the laws applicable to such segregated areas.

And here again we have the withdrawal of certain areas out of provincial lands — not necessarily unoccupied land — for provincial parks, forest reserves, game preserves, and many other specific purposes, it being noted that forest reserves and game preserves are placed in the same category. Then the statute goes on to refer to "withdrawal from disposition" of certain provincial lands and to the declaring of such lands "open for disposition" should they eventually revert to their original status upon cancellation of such withdrawal. The words "unoccupied Crown lands" do not occur in the treaty but, as already stated, they are contained in the agreement from which all subsequent statutes emanated, so I have arrived at the conclusion that those words must be interpreted as synonymous with the words "open for disposition" as embodied in *The Provincial Lands Act, 1931*. And this interpretation is further strengthened by sec. 20 which provides that grazing permits and hay permits on "unoccupied provincial lands" can only be granted under that Act, while such permits over lands included in forest reserves must be granted under *The Forest Act, 1931* — which, by the way, makes no reference to unoccupied lands — and thereupon become subject to elaborate and stringent regulations involving inspections, supervision and control by the officer in charge or any other officer duly instructed under that Act.

It has been suggested that a forest reserve has no definite purpose but that of conservation of trees, and that it does not involve such a degree of occupancy as would justify its being classified as occupied lands; so a cursory glance at the provisions of *The Forest Act, 1931,* will prove interesting. Sec. 4 deals, amongst other things, with the conservation of forests, reforestation, prevention of forest fires, sale and disposition of Crown timber, cutting and manufacturing, and the inspection of trees, timber and products of the forests. Sec. 48, which refers specifically to provincial forests, makes it clear that lands can be withdrawn from disposition, sale, settlement, or occupancy under that or any other Act in order that the purpose of the Act may be fully carried out. Sec. 50, subsec. (3), provides for the establishing of roads for the convenience of the public. Then here is something very significant in the light of the case at Bar: Sec. 57 provides for regulations governing, amongst other things, "the pre-

servation of game, birds, fish and other animals, and the destruction of noxious, dangerous and destructive animals." Surely we have here a purpose behind the segregation of such areas which is clear, important and beneficial to the public at large as well as true occupancy of such areas through an intricate administrative scheme which involves not only the conservation of timber, animals, birds and water supply, but also the development and exploitation of all such resources of the forest.

On the above conclusions I hold that a provincial forest reserve is not unoccupied territory within the meaning of sec. 12 of the agreement.

The resources agreement, however, refers not only to unoccupied lands, but also to lands to which the Indians might have a right of access. Did the accused in this case possess, as an Indian, a special right of access to the Emma Lake Provincial Forest Reserve within the meaning of sec. 12 of the agreement at the time in question? In the Alberta case the Court, no doubt because it was dealing with unoccupied Crown lands, did not attempt to define the meaning of the words. In *Rex v. Smith, supra*, it was pointed out that there was nothing before the Court to indicate that the Indian possessed any special right of access to a game preserve beyond that accorded to other people. My interpretation of these words of the agreement is that, for all or any purposes, they can only have reference to some specific right not enjoyed by the public at large. There is nothing in the treaty which suggests that the Indian enjoys any specific right of access to any lands except such as have not been taken up or set aside or withdrawn for some purpose within the contemplated meaning of the treaty, so any such right of access as is referred to in the agreement must be one created by statute. By law the Indian enjoys special rights on his own reserve. He may, for all I know, enjoy a right of access to or any other rights upon or in respect of lands by virtue of any Act of Parliament, as is suggested, for instance, by *The Provincial Lands Act, 1931*, which is not shared by others. Beyond that he is in exactly the same position as the white man, enjoying the same right of access to all places where such exists, but, like the white man, subject in that case to all the regulations, restrictions and prohibitions of the law.

And so, having found that the unoccupied Crown lands referred to in the agreement are those that are still open for

SASK. 1939

REX v. MIRASTY

Lussier, P.M.

disposition under *The Provincial Lands Act, 1931*, and that they do not include forest reserves, and having found that the Indian as such has no special or statutory right of access to such reserves, I hold that sec. 18 of *The Fur Act, 1936*, is not subject to or governed by the proviso in the agreement and is therefore quite within the legislative field of provincial jurisdiction.

By the way, counsel made a point of the fact that the evidence shows that the trapping of muskrats was allowed on that reserve at the time. That is purely and simply a matter of regulations under the statute: *The Fur Act, 1936*, sec 6 (2) (*p*). It has nothing to do with the hunting prohibition during the closed season.

Considerable stress was laid on the question as to whether or not the accused was hunting for food. The evidence satisfies me that in the circumstances disclosed he was not under the necessity of shooting beaver for food and I would have so found had such a finding been necessary.

On the foregoing conclusions I find the accused guilty as charged.

BRITISH COLUMBIA

SUPREME COURT — MANSON, J.

Rex ex rel Lee v. Workmen's Compensation Board

Mandamus — Whether Mandamus Lies to Compel Workmen's Compensation Board to Pay Old Age Pension to Person Entitled Thereto — Whether Board Special or General Agent of the Crown.

The applicant L. asked for a *mandamus* to compel the Workmen's Compensation Board to pay him an old-age pension pursuant to the *Old Age Pensions Act*, R.S.C., 1927, ch. 156, and the *Old-age Pension Act*, R.S.B.C., 1936, ch. 208. He had been in receipt of a pension, but the pension was stopped by the Board on the ground that he had divested himself of his interest in certain property.

The Court held that there was no justification for the Board's action in either the Dominion or the British Columbia Act, or in the regulations made thereunder, and therefore the plaintiff was entitled to have his pension continued.

Held that *mandamus* would lie to compel the Board to continue payment of the pension. The Board was not a general agent of the Crown, but a special agent constituted by statute to administer the old age pensions

BRITISH COLUMBIA

440

COURT OF APPEAL

Before Macdonald, C.J.B.C., Martin, Galliher, McPhillips and M. A. Macdonald, JJ.A.

Rex v. Morley

Constitutional Law—Indians and Indian Reserves—Provincial Game Laws — Applicability to Non-Indian Hunting on Reserve.

The accused, who was not an Indian, was convicted under a provincial Act (*Game Act*, R.S.B.C., 1924, ch. 98) for killing a pheasant during a close season. The act was committed on an Indian Reserve. The accused did not hold a permit from the superintendent of the reserve to hunt thereon.

Held that the Act was *intra vires* with respect to its application to the accused and the conviction should be sustained (per Martin, Galliher and McPhillips, JJ.A.; Macdonald, C.J.B.C. and M. A. Macdonald, J.A. dissenting).

[Note up with 2 C.E.D., *Constitutional Law*, secs. 52, 60; 4 C.E.D., *Game Laws*, sec. 5; *Indians*, secs. 6, 8.]

W. E. Burns, K.C., for accused, appellant.

F. D. Pratt, for Crown, respondent.

October 6, 1931.

Macdonald, C.J.B.C.

MACDONALD, C.J.B.C. (dissenting)—The appellant, a white man, was convicted under the *Game Act* of the province, R.S. B.C., 1924, ch. 98, of shooting a pheasant on an Indian Reserve and this appeal is from his conviction for such offence under that Act.

Shortly after the *Treaty of Paris, 1763*, the Crown showed its interest in protecting the Indians in their hunting fields and throughout the various changes which have since occurred in the management of the Indians and their lands that interest has been maintained. Sec. 91 (24) of the *British North America Act* assigns exclusively to the Dominion Parliament the right to legislate concerning Indians and the management of their lands.

The province under the said provincial Act fixed certain seasons as close seasons, that is to say, seasons in which game might not be shot, and the offence in question was committed on the Indian Reserve during ont of these close seasons and hence the prosecution. The *Indian Act*, R.S.C., 1927, ch. 98, sec. 34, enacts that:

B.C.
1931
REX
v.
MORLEY
Appeal
Macdonald, C.J.B.C.

No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General, reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.

Secs. 35 and 36 provide punishment for breach of this section. It is, therefore, clear that the Dominion, by its legislation, occupies the field in question. The contention of the province is that the question is one falling within sec. 92 (13) [*B.N.A. Act*] namely, property and civil rights, the right to legislate thereon being assigned by the said section to the province. It may be conceded at once for the purposes of this case that each had power to so legislate but the legislation, I think, must be confined to its respective field of operation. While there has been much dispute concerning the property rights of the Indians in Indian Reserves or more correctly of the Dominion Government, there has been no such dispute concerning the Dominion legislation in respect of Indians and the management of their lands. The pheasants on the Reserve belong to the Reserve and the *Indian Act* was passed *inter alia* to protect the interest of the Indians in these pheasants and to prohibit the hunting of them on Indian Reserves. In *G. T. Ry. v. Atty.-Gen. for Can.* [1907] A.C. 65, at 68, 76 L.J.P.C. 23, the Privy Council said:

> But a comparison of two cases decided in the year 1894—viz., *Atty.-Gen. for Ont. v. Atty.-Gen. for Can.* [1894] A.C. 189, 63 L.J.P.C. 59, and *Tennant v. Union Bank of Can.* [1894] A.C. 31, 63 L.J.P.C. 25—seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

That statement of the law is peculiarly applicable to the present case.

In the recent decision of the Privy Council, *In re Combines Investigation Act and Sec. 498 Cr. Code; Proprietary Articles Trade Assn. v. Atty.-Gen. for Can.* [1931] 1 W.W.R. 552, at 562, [1931] A.C. 310, 100 L.J.P.C. 84, the law is stated thus:

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in sec. 91, it is not to the purpose to say that it affects property and civil rights in the provinces.

And see the saving clause at the end of sec. 91.

In *Rex v. Rodgers* [1923] 2 W.W.R. 353, 33 Man. R. 139, 40 C.C.C. 51, it was held that where the offence against the provincial Act occurred beyond the limits of the Indian Re-

serve the Indian offender must be punished under the provincial Act; here the offence was committed not outside the reserve but within it and I think must be dealt with under the *Indian Act*, the field being occupied by that Act. Sec. 69 of the *Indian Act* enables the superintendent-general to give public notice that the provincial laws of

> Manitoba, Saskatchewan, or Alberta, or the Territories, or respecting such game as is specified in the notice, shall apply to Indians [Reserves] within the province or Territories, as the case may be, or to Indians [Reserves] in such parts thereof as to him seems expedient.

This section does not apply to and in any case has not been applied in this province.

The appeal must therefore be allowed with costs.

Martin, J.A.

MARTIN, J.A.—On April 9, 1930, the following conviction of the appellant was made by the stipendiary magistrate at Kamloops, B.C., viz.:

> For that he, the said Henry L. Morley of the City of Kamloops in the County of Yale, Solicitor, at Kamloops Indian Reserve in the County of Yale aforesaid on or about the second day of November, 1929, being the close season unlawfully did kill a pheasant contrary to section 9 of the *"Game Act"* being R.S.B.C., 1924, chapter 98, and I adjudge the said Henry L. Morley for his said offence to forfeit and pay the sum of twenty-five dollars to be paid and applied according to law; and also to pay to the prosecutor the sum of six dollars and twenty-five cents, for his costs in this behalf * * * (and to imprisonment upon default of such payment).

The appeal was taken from this conviction to His Honour Judge Swanson of the County Court of Yale and it was dismissed by him, whereupon a further appeal was taken to this Court.

I pause here to note that by some strange error and oversight this criminal appeal (cf. *Rex and Atty.-Gen for Can. v. Chung Chuck; Rex and Atty.-Gen. for Can. v. Wong Kit* [1930] 1 W.W.R. 129, [1930] A.C. 244, at 251, 254, 257-8, 99 L.J.P.C. 71, 53 C.C.C. 260) was not lodged or entered upon the list in the usual way under the proper title or heading pertaining thereto (as in, e.g., *Rex v. Jim* [1915] 22 B.C.R. 106; *Rex v. Cooper* [1925] 2 W.W.R. 778, 35 B.C.R. 457, 44 C.C.C. 314; *Rex v. McLeod* [1930] 2 W.W.R. 37, 54 C.C.C. 107; and *Rex v. Rodgers* [1923] 2 W.W.R. 353, 33 Man. R. 139, 40 C.C.C. 51) but was wrongly entered as if it were an ordinary civil appeal, which error gives a misleading complexion to the whole matter and is of importance in view of certain decisions hereinafter to be cited; therefore I give the proper title herein, viz., *Rex v. Morley*.

B.C.
1931
443
REX
v.
MORLEY
Appeal
Martin, J.A.

From the outset it is to be borne in mind that this case is not one of the conviction of an Indian but of a white man who trespassed upon an Indian Reserve and therein committed the offence complained of, and the ground of his appeal is that the said "*Game Act* * * * is *ultra vires* of the Province as regards Indian Reserves."

It becomes unnecessary therefore to consider what is the application of the said *Game Act* to Indians in general or those of the particular band living upon the Reserve in question, in regard to which it is to be observed that we have no evidence in the record and no other information than the admission by counsel of the bare fact that it is a "Reserve," within the meaning of the *Indian Act*, R.S.C., 1927, ch. 98, sec. 2, though under other circumstances full information on the history of the Reserve would be essential to define the rights of particular Indians as many reported cases show, e.g., *Atty.-Gen. for Can. v. Giroux* (1916) 53 S.C.R. 172.

In support of said ground it is submitted that the National Parliament has under the "exclusive authority" over "Indians, and Lands reserved for the Indians," conferred upon it by sec. 91, class 24, of the *B.N.A. Act*, occupied the field in question to the entire exclusion of the exclusive right of the provincial Legislature to make "Laws in relation to Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province" as conferred by classes 13 and 16 respectively of sec. 92 of said Act.

On legislation respecting animals *ferae naturae* we are fortunate in having for our assistance the leading and convincing judgment of the Manitoba Appellate Court in *Reg. v. Robertson* (1886) 3 Man. R. 613, delivered by Mr. Justice Killam, wherein it was decided that the game protection clauses of *The Agricultural Statistics and Health Act*, 1883, ch. 19, of the Manitoba Legislature were *intra vires* under both of said classes 13 and 16, and so a conviction of the appellant for having a moose in his possession during the "protected season" was affirmed. The whole judgment merits careful perusal but as it does not relate primarily to Indian Reserves and as its conclusions are not indeed attacked but sought to be avoided I shall make only three citations therefrom which throw light upon the present question, viz., p. 622:

> The prohibitions against the killing or taking of wild birds or other animals, and against having them in possession are prohibitions pure and simple of the exercise of civil rights. This was disputed upon the argu-

ment of the application, but it appears too clear to require any considerable discussion.

Sir Wm. Blackstone, in his *Commentaries on the Laws of England*, Vol. 2, c. 26, p. 403, lays down the principle, "With regard, likewise, to animals *ferae naturae* all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field; and this natural right still continues in every individual unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or if dead, are *absolutely* his own.

And at p. 623, after an informing citation from *Brown & Hadley's "Commentaries on the Laws of England,"* he proceeds:

This last citation exhibits the plain distinction which exists between the personal right of each individual to pursue and take or kill animals *ferae naturae* and the right to do so upon particular land, and this serves to show that although in this province as claimed in argument, the right to enter upon and pursue game over ordinary public lands can, as against the Crown, be conferred only by the officers of the Crown for the Dominion, yet the right to do so in a particular manner or at a particular season or even to do so at all is not necessarily on that account subject to the control of the Dominion Parliament.

It is to be remembered that at the time the learned Judge was speaking the "ordinary public lands" of the Crown in Manitoba belonged to the Dominion and therefore his observations are of particular force in this province which has always owned such lands.

At p. 625 he says:

I must, however, cite one sentence from the remarks of Chief Justice Ritchie in the same case, *Citizens Insur. Co. v. Parsons* (1880) 4 S.C.R. 215, at 243, "I think the power of the Dominion Parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the Local Legislatures to regulate property and civil rights in respect to all matters of a merely local and private nature, such as matters connected with the *enjoyment and preservation of property* in the province, or matters of contract between parties in relation to their property or dealings, *although the exercise by the Local Legislatures of such powers may be said remotely to affect matters connected with trade and commerce,* unless, indeed, the laws of the Provincial Legislatures should conflict with those of the Dominion Parliament passed for the general regulation of trade and commerce."

But a "conflict" is suggested to arise herein from sec. 34 of said *Indian Act* as follows in the group of six sections under the heading "Trespassing on Reserves":

34. No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General, reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.

2. All deeds, leases, contracts, agreements or instruments of whatsoever kind made, entered into, or consented to by any Indian, purporting

445

B.C.
1931

REX
v.
MORLEY

Appeal

Martin, J.A.

to permit persons or Indians other than Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void.

Sec. 35 follows to provide for the "removal or notification" of such trespassers and others in general, viz.:

35. If any Indian is illegally in possession of any land on a reserve, or if any person, or Indian other than an Indian of the band, without the license of the Superintendent General,

(*a*) settles, resides or hunts upon, occupies, uses, or causes or permits any cattle or other animals owned by him, or in his charge, to trespass on any such land or marsh;

(*b*) fishes in any marsh, river, stream or creek on or running through a reserve; or

(*c*) settles, resides upon or occupies any road, or allowance for road, on such reserve;

the Superintendent General or such other officer or person as he thereunto deputes and authorizes, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises, commanding him forthwith as the case may be,

(*a*) to remove from the said land, marsh or road, or allowance for road, every such person or Indian and his family, so settled, or who is residing or hunting upon, or occupying, or is illegally in possession of the same;

* * *

And it goes on to deal similarly with the other classes of trespassers and to empower the Indian agent to deal with trespassers in certain cases. Sec. 36 provides for the punishment of "any person or Indian" who returns to the Reserve for said prohibited purposes after being removed therefrom, by arrest under warrant of the superintendent-general and imprisonment on summary conviction by certain specified magistrates. Sec. 37 directs the sheriff to deliver the convict to the proper gaoler and the final sec. 38 directs and declares that:

38. The Superintendent General, or such officer or person aforesaid, shall cause the judgment or order against the offender to be drawn up and filed in his office.

2. Such judgment shall not be appealed from, or removed by *certiorari* or otherwise, but shall be final.

Therefore we find in this group of "Trespass" sections a special and final tribunal created for the purpose of preventing trespassing of all kinds upon Indian Reserves and for summarily punishing offenders of that class. Power is also given by sec. 115 to impose the additional penalty of a fine and costs, "half of which penalty shall belong to the informer."

With the greatest respect for other opinions I find myself unable to perceive any real conflict of jurisdiction between the

National Parliament and the provincial Legislature in the said special provisions of general prohibition against encroachments of any kind upon an Indian Reserve not only, be it noted, by "any person" but also by those Indians who are not "of the band" occupying the Reserve in question. Even were there no game laws in existence such legislation would be necessary to protect these aboriginal wards of the Crown from the incursions of trespassers in general (as has been done "from the earliest period"—*Totten v. Watson* [1857] 15 U.C.Q.B. 392, *in banco*) and the matter is not dealt with in the said *Indian Act qua* game but as a general prohibition against "hunting" (i.e., pursuing to capture or kill, *Game Act*, sec. 2) of any kind, even though the thing, be it furred or feathered or scaled, "hunted" is not "game" in the ordinary sporting sense (cf. Article "Game Laws," 6 *Encyc. Laws of England*, p. 36), or as defined in the B.C. *Game Act*, secs. 2 and 9, now under consideration, which deals not only with the "hunting, trapping, taking, wounding or killing" of ordinary "game" and "game birds" but with "fur bearing animals as defined in this Act" (which definition is constantly changing to meet new conditions, e.g., the introduction of wild turkeys—sec. 9 [*r*.] amended 1931, ch. 25, sec. 5) and a variety of cognate subjects, and authorizes and even offers bounties (sec. 41 [*e*]) for the destruction of certain predatory birds and animals (e.g., secs. 8 [*d*], 13) which are beyond the pale of the Act as being either enemies of game or dangerous and destructive to domestic stock and otherwise, e.g., eagles, timber wolves and cougars.

Ever since the British conquest of Quebec at least it has been the declared policy of the Government, by the Royal Proclamation of October 7, 1763.

> that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to us, are reserved to them, or any of them, as their hunting-grounds; * * *
>
> And we do further declare it to be our Royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company; as also the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and licence for that purpose first obtained.
>
> And we do further strictly enjoin and require all persons whatsoever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands which,

447

B.C.
1931
REX
v.
MORLEY
Appeal
Martin, J.A.

not having been ceded to or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

Though this Proclamation did not extend to what is now this province, which had not then been visited even by the two later Royal Naval expeditions of the King of Spain, which preceded by several years the arrival of Captain Cook, R.N., on this Pacific Coast, in 1778, yet it is a striking indication of the initial policy of excluding trespassers in general from Indian Reserves which is preserved till today by the group of sections above quoted.

There is to my mind no practical obstacle in the continuation of that historical Imperial policy in favour of the Indians and also in the later inauguration of the wider provincial policy, since Confederation at least, of the preservation and regulation of wild life at large for the general benefit of all the "residents" (sec. 2), including the Indians, of the provinces as the local Legislatures may think best under their widely varying conditions, in the due exercise of their said powers under the *B.N.A. Act*.

It is clearly established by repeated decisions of the Privy Council that the incidental occupation by the Dominion in the exercise of its exclusive powers of an otherwise exclusive provincial area can only be justified by and must be restricted to the reasonable necessity of the case, which becomes a question of degree under the circumstances—"trenching to any extent," as Lord Watson put it in *Tennant v. Union Bank of Canada* [1894] A.C. 31, at 45, 63 L.J.P.C. 25. Thus in *Citizens Insur. Co. v. Parsons* (1881) 7 App. Cas. 96, at 108, 51 L.J.P.C. 11, it was said, in a passage cited by Killam, J. in the *Robertson* case, *supra*, p. 626:

> Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament.

And again, pp. 108-9:

> In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective

powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

This view was later re-affirmed and adopted by the same tribunal in *John Deere Plow Co. v. Wharton*, 7 W.W.R. 635, [1915] A.C. 330, 84 L.J.P.C. 64, 29 W.L.R. 917, wherein at p. 338, while considering said secs. 91 and 92 "and the degree to which the connotation of the expressions used overlaps" their Lordships first said it was "unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions" because this "must almost certainly miscarry," and then went on to say:

It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co. v. Parsons* [*supra*] to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases.

And again on p. 342:

Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the Courts have to determine on which side of a particular line the facts place them.

In *In re Sale of Shares Act and Municipal and Public Utility Board Act; Atty.-Gen. for Man. v. Atty.-Gen. for Can.* [1929] 1 W.W.R. 136, at 141, [1929] A.C. 260, at 267, 98 L.J.P.C. 65, the Privy Council said, after a consideration of the leading cases:

As a matter of construction it is now well settled that, in the case of a company incorporated by Dominion authority with power to carry on its affairs in the provinces generally, it is not competent to the Legis-

B.C.
1931

REX
v.
MORLEY

Appeal

Martin, J.A.

latures of those provinces so to legislate as to impair the status and essential capacities of the company in a substantial degree.

And went on to hold that "the statutes now under consideration do so impair the status and powers of such a company * * *"

In the British Columbia Fisheries Reference Case, *In re Fisheries Act, 1914; Atty.-Gen. for Can. v. Atty.-Gen. for B.C.* [1929] 3 W.W.R. 449, [1930] A.C. 111, 99 L.J.P.C. 20, it was contended by the National Government that certain sections of the National *Fisheries Act* of 1914, ch. 8 (authorizing the Minister of Fisheries to withhold licences to fish) were valid on the ground (p. 120 [A.C.]) that they were "necessarily incidental to effective legislation upon an enumerated subject" (class 12, "Sea Coast and Inland Fisheries") though otherwise the matter admittedly fell within the exclusive jurisdiction of the province as "Property and Civil Rights," but it was held (pp. 121-2 [A.C.]) that they were not so incidental and consequently "the impugned sections * * * cannot be supported."

On p. 118 [A.C.] and p. 453 [W.W.R.] four "propositions" were stated on the question of legislative conflict of which the third and fourth are of special relevancy, viz.:

(3.) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial Legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in sec. 91 (see *Atty.-Gen. for Ont. v. Atty.-Gen. for Can.* [1894] A.C. 189, 63 L.J.P.C. 59; and *Atty.-Gen. for Ont. v. Atty.-Gen. for Can.* [1896] A.C. 348, 65 L.J.P.C. 26).

(4.) There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail (see *G.T. Ry. v. Atty.-Gen. for Can.* [1907] A.C. 65, 76 L.J.P.C. 23).

Still more recent is the decision of the same tribunal in *In re Combines Investigation Act and Sec. 498 Cr. Code; Proprietary Articles Trade Assn. v. Atty.-Gen. for Can.* [1931] 1 W.W.R. 552, [1931] A.C. 310, 100 L.J.P.C. 84, wherein the principles hereinbefore cited from the *Citizens* and *John Deere* cases, *supra*, were approved, pp. 316-7 [A.C.] and p. 554 [W.W.R.], with the additional observation:

The object is as far as possible to prevent too rigid declarations of the Courts from interfering with such elasticity as is given in the written constitution.

With these two principles in mind the present task must be approached.

And it was held that the "pith and substance" of the impugned Federal statute was, under the circumstances, not "in substance" (p. 325 [A.C.]) an encroachment on the exclusive power of the provinces to legislate on property and civil rights, though in *In re Board of Commerce Act and Combines and Fair Prices Act, 1919; Atty.-Gen. for Can. v. Attys.-Gen. for Alta. and Que.* [1922] 1 W.W.R. 20, [1922] 1 A.C. 191, 91 L.J.P.C. 40 (which was much relied upon by the provinces concerned, but was now distinguished on the facts, p. 325 [A.C.]) it was held by the same tribunal that there had been on the part of the Dominion "attempts to interfere with Provincial rights," sought to be justified under the head of criminal law, but which had been made "colourably and merely in aid of what is in substance an encroachment."

And at p. 317 [A.C.] and p. 554 [W.W.R.] it was said:

> Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires;* nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

In the attempt to determine the vexed question as to whether the two legislations really "meet" (which must mean meet in conflict) in a field which is not clear, great difficulty is often encountered in drawing the "lines of demarcation" on the ever-varying facts before the Court. Upon rare occasions there is little difficulty, e.g., in *Madden v. Nelson and Fort Sheppard Ry.* [1899] A.C. 626, 68 L.J.P.C. 148, wherein it was found (p. 628) that the provincial Legislature had attempted to "enter into a field * * * which is wholly withdrawn from them and is, therefore, manifestly *ultra vires.*" But in so holding the Privy Council referred to a case which was on the line, viz., their own very recent decision in *C.P.R. v. Notre Dame de Bonsecours Parish* [1899] A.C. 367, 68 L.J. P.C. 54, and which is relied upon by the present respondent, and it undoubtedly does assist his submission that even a great railway corporation, created by special Act of Parliament for exceptional National purposes, may still be under provincial obligations (there to keep its own authorized ditches clean) delegated to municipalities, even though, as Lord Watson said, p. 371:

> It is not matter of dispute that, by virtue of these enactments, the Parliament of Canada had and have the sole right of legislating with reference to the matter of the appellants' railway.

B.C.
1931

REX
v.
MORLEY

Appeal

Martin, J.A.

On the other hand, we have a later decision of the same tribunal, also with regard to a Dominion railway, *G.T. Ry. v. Atty.-Gen. for Can.* [1907] A.C. 65, 76 L.J.P.C. 23, that it was "truly railway legislation" on the part of the company to enter into contracts with its employees which were prohibited by Parliament even though (p. 68):

> It is true that in so doing it does touch what may be described as the civil rights of those employees. But this is inevitable * * *

Then the leading case from this province of *Cunningham v. Tomey Homma* [1903] A.C. 151, 72 L.J.P.C. 23, is noteworthy and very instructive on the present question because it was one of an alien, and only two classes of persons as such are specifically enumerated in said secs. 91 or 92, viz., "25. Naturalization and Aliens," and "24, Indians, etc." It was sought in that case to expand the personal rights of naturalized aliens, and the power of Parliament over that exclusive subject-matter, to such an extent that they had the right to have their names placed upon the provincial register of voters, and it was submitted (p. 155) that under said class 25 "the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion" and that by the *Naturalization Act* of Canada a naturalized alien is within Canada entitled to all political and other rights, powers and privileges to which a natural-born British subject is entitled in Canada. But this submission was rejected, their Lordships saying (pp. 156-7):

> The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other—but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

This decision was followed in another case from this province—*Brooks-Bidlake and Whittall Ltd. v. Atty.-Gen. for B.C.* [1923] 1 W.W.R. 1150, [1923] A.C. 450, 92 L.J.P.C. 124, wherein it was stated, p. 457 [A.C.] and p. 1153 [W.W.R.]:

> It is said that, as sec. 91 (25) of *The B.N.A. Act* reserves to the Dominion Parliament the exclusive right to legislate on the subject of "Naturalization and Aliens," the provincial legislature is not competent to impose regulations restricting the employment of Chinese or Japanese on Crown property held in right of the province. Their Lordships are unable to agree with this contention. Sec. 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons; but the Dominion is not empowered by that section to regulate the management of the public property of the

province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions are assigned by sec. 92 (5), and sec. 109 of the Act to the legislature of the province; and there is nothing in sec. 91 which conflicts with that view.

Then there is the important decision of the Supreme Court of Canada in *Quong Wing v. Reg.* (1914) 49 S.C.R. 440, 6 W.W.R. 270, wherein it was held that a general prohibition, to be enforced by penalties after conviction, in a Saskatchewan statute, against the employment by any person of white women or girls in "any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman" was *intra vires* even though the Chinese appellant convicted thereunder was a naturalized alien, and *Tomey Homma's* case, *supra*, was relied upon, and the submission was again rejected that under said class 25 Parliament had exclusive authority over all matters which directly concern the rights, privileges and disabilities of naturalized aliens. Mr. Justice Davies said, p. 447 [S.C.R.] and p. 273 [W.W.R.]:

> While it (class 25) exclusively reserves these subjects to the jurisdiction of the Dominion in so far as to determine what shall constitute either alienage or naturalization, it does not touch the question of what consequences shall follow from either, I am relieved from the difficulty I would otherwise feel.
>
> The legislation under review does not, in this view, trespass upon the exclusive power of the Dominion legislature. It does deal with the subject-matter of "property and civil rights" within the province, exclusively assigned to the provincial legislatures, and so dealing cannot be held *ultra vires*, however harshly it may bear upon Chinamen, *naturalized or not*, residing in the province.

And p. 448 [S.C.R.] and p. 274 [W.W.R.]:

> I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the provincial legislatures in the case of *Union Collieries Co. v. Bryden* [1899] A.C. 580, 68 L.J.P.C. 118.

Mr. Justice Duff said, p. 462 [S.C.R.] and p. 282 [W.W.R.]:

> The enactment is not necessarily brought within the category of "criminal law," as that phrase is used in section 91 of the *"British North America Act, 1867,"* by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions * * *
>
> * * *
>
> The authority of the legislature of Saskatchewan to enact this statute now before us is disputed upon the ground that the Act is really and

B.C.
1931

REX
v.
MORLEY

Appeal

Martin, J.A.

truly legislation in relation to a matter which falls within the subject assigned exclusively to the Dominion by section 91 (25), "aliens and naturalization," and to which, therefore, the jurisdiction of the province does not extend.

And he proceeds to dispose of that submission, basing his convincing opinion largely upon the *Tomey Homma* case, *supra*, which removed (pp. 466 *et seq.* [S.C.R.]) the obstacle raised by Lord Watson's observations in *Bryden's* case, *supra*.

Finally* I refer to the first case cited herein, *Rex and Atty.-Gen. for Can. v. Chung Chuck; Rex and Atty.-Gen. for Can. v. Wong Kit* [1930] 1 W.W.R. 129, [1930] A.C. 244, 99 L.J.P.C. 71, 53 C.C.C. 260, which followed *Rex v. Nadan* [1926] 1 W.W.R. 801, [1926] A.C. 482, 95 L.J.P.C. 114, wherein it was held that each of the two distinct appeals from the Appellate Court of Alberta, affirming separate convictions, was a "criminal case" within sec. 1025 of the *Criminal Code*, even though one of the convictions was under the *Government Liquor Control Act of Alberta*, 1924, ch. 14, for unlawfully having liquor in possession, and the other was under the *Canada Temperance Act*, R.S.C., 1906, ch. 152 [now R.S.C., 1927, ch. 196] for unlawfully transporting liquor through that province; on the first charge the appellant was fined $200 and costs and the liquor and his motor car forfeited, and on the second he was fined $500 and costs, and in default of payment to be, in each case, imprisoned.

Both the appeals were dismissed even though it was desired to question the validity of the respective provincial and Dominion statutes on which the separate convictions were based, their Lordships saying in conclusion, p. 496 [A.C.] and p. 809 [W.W.R.]:

> It is of the utmost importance that a decision on a criminal charge so reached should take immediate effect without a long-drawn-out process of appeal, and it is undesirable that appeals upon such decisions should be encouraged by the Board.

In *Chung Chuck's* case, *supra*, which was a conviction for shipping vegetables contrary to the *Produce Marketing Act*, 1926-27, ch. 54, of this province, leave to appeal was also refused upon the same ground, as appears from the judgment at pp. 251, 257, 258, particularly at p. 251 ([1930] A.C.) wherein is approved the judgment of Lord Sumner in *Rex v.*

*To these cases should now be added the later and confirmatory decision of the Privy Council in *Mayland and Mercury Oils Ltd. v. Lymburn and Frawley* [1932] 1 W.W.R. 578, at 582-3; and cf. also *In re Silver Brothers Ltd.; Atty.-Gen. for Que. v. Atty.-Gen. for Can.* [1932] 1 W.W.R. 764, at 767—A.M.

Nat Bell Liquors [1922] 2 W.W.R. 30, [1922] 2 A.C. 128, 91 L.J.P.C. 146, 37 C.C.C. 129, "that there was a part of the criminal law which was within the competence of the provincial Legislature," though by class 27 of said sec. 91 the Parliament of Canada is given exclusive jurisdiction over the subject-matter of the "Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

These two cases, therefore, are a striking illustration of the way in which in the practical working out of liquor control or prohibition the enactments of two distinct Legislatures may stand side by side and be reasonably enforced without meeting in conflict in the field.

Approaching, then, the present circumstances in the light of all the foregoing principles as a guide I have little difficulty in reaching the conclusion the "lines of demarcation" between these statutes should be drawn to hold that the total prohibition in the said group of sections of the *Indian Act*, entitled "Trespassing on Reserves," against all kinds of trespassers upon reserves, extending even to Indians not of the band in occupancy thereof, does not meet in conflict the said *Game Act* of this province in its practical operation so far as concerns any "person," who comes within the definition in the *Indian Act*, sec. 2, of that word as meaning "an individual other than an Indian," and there is nothing to induce me to think or apprehend that in its "special aspect" and for the attainment of its "particular purpose" (to use the very apt expressions already cited from the *Parsons* case, *supra*) said Act has not been and will not be fully effective, taken in conjunction with other sections, such as 118, to protect the Indians from the encroachments of trespassers of all kinds including hunters and fishermen, and there is no necessity to seek for or resort to other incidental powers which would conflict with those of property and civil rights as asserted by said *Game Act* for the general benefit of all residents of the province as aforesaid. In other words, a trespassing "person" who violates the special prohibitions of said sections may, as in *Rex v. Nadan, supra,* so act as to find himself open to two distinct prosecutions and penalties, first, to one under said trespass group of sections and sec. 115, and second to the additional one of violating the game laws of the province.

The truth is that in order to secure the practical working out of Parliamentary powers relating to such a special and personal subject-matter as Indians not only the Courts but the

B.C.
1931
REX
v.
MORLEY
Appeal
Martin, J.A.

respective Legislatures must "in performing a difficult duty" work in harmony to find a way to make it "possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them" as was laid down by the *Parsons* and *John Deere Plow* cases, *supra*, and in the Indian Treaty case, *Dominion of Canada v. Province of Ontario* [1910] A.C. 637, 80 L.J.P.C. 32, it was said, p. 645:

> The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands, they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.

With respect to the effect of the words "without the authority of the Superintendent General to reside or hunt upon, occupy or use any land or marsh * * *" said sec. 34, it is not necessary for the disposition of this case, to consider them because no "authority" was in fact given, and so the question does not arise, therefore I shall content myself by saying that under certain circumstances the superintendent would unquestionably have the power, in the exercise of general control over the subject-matter of trespassing, to give authority to any Indians to occupy, reside or hunt upon any part of any Reserve where it would be for the benefit of them or its Indian occupants to do so: it might, e.g., be for the general or particular benefit of the Indians in a province to allow some of them to occupy temporarily the Reserve of another band and to hunt and fish thereon in times of scarcity for food, or to cut timber for fuel, and even also to allow other "persons" (defined as aforesaid) to enter the Reserve for the benefit of the Indians, but never otherwise: e.g., to hunt and destroy wolves and cougars as aforesaid, or wild horses under the *Animals Act*, R.S.B.C., 1924, ch. 11, sec. 18, or sea lions interfering with their fisheries, or other harmful beasts, birds or insects, etc. But whether that authority could lawfully be extended to allow game to be hunted on Reserves by such "persons" during a close season defined by a provincial *Game Act* is a question which will require full and careful consideration should it ever arise. That it would not be lawful for the superintendent to get up a shooting party on an Indian Reserve for the benefit of himself or his friends or allow any one else to do so in a close season or at any time, may be conceded, though it is not for a moment to be presumed that he would sanction such improper proceedings.

Illustrations may well be given, as some of my learned brothers have done, of the unexpected results of pushing these two respective legislations to an extremity, but then any power, even judicial, may be abused and we must assume that the Governments concerned will act in concert in a reasonable manner in the practical furtherance of the two distinct matters under their control. So far, happily, that wise course has been adopted, and several sections in this provincial *Game Act* show that the Legislature is alive to the just claim of the Indians for protection, and indeed special consideration, respecting game (cf. secs. 6, 9, 22, 40 and 41) which, as my brother Galliher says, is peculiar owing to the mobile habits of birds and animals and it is just as much, if not more, in the interest of Indians that game should be generally preserved outside their Reserves because the more it is produced outside the more will be found inside them.

During the argument it was submitted that the game on this Indian Reserve is part and parcel of the land itself and the absolute property of the National Government, as pertaining to its ownership of the land, but no authority was cited to support that position, which, though doubtless sound as to Nationally owned "Territories," is as regards the provinces contrary to the whole ground of the decision in *Reg. v. Robertson, supra*, and to the line of decisions by the Privy Council beginning with *St. Catherine's Milling Co. v. Reg.* (1888) 14 App. Cas. 46, 58 L.J.P.C. 54, and continuing through *Ont. Mining Co. v. Seybold* [1903] A.C. 73, 72 L.J. P.C. 5, and the Indian Treaty Case, *Dominion of Canada v. Province of Ontario, supra*, at pp. 644-6, and also not overlooking *Burk v. Cormier* (1890) 30 N.B.R. 142, and Lord Herschell's statement in *Atty.-Gen. for Can. v. Attys.-Gen. for Ont., Que. and N.S.* [1898] A.C. 700, at 709, 67 L.J.P.C. 90, that:

> It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it.

The case of *Atty.-Gen. for Can. v. Giroux, supra*, is instructive though it was one of a special title through a commissioner. In *Quirt v. Reg.* (1891) 19 S.C.R. 510, at 519, Mr. Justice Strong truly said, "the rights of the crown as regards Indian lands are of * * * an anomalous and

B.C.
1931

457

REX
v.
MORLEY

Appeal

Martin, J.A.

peculiar nature;" and cf. also *Martin's H.B. Co. Land Tenures* (1898) ch. VI, on "The Indian Title and Half-Breed Claims."

With respect to the language "of which legal title is in the Crown" in the said definition of "reserve," the word "Crown" is used in the broad sense indicated in the *Dominion of Canada* case, *supra*, at pp. 645-6 as including the Crown provincial in appropriate circumstances, as had also been held by the same tribunal in the earlier Vancouver *"Street Ends Case," Atty.-Gen. for B.C. v. C.P.R.* [1906] A.C. 204, at 211, 75 L.J.P.C. 38.

There remain for consideration secs. 117 and 156 and 69. The first relates only to cases where the Indians of a band have consented to the leasing or granting "to any person" of shooting or fishing privileges over their Reserve in whole or in part, and "in such case" there is a general prohibition, with a penalty, against "every person" not entitled under such lease or grant (which would include the consenting Indians themselves) from shooting or fishing within such leased or granted area. This is so clearly the special case of active participation by the Indians themselves in the disposition and restriction of their own personal rights in their own Reserve that it would undoubtedly be a matter falling within the jurisdiction of Parliament under class 24, and it would be, obviously, in any event, a necessary incident to that jurisdiction that "every person" other than the Indians should be excluded from fishing or shooting in the "leased or granted" area, quite apart from any fish or game laws that might lawfully be enacted by the province respecting its "Property and Civil Rights;" in other words, the two legislations do not in reality "meet."

Sec. 156 is simply in essentials a repetition, for no apparent purpose, of the prohibition contained in said sec. 117, and therefore governed by the same observations.

Sec. 69 provides that:

> 69. The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient.

This is an enabling section to authorize the application of Federal and certain provincial game laws in whole or in part, but as it does not extend to this province it is not relevant

to this case. Obviously it has reference to the origin and history (alluded to in *Reg. v. Robertson, supra,* pp. 616-7, 619, and discussed in *"The Rise of Law in Rupertsland,"* 1890, 1 West. Law Ti., pp. 49, 73 & 93) of those three provinces and of the old Northwest Territories (under ch. 49 of 1875) formerly Rupert's Land and the easterly part of the Indian Territories, out of which they were after Confederation partly carved (as long before was also the colony of Vancouver Island in 1849 by 12 & 13 Vict., ch. 48) the "ordinary Crown lands" of which were, as has been noted *supra,* till quite recently the property of the Dominion of Canada, and still are in the case of the "Territories" named in said section, which by the interpretation sec. 2 (*m*) "means the Northwest Territories and the Yukon Territory;" and in all cases its application is not general as it is only declared to "apply to Indians within the said province or Territories as the case may be * * * ."

We are not informed that the superintendent-general has taken advantage of the power so conferred upon him which might well be usefully exercised in co-operation with the said Legislatures to the mutual benefit of all concerned, though that is purely a matter for them to decide upon their varying conditions (cf. *Reg. v. Robertson, supra,* at p. 619) which differ greatly from those on this Pacific Coast, and we must assume, as the Privy Council said in the *"Street Ends Case," supra,* "that all necessary communications between the Governments would always take place."

Pursuant to the "wise course" suggested in *Parsons* case, *supra,* I have refrained from considering more than is absolutely necessary the status or rights of Indians as distinguished from other "persons" under the legislation in question, and though several cases have been decided upon that interesting question (the principal ones being *Totten v. Watson* [1857] *supra; Reg. ex rel Gibb v. White* [1870] 5 P.R. 315; *Rex v. Hill* [1907] 15 O.L.R. 406; *Rex v. Beboning* [1908] 17 O.L.R. 23; *Rex v. Martin* [1917] 41 O.L.R. 79; *Sanderson v. Heap* [1909] 19 Man. R. 122, 11 W.L.R. 238; *Rex v. Rodgers* [1923] 2 W.W.R. 353, 33 Man. R. 139, 40 C.C.C. 51; *Rex v. Jim* [1915] 22 B.C.R. 106; *Rex v. Chan Lung Toy* [1924] 3 W.W.R. 196, 34 B.C.R. 194; *Rex v. Cooper* [1925] 2 W.W.R. 778, 35 B.C.R. 457, 44 C.C.C. 314; and *Rex v. McLeod* [1930] 2 W.W.R. 37, 54 C.C.C. 107) I need only refer to our decision in *Rex v. Cooper, supra,* for the sole purpose of saying that it was a case wherein an

B.C.
1931
REX
v.
MORLEY
Appeal
Martin, J.A.

459

Indian was personally concerned by the selling of intoxicating liquor to him, and we were of opinion that the *Government Liquor Act* of this province, R.S.B.C., 1924, ch. 146, did not apply to such an offence because there had been "a complete occupation *ad hoc* by the Federal Parliament of this particular field," which I may add is peculiarly one that that Parliament should have the control of so as to protect the Indians as much as possible from the shocking results of inflaming them with intoxicants.

It follows that in my opinion the learned Judge appealed from was right in affirming this conviction, doubtless in pursuance of the views expressed in his prior carefully prepared judgment in *Rex v. McLeod, supra,* with which I am in general accord, and therefore this appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.—I agree in the result with my brother McPhillips. The act complained of was for shooting a pheasant during the close season. The offence took place on an Indian Reserve over which the Dominion Government has jurisdiction and the Federal Government under the *Indian Act,* R.S.C., 1927, ch. 98, has passed a law making it an offence to shoot birds at any time upon the Indian Reserves without permission and was designed for the preservation of game generally in the interests of the Indians.

The provincial Act [R.S.B.C., 1924, ch. 98] is one passed for the protection of game in the province and a close season is fixed from time to time between certain dates in which it is unlawful to shoot game, dealing with certain species of game birds and animals.

The prosecution was under the provincial *Game Act* and among other objections raised to the conviction is that, the Dominion Government having entered the field, prosecutions must be under that Act where the offence is committed on an Indian Reserve. It is well known that each province has its own game laws restricting the shooting of wild game and fixing close seasons.

It is scarcely to be thought that in dealing with the subject in a general way the Dominion would have had in mind that they were covering a subject where owing to climatic and other prevailing conditions the different provinces would and have different restrictions and different close seasons where they could by permission given to certain persons allow indiscrimin-

B.C.
1931
REX
v.
MORLEY
Appeal
Galliher, J.A.

ate shooting on Indian Reserves regardless of any provincial laws passed for the preservation of game generally.

We all know of the flight of birds and their moving from one area to another.

Today numbers of birds may be on an Indian Reserve and in a few days outside that Reserve entirely so that as I view it the provinces are dealing with the protection of the game generally as game and the Dominion was dealing with the subject not so much directly for the protection of the game as for the protection of the Indians on the Reserve. In other words, in my view, they were not dealing with the matter in the same aspect as the province has in legislating as to close seasons. In this view I would uphold the conviction and dismiss the appeal. My brother McPhillips has dealt at length with other aspects of the case which it is unnecessary for me to enter into but which I think carry weight.

McPhillips, J.A.

McPHILLIPS, J.A.—This appeal is one from the judgment of His Honour Judge Swanson affirming a conviction made by a stipendiary magistrate in the county of Yale whereby the appellant was convicted for that he at Kamloops Indian Reserve in the county of Yale on or about November 2, 1929, being the close season, unlawfully did kill a pheasant contrary to sec. 9 of the *Game Act*, being R.S.B.C., 1924, ch. 98, and a fine was imposed of $25 and failing payment imprisonment for the term of seven days would follow. The appeal is put upon the ground that the *Game Act* is *ultra vires* of the province as regards Indian Reserves. This certainly brings up a very important matter but at the outset I venture to say that the contention is wholly fallacious. Further it would be a most astounding result if the contention made had merit. It would in its result have the effect of a serious and disastrous result upon the game of the province. It would mean that game could be, in the close season, slaughtered upon Indian Reserves. In truth all that would be necessary would be to carry out a drive of game onto the Indian Reserve and there a wholesale slaughter could take place. That this could be is unthinkable and of course it is not difficult to at once call up authority to absolutely controvert any such contention. I may say that this is not a case of an Indian upon the Reserve shooting—although I do not consider that even he would be entitled to disobey the provincial law.

It is pressed that the decision of this Court in the case of *Rex v. Cooper* [1925] 2 W.W.R. 778, 35 B.C.R. 457, 44

B.C.
1931

REX
v.
MORLEY

Appeal

McPhillips, J.A.

C.C.C. 314, stands in the way of it being held that the conviction in the present case is a valid one. With great respect to all contrary opinion that is not my view. The case there was express Dominion legislation (*Indian Act*, R.S.C., 1906, ch. 81, sec. 135, now R.S.C., 1927, ch. 98) covering the offence, and the holding was that the provincial statute did not apply to a sale of liquor which is within the terms of the *Indian Act* and the conviction was quashed. We have no such case here. What we have here is provincial legislation imposing a ban on shooting throughout the province during certain close seasons and it was within a close season that the shooting took place. It was not shown that the appellant came within sec. 115 of the *Indian Act*, i.e., that he had the authority of the superintendent-general to hunt upon the Reserve, but if he had he still would be subject to the provincial law and could not shoot out of season. This is not the case of the same act as that legislated against by the Dominion. Here, even if the appellant had not the authority of the superintendent-general to hunt upon the Reserve and would be subject to a penalty, the act that is covered by the provincial legislation is shooting out of season, a very different act. The gist of the decision in *Rex v. Cooper, supra*, as defined by the learned Chief Justice of this Court is found on p. 460 [B.C.R.] and p. 779 [W.W.R.] and reads as follows:

> The assertion of the right by two distinct legislative bodies to make the same act an offence and subject the offender to a double penalty, is, I think, contrary to the accepted principles of our law and contrary to *The B.N.A. Act*. No doubt that result may sometimes be brought about indirectly, but there is no case in the books which goes the length of holding that when the Dominion has created a particular act a crime, the province may for its purposes create the same act a crime.

I would refer to a judgment of Killam, J. (as he then was, afterwards Chief Justice of Manitoba, later one of the Justices of the Supreme Court of Canada and later again Chief Railway Commissioner for Canada), a most learned judgment of that very eminent and distinguished Canadian jurist in *Reg. v. Robertson* (1886) 3 Man. R. 613, dealing with the Manitoba Statute 46 & 47 Vict., ch. 19, as amended by 47 Vict., ch. 10, sec. 25 (*g*), regulating the killing and possession of game at certain seasons of the year, and it was held that the legislation was *intra vires* being within the clauses of *The B.N.A. Act* relating to "Property and Civil Rights" and "Matters of a merely local or private Nature."

The learned Judge dealt with the object of the Manitoba Act at p. 620:

The object of the Act, or the portion relating to the protection of game, is essentially local. It is to secure the increase, or to prevent, at any rate as far as possible, the decrease of the supply of game within the province, in order that the people of the province may enjoy the sport of pursuing and killing the birds and other animals mentioned in the Act, or may have at hand a ready supply of them for food or for profit. All of the enactments against having them in possession or exporting them, are evidently so many accessories to the prohibition upon the killing at certain seasons, and all are plainly directed to the purpose mentioned.

Then at p. 622 we have this language:

The prohibitions against the killing or taking of wild birds or other animals, and against having them in possession are prohibitions pure and simple of the exercise of civil rights. This was disputed upon the argument of the application, but it appears too clear to require any considerable discussion.

The appellant in the present case had imposed upon him, as well as upon all the inhabitants of British Columbia, the inhibition of not being entitled to shoot pheasants during the close season. I would here again call attention to the language of Killam, J., above quoted:

The prohibition against the killing or taking of wild birds or other animals, and against having them in possession are prohibitions pure and simple of the exercise of civil rights.

No matter where the appellant was—upon an Indian Reserve with or without authority—the provincial legislation is paramount in respect of "(13) Property and Civil Rights in the Province" (*B.N.A. Act*). The *Game Act* is legislation in the way of regulation of property and civil rights. In passing for instance fire regulations under the *Fire Marshal Act*, R.S.B.C., 1924, ch. 91, such regulations would have application in Indian Reserves; if not see the peril that would result from a fire upon an Indian Reserve perilous to adjoining territory. Would not the provincial legislation extend into the Reserve? Assuredly this would be so.

Then we have Lord Watson in *St. Catherine's Milling Co. v. Reg.* (1889) 14 App. Cas. 46, 58 L.J.P.C. 54, saying:

There has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominum* whenever that title was surrendered or otherwise extinguished.

I would refer to what *Lefroy* has said in his work on *Canadian Constitutional Law*, 1918, at p. 141:

* * * it does not follow that when the Dominion Parliament has drawn an act into the domain of criminal law the right of the provincial legislatures to pass laws in regard to such an act necessarily ceases. They may still in many instances legislate against the same act in another aspect. [*Reg. v. Boardman* (1871) 30 U.C.Q.B. 553, at 556; *Quong Wing v. Reg.* (1914) 49 S.C.R. 440, at 462, 6 W.W.R. 270; *Reg. v. Boscowitz* (1895) 4 B.C.R. 132.]

463

B.C.
1931
REX
v.
MORLEY
Appeal
McPhillips, J.A.

The short point really in this appeal is this that the legislation (*Game Act*) has effect throughout the whole province, inclusive of Indian Reserves, and must be obeyed. I would again make a quotation from Killam, J., in *Reg. v. Robertson*, *supra*, at p. 627:

> The Provincial Legislature, under its authority to legislate upon the subject of "Property and Civil Rights," could undoubtedly limit civil rights, could take away some already existing, could prohibit their exercise as such. If it could do this, it could do it in the interests of the province, and those in the province, at large, as well as in the interests of special individuals or classes of individuals. It must then follow that, the power being expressly given to it by statute, it can enforce its law by the imposition of punishment, and cannot be considered as thereby enacting a "criminal law," or legislating upon the subject of "criminal law" within the meaning of *The British North America Act*.

I am therefore clearly of the opinion that the conviction here was a valid one founded upon a provincial statute respecting property and civil rights, an exclusive jurisdiction of the province under the *British North America Act*, and it is idle to contend that the legislation is *ultra vires* as respects Indian Reserves. The legislation of the Dominion as respects hunting on Reserves is one aspect but the other aspect is materially different. It is a prohibition from shooting within the close season. This is an interference with civil rights and clearly within the power of the provincial Legislature, an exclusive power into which domain the Dominion Parliament cannot enter. That being the case His Honour Judge Swanson was right in his affirmance of the conviction. It follows that the appeal in my opinion should be dismissed.

Macdonald, J.A.

M. A. MACDONALD, J.A. (dissenting)—This is an appeal from a conviction of one Morley (not an Indian) by a stipendiary magistrate, affirmed on appeal by His Honour J. D. Swanson, Judge of the County Court of Yale, for unlawfully killing a pheasant in November, 1929 (during the close season) on the Kamloops Indian Reserve contrary to sec. 9 of the provincial *Game Act*, R.S.B.C., 1924, ch. 98. The point raised is that the *Game Act* does not extend to Indian Reserves; that the province has no authority to create the Act complained of an offence or to prosecute in respect thereto and that a conviction, if any, could only be made by the Federal authorities under the *Indian Act*, R.S.C., 1927, ch. 98, exclusive legislative authority over "Indians, and Lands reserved for the Indians" being vested only in the Dominion Parliament (*B.N.A. Act*, sec. 91, subsec. 24).

By sec. 2 (*e*) of the *Indian Act* the term "Indian lands" means any Reserve or portion of a Reserve which has been surrendered to the Crown and by subsec. (*j*):

> "Reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein.

If an Indian living on the Reserve had been convicted of this offence under a provincial statute it would be invalid: *Rex v. Jim* (1915) 22 B.C.R. 106. What is the situation where, as here, a white man enters a Reserve and kills a pheasant contrary to the provisions of the provincial *Game Act*? Has the Federal Parliament jurisdiction to legislate with respect to a person other than an Indian who may commit an offence on an Indian Reserve? I think it has but that does not conclude the point. It purports to exercise that right by several sections of the *Indian Act*. By sec. 10, subsec. 4, any "person" with whom an Indian child resides who fails to cause such child between certain ages to attend the industrial or boarding schools provided as required by that section is liable to a fine. "Person" in that Act means "an individual other than an Indian." Here we have legislation applying to a white man, living off a Reserve, in respect to his conduct towards Indians under Dominion supervision. If Dominion legislation is necessary before a white man living off the Reserve can be prosecuted, it does not follow that because of failure to make such provision—assuming for the moment it is within the power of the Dominion Parliament to do so—the provincial Parliament has authority to legislate on the same point: *Madden v. Nelson and Fort Sheppard Ry.* [1899] A.C. 626, 68 L.J.P.C. 148. If that class of legislation is wholly within Federal jurisdiction, whether the field is occupied by Dominion legislation or not, the provincial Parliament will not be permitted to enter it. It follows that if the Dominion Parliament has authority to make it an offence for a white man to enter a Reserve and shoot game thereon the local Legislature cannot under its *Game Act* make a similar Act an offence.

However, it is not necessary to go as far as indicated. The Dominion Parliament did legislate in respect to persons, other than Indians, trespassing or "hunting" upon parts of a Reserve without authority and have therefore occupied the field. Sec. 34 provides that:

B.C.
1931

465

REX
v.
MORLEY

Appeal

Macdonald, J.A.

No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.

The caption of this section is "Trespassing on Reserves." I cannot agree, however, with respect, with the view of Swanson, C.C.J. in *Rex v. McLeod* [1930] 2 W.W.R. 37, at 41, 54 C.C.C. 107, in giving a restricted meaning to the word "hunt." confining it to a trespass. Hunting may not eventuate in the killing of game but if game is killed on part of a Reserve the offender, as a necessary and natural sequel, must have been engaged in hunting. The accused, to kill the pheasant, must necessarily have hunted on part of the Reserve, and would be liable to the penalties imposed under sec. 115 of the same Act; and, if so, and these sections are *intra vires* of the Dominion Parliament, the local Legislature cannot make the same Act an offence by a provincial statute. Other sections in the *Indian Act* dealing with game and hunting by white men or Indians indiscriminately are secs. 35, 117, and 156. It follows therefore that the Dominion Parliament having legally occupied the field any legislation of the local Legislature creating the same Act an offence is, to the extent that it does so, displaced: *Rex v. Cooper* [1925] 2 W.W.R. 778, 35 B.C.R. 457, 44 C.C.C. 314.

The Dominion Parliament has authority to legislate and did legislate in respect to birds found on or over a Reserve. It is within its rights in making it an offence to "hunt" game of any kind on the Reserve and having done so the provincial Legislature cannot make the same act an offence. *Rex v. Cooper, supra*, governs this case unless upon the construction of the relevant sections of the *Indian Act* it should be held that the offence of "hunting" on a Reserve is something different from "killing a pheasant." It is enough to say that one who kills a pheasant while out for game cannot be heard to say that although he did so he was not hunting.

If the appellant produced authority from the superintendent-general for hunting upon the Reserve he would not be guilty of an offence in killing a pheasant thereon. The respondent's contention really is that such authority would be without validity during the close season for game provided by the provincial *Game Act*. In other words, if one armed with such authority should shoot a pheasant in the close season he could be prosecuted under the provincial Act. That is not so, however. The reservation of Federal jurisdiction in respect to

"Indians and Lands reserved for the Indians" has a definite object in view, viz., safeguarding the rights and privileges of the wards of the Dominion at all times, and one of its main purposes is to protect game on the Reserve for the exclusive use of the Indians, subject to minor exceptions. Sec. 34, *supra*, does not apply to "an Indian of the band." They do not require authority to hunt. They may hunt on the Reserve at any time and a provincial Act cannot curtail that right by attempting to establish a close season applicable to Reserves.

If therefore the rights of the Indians are to be preserved in these limited areas known as Reserves it is incidentally necessary to prevent appellant and others of the white race from "hunting" and killing game thereon at all times of the year. Such an Act is legislation in respect to "Indians," i.e., in respect to the requirements of Indians. If too the provincial Legislature has authority to provide for a close season for shooting game on Indian Reserves it could by the same authority except Reserves from the operation of the local *Game Act* and permit all and sundry to "hunt" thereon throughout the year. The provincial Legislature would have power, if it chose to exercise it, to declare a close season for certain kinds of game, or for all kinds of game, in all parts of the province except, for example, the district of Cariboo. Could it also declare a close season for the shooting of pheasants in all parts of the province except upon Indian Reserves permitting indiscriminate slaughter in that area; and if so would not the latter part of the Act be *ultra vires* and any one attempting to take advantage of it liable to prosecution under the *Indian Act*?

When authority was reserved to the Federal authorities to legislate in respect to its wards, the Indians, it means in respect to all matters affecting their welfare and civil rights. If their welfare is to be protected, others besides Indians must be restrained if they enter Reserves. They cannot commit acts—such as shooting game—likely to interfere with their well-being, if the *Indian Act* prevents it. The preservation of game affects their well-being and to preserve it the ordinary civil rights of others must be curtailed.

This contention is presented against the views I have outlined. Mankind, it is said, have a natural right to pursue and take game at all times and a law interfering with it (such as providing for a close season) is an invasion of that civil right and therefore within provincial authority to enact it. It is said to be a matter affecting "Property and Civil Rights" of a

467

B.C.
1931

REX
v.
MORLEY

Appeal

Macdonald, J.A.

"merely local and private Nature;" that the object of the provincial *Game Act* is the protection of game in this province and hence an essentially local matter. It is a prohibition pure and simple of the exercise of civil rights. But the civil rights of an Indian may be affected and are affected by Dominion legislation by certain sections of the *Indian Act* and it cannot be said that such sections are *ultra vires* of the Dominion Parliament because "Property and Civil Rights" is a subject of legislation reserved to the provinces. If interference with civil rights alone brings the matter within the jurisdiction of the province these sections would be *ultra vires*. A division of legislative authority was provided by the *B.N.A. Act* and under it the civil rights of all may be curtailed by the Dominion Parliament if by exercising them they conflict with the superior rights of the Indians on Reserves to have the game thereon preserved for their own use and sustenance. If we had no *Game Act* and no provincial legislation to interfere with the natural right of man to hunt at all seasons it would be possible, if this contention prevailed, to hunt on Reserves at all times, notwithstanding the prohibitions contained in the *Indian Act*. If that view prevailed one of the purposes in reserving to the Dominion Parliament questions respecting "Indians and Lands reserved for the Indians" would be defeated. Protection of game on an Indian Reserve is under Dominion control. Incidental to that protection is the necessity of preventing hunting and shooting by any one. It may be faulty or improvident legislation. That would not permit the province to legislate in respect to the Reserves to supplement it or to make it more effective. With some exceptions the Federal Parliament provides for a close season on Reserves at all times. If the provincial Act applies shooting would only be prevented for a limited period in each year. It necessarily follows that if it is illegal to shoot on a Reserve by provincial law during the close season it would be permissible to do so outside that period. That, however, is not the case. The Dominion Act prevents any one, except those of a certain class, Indians of the band, or those having authority from the superintendent, to hunt at any time. The appellant herein was within the prohibition of that Act. He could be convicted under it for the offence committed unless he produced authority to hunt from the superintendent; and Federal legislation preventing him from destroying game on a Reserve is legislation in respect to Indians inasmuch as it preserves for them hunting privileges and a means of livelihood.

I would allow the appeal.

[PARRY SOUND DISTRICT COURT]

Regina v. Moses

LITTLE, D.C.J. 16TH DECEMBER 1969.

Indians — Hunting rights — Charge under Game and Fish Act, 1961-62, of hunting moose during closed season — Accused hunting on unoccupied Crown land — Descendant band signing Robinson Treaty of 1850 — Members of band entitled to hunt moose at any time on unoccupied Crown land — Onus on accused to prove game lawfully taken pursuant to s. 81(a) of the Game and Fish Act, 1961-62 — No derogating legislation to restrict rights of Indians entitled to benefit under treaty — Accused satisfying onus — Game and Fish Act, 1961-62, ss. 38(1), 81(a) — Indian Act (Can.), ss. 5, 6, 7, 37 — B.N.A. Act, 1867, ss. 109, 91(24), 92(13).

[*St. Catherines Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd [1965] S.C.R. vi, 52 D.L.R. (2d) 481*n*; *R. v. Sikyea*, 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65; affd [1964] S.C.R. 642, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, 44 C.R. 266, 49 W.W.R. 306, refd to]

APPEAL by the accused by way of trial *de novo* from his conviction by Powell, Prov.Ct.J., on a charge of unlawfully hunting moose during the closed season for moose contrary to s. 38(1) of the *Game and Fish Act*, 1961-62 (Ont.), c. 48.

Wm. H. Green, Q.C., for accused, appellant.
J. S. Stewart, for the Crown, respondent.

LITTLE, D.C.J.:—This is an appeal in the form of a trial *de novo* from the conviction of the appellant on February 24, 1969, by Provincial Court Judge F. C. Powell, with respect to a charge that the appellant did on or about January 19, 1968, at the Township of Mowat, in the District of Parry Sound, unlawfully hunt moose during the closed season for moose, contrary to s. 38(1) of the *Game and Fish Act*, 1961-62 (Ont.), c. 48.

Said s. 38(1) reads:

> 38(1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed by the regulations, no person shall hunt black bear, polar bear, caribou, deer, or moose.

At the commencement of the appeal counsel agreed on the following facts as contained in the judgment of the Court below:

> The facts as proven or admitted are that the accused is a resident member of an Indian reserve known as the Lower French River Reserve or Pickerel Reserve, situate on the south shore of the Pickerel River, south of the French River, in the Township of

469

Mowat, District of Parry Sound. He tracked three moose on the reserve, thence west off the reserve, which is skirted along its west boundary by Kings Highway 69, to a location on Lot 33, Concession 19, of the said township, which is west of the highway, where he killed all three moose and slaughtered them. This was on January 19, 1968, during a period when there was closed season for moose. The following day Conservation Officer William Watts of the Department of Lands and Forests, found three piles of meat admitted to be moose meat on the said lot or in the vicinity of it and later stationed himself at the scene when a car approached. The occupants included the accused, who admitted that he had killed the three moose and he was going to give other Indians with him parts of the meat for food and that the reason for killing was to supply food to residents of the reserve including himself.

Crown counsel further admitted (1) that the hunting took place on unoccupied Crown lands, and (2) that the appellant was paid treaty money by the federal Government in 1968 and according to the records of the Indian agent at Parry Sound said payment arose out of the Robinson Treaty made in the year 1850 with the Ojibewa Indians of Lake Huron, conveying certain lands to the Crown.

Relevant provisions of the *Indian Act*, R.S.C. 1952, c. 149, as to the definition and registration of Indians read as follows:

> 5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.
>
> 6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.
>
> 7(1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with the provisions of this Act, is entitled or not entitled, as the case may be, to have his name included in that List.
>
> (2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.
>
> 8. Upon the coming into force of this Act, the band lists then in existence in the Department shall constitute the Indian Register, and the applicable lists shall be posted in a conspicious place in the superintendent's office that serves the band or persons to whom the list relates and in all other places where band notices are ordinarily displayed.

The Registrar designated under the *Indian Act*, Mr. H. H. Chapman, testified that the accused Moses was registered under List 190 — Henvey Inlet Band which was posted in accordance with the provisions of said s. 8 in 1951. The same witness then proceeded to establish that the members of the Henvey Inlet Band were descendants of a band whose chief

had signed the Robinson Treaty and that the accused was therefore one of those entitled to any of the rights or benefits flowing from the said treaty.

The said Robinson Treaty was executed at Sault Ste. Marie, in the Province of Canada on September 9, 1850, and was between the Honourable William Benjamin Robinson, on behalf of Her Majesty the Queen, and the Chiefs and Principal Men representing Indian tribes or bands referred to therein "inhabiting and claiming the Eastern and Northern Shores of Lake Huron, from Penetanguishine to Sault Ste. Marie, and thence to Batchewanaung Bay, on the Northern Shore of Lake Superior; together with the Islands in the said Lakes, opposite to the Shores thereof, and inland to the Height of land which separates the Territory covered by the charter of the Honourable Hudson Bay Company from Canada; as well as all unconceded lands within the limits of Canada West to which they have any just claim . . .". It provided that the said Chiefs and Principal men did "voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors for ever, all their right, title, and interest to, and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed; which reservations shall be held and occupied by the said Chiefs and their Tribes in common for their own use and benefit".

The said treaty, after providing for the making of certain payments stated as follows: "and further to allow the said Chiefs and their Tribes the full and free privilege to hunt over the Territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing; saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government".

The said Schedule of Reservations made by the said subscribing Chiefs and Principal Men included the following:

> Second — Wagemake and his Band, a tract of land to commence at a place called NEKICKSHEGESHING, six miles from east to west, by three miles in depth.

The Registrar stated that the original pay list of the Henvey Inlet Band from 1850 names the head of the band as Chief Waikemancai and refers to those listed as the Indians of Nigikishingishing entitled under the said treaty to share in the annuities provided for therein and to occupy the reserve.

All the Indian signatories to the said treaty signed by making their marks. The witness also stated that the spelling of both Indian names and places varied according to the way in which those writing them heard them pronounced. He further said that the "Waikemahcai" and "Nigikishingishing" sounded phonetically like "Wagemake" and "Nekickshegeshing", respectively, so he was satisfied that Chief Wagemake who signed the treaty was the Chief Waikemancai referred to in the original pay list; and the place called "Nekickshegeshing" mentioned in the treaty was the place called "Nigikishingishing" also referred to in the said original pay list.

This witness also produced a surveyor's "Plan of the Henvey Inlet Indian Reserve at NEKICKSHEGESHING North Shore of Lake Huron being No. 2 under the Treaty of Sept. 9th, 1850 Signed John Stoughton Dennis P.L.S. Weston 12th May 1852" (ex. 6) and said this plan was now designated as the reserve of the Henvey Indian Band and is called "Henvey Inlet Reserve".

Finally, Mr. Chapman stated that annuities under the said treaty had been regularly paid to those on the said original pay list and thereafter to their descendants up to, and including, those on the list of the Henvey Inlet Reserve today which includes the accused. Furthermore, it matters not that Moses lives on another reserve. A member of one band may live on the reserve of another band provided he has permission from those governing the reserve on which he lives. The word "occupied" in the first paragraph of the treaty has been treated as meaning "set aside for their use and benefit" and not necessarily physically occupied.

It is therefore clear from this evidence, and I so find, that Moses is a member of the Henvey Inlet Band; that he is one of the successors of the band headed by Chief Wagemake who signed the treaty; that the lands comprising the Henvey Inlet Reserve are those shown on ex. 6; that these are the lands "occupied" by this band as referred to in the treaty; and even though he does not live on the said reserve, Moses is one of those entitled to "occupy" it and he not only annually receives money under the provisions of the said treaty, but is also entitled to any other rights or benefits conferred on the members of his band by it.

Before deciding what those rights are I have considered the provisions of two other treaties, one dated October 31, 1923, between His Majesty King George V and the Chippewa Indians of Christian Island, Georgina Island and Rama, and

the other dated November 15, 1923, between His Majesty King George V and the Mississauga Indians of Rice Lake, Mud Lake, Scugog Lake and Alderville. By these treaties both the tribes and the Indians comprising them, did "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 lands and premises therein described". The said lands would appear to include the lands considered to be the Henvey Inlet Reserve, but it should be observed that at the conclusion of the metes and bounds description there appears the following exception: "Excepting thereout and therefrom those lands which have already been set aside as Indian reserves."

In the first recital in each of these treaties it is stated that the interests claimed in the said lands are "such interests being the Indian title of the said tribe to fishing, hunting and trapping rights over the said lands". It further states that His Majesty "is desirous of obtaining a surrender" of such rights and had appointed Commissioners to determine the validity of the claims and had agreed if they were found to be valid to negotiate treaties for their surrender on the payment of certain compensation.

It then recites that the inquiry by the Commissioners had been determined in favour of the validity of such rights and therefore the treaties were being entered into.

I have considered the provisions of the said treaties dated October 31 and November 15, 1923, in conjunction with the evidence of Hugh R. Conn who was, prior to this retirement. special adviser on treaties to the Department of Indian Affairs, and is presently consultant on treaties to the National Indian Brotherhood. He produced a map (ex. 5) on which is superimposed the boundaries of lands referred to in Indian treaties including the Robinson Treaty. The lands affected by the latter treaty are shown thereon as Robinson-Superior and Robinson-Huron. This map was prepared by draftsmen in the Department of Indian Affairs specifically for the use of a joint Senate-House of Commons Committee which was considering the *Indian Act* in 1961. It is clear from this map that lands reserved for the Henvey Indian Reserve are included in the area Robinson-Huron. It is well south of the northerly boundary and considerably north of the southerly boundary of Robinson-Huron.

It should also be observed that the Ojibewa, Mississauga and Chippewa Indians all belonged to the same language group, the Algonquins.

The lower Court, which did not have the benefit of the evidence of Chapman and Conn, came to the conclusion that Moses was more likely to be a Mississauga Indian that an Ojibewa, and concluded that he was therefore likely affected by the 1923 treaty under the terms of which the Mississauga Indians had given up the right to fish and hunt in the area where the offence took place. It thus decided that the accused became subject to the provisions of the *Game and Fish Act, 1961-62.*

I have already found that Moses was an Ojibewa. He, therefore, could not have been affected by the 1923 treaties for two reasons. He was neither a Mississaugan nor a Chippewan. In addition, although the Mississaugas and the Chippewas had apparently a concurrent right with the Ojibewas to hunt and fish in the lands and waters reserved for the Henvey Inlet Band, such reserve was excluded from the provisions of the 1923 treaties, and in any event, the Mississaugas and the Chippewas, could only cede to the Government of Canada the rights and privileges of their own bands, which excluded the Ojibewas.

Having satisfied myself that the accused is an Ojibewa and a member of the Henvey Inlet Band and entitled to any rights which the present members of the band may have under the provisions of the Robinson Treaty, I must now decide if any legislation has been passed abrogating those rights.

Section 87 of the *Indian Act* reads:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Section 81(*a*) of the *Game and Fish Act, 1961-62*, reads as follows:

> 81. In prosecutions under this Act in respect of,
>
> (*a*) taking, killing, procuring or possessing game or fish, or any part thereof, the onus is upon the person charged to prove that the game or fish or part thereof was lawfully taken, killed, procured or possessed by him;

The onus is therefore on the accused under said s. 81(*a*) and he seeks to meet that onus by claiming that the terms of

474

the Robinson Treaty are still operative, and if so, he has not contravened the provisions of said s. 38(1) as charged.

The lands referred to in the Robinson Treaty belong to the Province of Ontario by virtue of s. 109 of the *B.N.A. Act*, 1867, which reads:

> 109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Said s. 109 was considered by the Privy Council in *St. Catherines Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. In that case, a similar treaty to the Robinson Treaty had been entered into by the Government of the Dominion of Canada on behalf of the Queen with the "Salteaux tribe of Ojibbeway Indians" in Ontario. Possession of the lands therein referred to had been granted to the Indians by the Royal Proclamation in 1763 [see R.S.C. 1952, vol. VI, p. 6127]. The treaty of 1873 provided that the lands which had been under occupation by the Indians since the proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of Canada for the Crown, subject to a certain qualified privilege of hunting and fishing. It was decided by the Court, and I quote from the judgment delivered by Lord Watson at p. 54:

> The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them.

That inference is, however, at variance with the terms of the instrument, which shew that a tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.

At p. 55:

It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

At pp. 58-9:

The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of sect. 91(24) which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91(24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

The sole right to legislate on behalf of Indians, and lands reserved for Indians, is conferred on the Parliament of Canada by s. 91(24) of the said *B.N.A. Act, 1867*. The Robinson Treaty was between the Province of Canada (Ontario and Quebec) and counsel for the Crown on this appeal raised the question, but without pressing it, as to whether in this case "property and civil rights" rather than "Indians, and lands reserved for Indians" were involved. If it were only the former, the provincial Legislature under the powers conferred by s. 92(13) of the said *B.N.A. Act, 1867* had effec-

476

tively abrogated the rights of the Indians to fish and hunt freely by passing the said *Game and Fish Act*, 1961-62 and prior legislation relating thereto. Counsel conceded, that this argument did not appear to have been raised in any previous cases where Indians were alleged to have hunted illegally.

I must reject this contention as I am satisfied from the authorities that it is only the Parliament of Canada which has power to abrogate the privilege to hunt which the Indians retained under the Robinson Treaty.

In *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (decision of the B.C. Court of Appeal), and confirmed unanimously by the Supreme Court of Canada — see [1965] S.C.R. vi, 52 D.L.R. (2d) 481*n*, this power of Parliament was clearly upheld. I quote part of the (D.L.R.) headnote covering the Court of Appeal decision:

> The prohibitions of the *Game Act*, R.S.B.C. 1960, c. 160, against the hunting of game, *e.g.*, deer, during the closed season (unless under permit) do not apply to native Indians, descendants of certain Nanaimo tribes, who hunt on unoccupied lands in an organized district, such lands not being within a reserve but being lands conveyed to the Hudson's Bay Co. by ancestors in the tribes. The conveyance of surrender of the lands in 1854 is a "Treaty" within the meaning of that term in the context of the *Indian Act*, R.S.C. 1952, c. 149; and s. 87 of this Act, in making applicable to Indians in a Province all provincial laws of general application subject, *inter alia*, to "the terms of any treaty and any other Act of the Parliament of Canada", qualifies the application of provincial legislation not only by Indian Treaties that create hunting rights but also any that confirm or except pre-existing rights already in being.
>
> *Per* Davey, J.A., Sullivan, J.A., concurring: Legislation that abrogates or abridges hunting rights reserved to Indians under the Treaties and agreements by which they sold their ancient territories to the Crown and to the Hudson's Bay Co. for white settlement is legislation in relation to Indians because it deals with rights peculiar to them. Such rights cannot be abrogated or abridged by provincial legislation alone which is of such general application as to include Indians. Only Parliament can derogate from those rights, and it has, on the contrary, preserved them by s. 87.
>
> *Per* Norris, J.A.: Aboriginal rights existed in favour of Indians from time immemorial and they became personal and usufructuary under the British Crown when it acquired a proprietary estate, by virtue of its sovereignty, over Vancouver Island. The right to hunt and fish on unoccupied lands was an aboriginal right confirmed by the *Royal Porclamation of 1763* which applied to territories claimed by the British with the exception mentioned therein, and it applied to Vancouver Island by virtue of the claim of Sir Francis Drake in 1579 and subsequent British claims thereto. Vancouver Island was not within the exceptions in the Proclamation since it was not Hudsons' Bay Co. land in 1763. This right to hunt and fish, recognized by British and colonial governments before Confederation, could only be extinguished before Confederation by surrender to the

British Crown and after Confederation by surrender to the Dominion Government. Dominion and Provincial Governments had recognized this right after Confederation and it had never been surrendered or extinguished.

Finally, in *R. v. Sikyea*, 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325, 46 W.W.R. 65, 43 C.R. 83, a decision of the Northwest Territories Court of Appeal, later affirmed by the Supreme Court of Canada, [1964] S.C.R. 642, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, 44 C.R. 266, 49 W.W.R. 306, in which Hall, J., in delivering the judgment of the Court said at p. 646 S.C.R., p. 84 D.L.R., p. 132 C.C.C.:

On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson, J.A., in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

The portion of the headnote summarizing the reasoning of Johnson, J.A., in dealing with the issue with which we are concerned here appears in 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325, and reads:

A treaty with an Indian Band, as for example Treaty 11 of 1921 respecting Indian rights in the Yellowknife area, by which the Government covenants that the Indians shall have the right to pursue their usual vocations of hunting, trapping and fishing (but subject to such Regulations as may from time to time be made by the Government) cannot stand against derogating legislation which goes beyond contemplated Regulations that would assure that a supply of game for the needs of the Indians would be maintained. Although legislation which, in imposing game restrictions, goes beyond the permission of the treaty to make Regulations, may be a breach of promise to the Indians, Parliament is not thereby prevented from legislating competently on the subject thereof, as it did in enacting the *Migratory Birds Convention Act*, and Regulations to implement a Convention entered into by Great Britain on behalf of Canada with the United States as authorized by s. 132 of the *B.N.A. Act. Held*, although the Convention and implementing legislation preceded the Treaty of 1921, the prohibition in the legislation and Regulations thereunder against shooting mallard ducks out of season is binding as against an Indian who shot such a duck for food in reliance on the terms of the treaty.

1*R. v. Wesley*, 58 C.C.C. 269, [1932] 4 D.L.R. 774, 26 A.L.R. 433, [1932] 2 W.W.R. 337; *A.-G. Can. v. A.-G. Ont., A.-G. Que. v. A.-G. Ont.*, [1897] A.C. 199, apld]

In the case at bar no derogating legislation has been enacted by the Parliament of Canada to restrict in any way the right of Indians entitled to the benefits under the Robinson Treaty from hunting moose at any time on unoccupied Crown lands. As a member of the Henvey Inlet Band, Moses still has his rights under the said treaty and has therefore satis-

fied the onus cast on him by said s. 81(*a*). He therefore did not commit an infraction of s. 38(1) of the *Game and Fish Act, 1961-62*. The appeal is therefore allowed and I order the conviction quashed. An order will also go remitting the fine, if paid, to the accused, together with the deposit made at the time of launching the appeal.

Appeal allowed; conviction quashed.

[COURT OF APPEAL]

Bonser v. London & Midland General Insurance Co. et al.

SCHROEDER, KELLY AND BROOKE, JJ.A. 21ST MAY 1970.

Insurance — Fire insurance — Mortgage clause — Insured financing three-year premium with independent financer — Financer serving insurer with notice of termination of insurance upon default by insured in financing contract — Insurer precluded by s. 110 of the Insurance Act, R.S.O. 1960, c. 190, from "cancelling or altering" policy to prejudice of mortgagee — Semble, acceptance of notice of termination is a "cancellation" or "alteration" within meaning of s. 110.

APPEAL from a decision of Donohue, J., [1970] 1 O.R. 89, 7 D.L.R. (3d) 561, awarding damages against an insurer for its failure to notify a mortgagee named as loss payee in a fire policy upon the termination of the insurance by an agent of the insured.

Albert E. Shepherd, Q.C., for defendant, appellants.
J. Edward Eberle, Q.C., for plaintiff, respondent.

The judgment of the Court was delivered orally by

SCHROEDER, J.A.:—It will not be necessary to call on you, Mr. Eberle, as we are all of the opinion that this appeal fails.

The appeal is from a judgment pronounced by Donohue, J., on June 19, 1969, after trial of the action before him at the non-jury sittings at Owen Sound, whereby it is ordered and adjudged that the plaintiff do recover from the defendants the sum of $41,000 together with interest at the rate of 5% from July 1, 1967, the amount awarded to be payable by the several defendants in the proportions stated in cl. 2 of the judgment.

The case was presented to the learned Judge on the basis of a statement of facts to which the parties had agreed. This statement reads as follows:

Joseph Myran, James Meeches, Dorene Meeches and Ruth Myran *Appellants*;

and

Her Majesty The Queen *Respondent*.

1975: May 21; 1975: June 26.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Indians—Hunting rights—Accused hunting without due regard for safety of others in vicinity—Whether immune from prosecution by terms of para. 13 of Memorandum of Agreement approved under The Manitoba Natural Resources Act, R.S.M. 1970, c. N30—The Wildlife Act, R.S.M. 1970, c. W140, s. 10(1).

Trespass—Hunters entering private property without owner's permission—Question of right of access.

The appellants, Treaty Indians, were each convicted on the charge of hunting without due regard for the safety of others in the vicinity, contrary to the provisions of s. 10(1) of *The Wildlife Act*, R.S.M. 1970, c. W140, and the convictions were affirmed on appeal by trial *de novo* in the County Court and by the Court of Appeal for Manitoba. With leave, the appellants appealed to this Court.

It was common ground that the accused were hunting for food and there was no doubt that they were doing so without due regard for the safety of others in the vicinity. They were deer hunting shortly before midnight in an alfalfa field belonging to a farmer who was awakened by the sound of rifle shots and by a light flashing through the window of his bedroom. The range of the weapon was close to two miles; within range were farm houses, highways, railways, pastureland, a town and a breeding station. The convictions were, therefore, properly entered unless it could be said that the accused were immune from prosecution by the terms of para. 13 of the Memorandum of Agreement dated December 14, 1929, set out in the Schedule of *The Manitoba Natural Resources Act*, R.S.M. 1970, c. N30.

Held: The appeals should be dismissed.

There is no irreconcilable conflict or inconsistency in principle between the right to hunt for food assured under para. 13 of the Memorandum of Agreement

Joseph Myran, James Meeches, Dorene Meeches et Ruth Myran *Appelants*;

et

Sa Majesté La Reine *Intimée*.

1975: le 21 mai; 1975: le 26 juin.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Indiens—Droits de chasse—Les accusés chassaient sans égard à la sécurité d'autrui dans le voisinage—Jouissaient-ils de l'immunité en vertu de la cl. 13 de la Convention approuvée par le Manitoba Natural Resources Act, R.S.M. 1970, c. N30?—The Wildlife Act, R.S.M. 1970, c. W140, art. 10(1).

Violation de propriété—Chasseurs circulant sur une propriété privée sans la permission du propriétaire—Question de droit d'accès.

Les appelants, Indiens assujettis à un traité, ont tous été trouvés coupables d'avoir chassé sans égard à la sécurité des autres dans le voisinage, contrairement aux dispositions du par. (1) de l'art. 10 du *Wildlife Act*, R.S.M. 1970, c. W140, et les condamnations ont été confirmées en appel par nouveau procès devant la Cour de comté, et ensuite par la Cour d'appel du Manitoba. Sur autorisation, les appelants se sont pourvus devant cette Cour.

Il est reconnu que les accusés chassaient pour se nourrir et il ne fait pas de doute qu'ils le faisaient sans égard à la sécurité des autres dans le voisinage. Peu avant minuit, ils chassaient le chevreuil dans le champ de luzerne d'un fermier qui fut réveillé par le bruit des coups de carabine et une lumière brillant à travers la fenêtre de sa chambre à coucher. L'arme avait une portée de près de deux milles; dans ce rayon se trouvaient des fermes, des routes, des voies ferrées, des pâturages, un village et une station génétique. Par conséquent, les condamnations sont légitimes à moins que les accusés jouissent de l'immunité en vertu de la cl. 13 de la Convention du 14 décembre 1929, reproduite en annexe du *Manitoba Natural Resources Act*, R.S.M. 1970, c. N30.

Arrêt: Les pourvois doivent être rejetés.

En principe, il n'y a ni conflit ni contradiction entre le droit de chasser pour se nourrir, droit assuré par la cl. 13 de la Convention approuvée par le *Manitoba Natural*

approved under *The Manitoba Natural Resources Act* and the requirement of s. 10(1) of *The Wildlife Act* that such right be exercised in a manner so as not to endanger the lives of others. The first is concerned with conservation of game to secure a continuing supply of food for the Indians of the Province and protect the right of Indians to hunt for food at all seasons of the year; the second is concerned with risk of death or serious injury omnipresent when hunters fail to have due regard for the presence of others in the vicinity. Thus, s. 10(1) does not restrict the type of game, nor the time or method of hunting, but simply imposes on every person a duty of hunting with due regard for the safety of others.

On the question concerning the phrase "right of access" in para. 13, although the point did not fall squarely for decision in this appeal, there was considerable support for the view that in Manitoba at the present time hunters enter private property with no greater rights than other trespassers; that they have no right of access except with the owner's permission; and, lacking permission, are subject to civil action for trespass and prosecution under s. 2 of *The Petty Trespasses Act*, R.S.M. 1970, c. P50.

Prince and Myron v. The Queen, [1975] S.C.R. 81, applied; *Daniels v. The Queen*, [1968] S.C.R. 517; *R. v. Wesley*, [1932] 2 W.W.R. 337, referred to.

APPEALS from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Kerr Co. Ct. J. Appeals dismissed.

M. F. Garfinkel and *A. J. Conner*, for the appellants.

A. G. Bowering, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—The appellants, Treaty Indians from the Long Plain Indian Reserve in the Province of Manitoba, were each convicted on the charge of hunting without due regard for the safety of other persons in the vicinity, contrary to the provisions of s. 10(1) of *The Wildlife Act*, R.S.M. 1970, c. W140, and the convictions were affirmed on appeal by trial *de novo* in the County Court and by the Court of Appeal for Manitoba.

[1] [1973] 4 W.W.R. 512, 35 D.L.R. (3d) 473.

Resources Act, et la prescription du par. (1) de l'art. 10 du *Wildlife Act*, en vertu duquel l'exercice de ce droit ne doit pas mettre la vie d'autrui en danger. La première disposition vise la protection du gibier pour assurer aux Indiens de la province un approvisionnement continu en vivres et protéger leur droit de chasser pour se nourrir en toute saison de l'année; la seconde concerne le risque omniprésent de mort ou de blessure grave qui existe lorsque des chasseurs ne tiennent pas compte de la présence d'autres personnes dans le voisinage. Ainsi, le par. (1) de l'art. 10 ne restreint pas le type de gibier, le temps ou la méthode de chasse, il impose seulement à chaque individu l'obligation de chasser en ayant égard à la sécurité d'autrui.

Au regard de la question portant sur l'expression «un droit d'accès» contenue dans la cl. 13, même si cette Cour n'a pas à trancher définitivement cette question dans la présente affaire, il y a beaucoup à dire en faveur de la thèse que, au Manitoba, les chasseurs n'ont pas plus de droits que les citoyens ordinaires à l'égard de ce qui est propriété privée; ils n'ont aucun droit d'accès à une terre sans la permission du propriétaire et, sans cette permission, ils s'exposent à une poursuite pour violation de propriété en vertu de l'art. 2. du *Petty Trespasses Act*, R.S.M. 1970, c. P50.

Arrêt appliqué: *Prince et Myron c. La Reine*, [1975] R.C.S. 81; arrêts mentionnés: *Daniels c. La Reine*, [1968] R.C.S. 517; *R. v. Wesley*, [1932] 2 W.W.R. 337.

POURVOIS interjetés à l'encontre d'un arrêt de la Cour d'appel du Manitoba[1], qui a confirmé un jugement du juge Kerr de la Cour de comté. Pourvois rejetés.

M. F. Garfinkel et *A. J. Conner*, pour les appelants.

A. G. Bowering, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—Les appelants, Indiens assujettis au traité de la réserve indienne *Long Plain* du Manitoba, ont tous été trouvés coupables d'avoir chassé sans égard à la sécurité des autres dans le voisinage, contrairement aux dispositions de l'art. 10(1) du *Wildlife Act*, R.S.M. 1970, c. W140, et les condamnations ont été confirmées en appel par nouveau procès devant la cour de comté et ensuite par la Cour d'appel du Manitoba. L'au-

[1] [1973] 4 W.W.R. 512, 35 D.L.R. (3d) 473.

Leave to appeal to this Court was granted on June 4, 1973.

There can be no doubt the accused were hunting without due regard for the safety of others in the vicinity. They were deer hunting shortly before midnight in an alfalfa field belonging to a farmer who was awakened by the sound of rifle shots and by a light flashing through the window of his bedroom. The range of the weapon was close to two miles; within range were farm houses, highways, railways, pastureland, a town and a breeding station. The convictions were, therefore, properly entered unless it can be said that the accused are immune from prosecution by the terms of para. 13 of the Memorandum of Agreement dated December 14, 1929, set out in the Schedule of *The Manitoba Natural Resources Act*, R.S.M. 1970, c. N30, which reads:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Section 46(1) of *The Wildlife Act*, *supra*, reads:

> Nothing in this Act reduces, or deprives any person of, or detracts from, the rights and privileges bestowed upon him under paragraph 13 of the Memorandum of Agreement approved under The Manitoba Natural Resources Act.

The history of para. 13 quoted above and of its Alberta counterpart will be found respectively in the judgment of Mr. Justice Judson in this Court in *Daniels v. White and The Queen*[2], and in the judgment of Mr. Justice McGillivray in the Appellate Division of the Supreme Court of Alberta in *Rex v. Wesley*[3]. The case, however, which bears

[2] [1968] S.C.R. 517.
[3] [1932] 2 W.W.R. 337.

torisation de se pourvoir devant cette Cour a été accordée le 4 juin 1973.

Il ne fait pas de doute que les accusés chassaient sans égard à la sécurité des autres dans le voisinage. Peu avant minuit ils chassaient le chevreuil dans le champ de luzerne d'un fermier qui fut réveillé par le bruit des coups de carabine et une lumière brillant à travers la fenêtre de sa chambre à coucher. L'arme avait une portée de près de deux milles; dans ce rayon, se trouvaient des fermes, des routes, des voies ferrées, des pâturages, un village et une station génétique. Les condamnations sont, par conséquent, légitimes, à moins que les accusés jouissent de l'immunité en vertu de la cl. 13 de la Convention du 14 décembre 1929, reproduite en annexe du *Manitoba Natural Resources Act*, R.S.M. 1970, c. N30, où il est dit:

> [TRADUCTION] Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

L'article 46(1) du *Wildlife Act*, précité, se lit comme suit:

> [TRADUCTION] Rien dans la présente loi ne restreint, ni ne supprime les droits et privilèges conférés par la clause 13 de la Convention approuvée par le *Manitoba Natural Resources Act*.

Dans *Daniels c. White et la Reine*[2], le juge Judson a fait l'historique de la cl. 13 précitée et dans *Rex c. Wesley*[3], le juge McGillivray de la Division d'appel de la Cour suprême d'Alberta a fait l'historique de sa contrepartie albertaine. Toutefois l'affaire qui porte plus directement sur le présent

[2] [1968] R.C.S. 517.
[3] [1932] 2 W.W.R. 337.

more directly upon the issue raised in the present appeal is *Prince and Myron v. The Queen*[4]. In *Prince and Myron* the appellants, Treaty Indians, were charged with unlawfully hunting big game by means of night lights, contrary to *The Game and Fisheries Act* of Manitoba, R.S.M. 1954, c. 94, and it fell to the Court to consider what was meant by "... the right ... of hunting ... game ... for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access". It was common ground in that case, as in the instant case, that the accused were hunting for food. The majority position in the Manitoba Court of Appeal was expressed by Miller C.J.M.[5], who said in the course of his judgment, pp. 238-9:

The point is: Just what restrictions in *The Game and Fisheries Act* do apply to Indians? It seems to me that the manner in which they may hunt and the methods pursued by them in hunting must, of necessity, be restricted by the said Act. Mr. Pollock, counsel for the Indians, argued that they were only restricted by the provisions of *The Game and Fisheries Act* when hunting for sport or commercial purposes. I can only say that I am unable to read any such provision into sec. 13 of *The Manitoba Natural Resources Act*. I do not think Indians are debarred from hunting for food during any one of the 365 days of any year, and can hunt for food on all unoccupied crown lands and on any land to which Indians have a right of access. I am of the opinion, though, that they have no right to adopt a method or *manner* of hunting that is contrary to *The Game and Fisheries Act*, because sec. 13 of *The Natural Resources Act* specifically provides that the *Game Act* of the province *shall* apply to Indians in some respects.

Freedman J.A., as he then was, giving the reasons for the minority, stated, p. 242:

The fundamental fact of this case, as I see it, is that the accused Indians at the time of the alleged offence were hunting for food. It was not a case of hunting for sport or for commercial purposes. By sec. 72(1) of *The Game and Fisheries Act*, RSM, 1954, ch. 94, and by sec. 13 of *The Manitoba Natural Resources Act*, RSM, 1954, ch. 180, the special position of the Indian when hunting for food is acknowledged and recognized. The clear purpose of those sections is to secure to the Indi-

[4] [1964] S.C.R. 81.
[5] (1964), 40 W.W.R. 234.

litige est *Prince et Myron c. La Reine*[4]. Les appelants, Indiens assujettis à un traité, étaient accusés d'avoir chassé illicitement le gros gibier en utilisant des lanternes, contrairement aux prescriptions du *Game and Fisheries Act* du Manitoba, R.S.M. 1954, c. 94; la Cour s'est penchée sur le sens de la phrase [TRADUCTION] «... le droit ... de chasser ... le gibier ... pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès». Comme ici on s'accordait à dire que les accusés chassaient afin de pourvoir à leur subsistance. L'opinion de la majorité à la Cour d'appel du Manitoba a été exprimée par le juge en chef Miller du Manitoba[5], qui y a dit, aux pp. 238-9:

[TRADUCTION] Voici la question qui se pose: quelles restrictions du *Game and Fisheries Act* s'appliquent aux Indiens? Il me semble que leur façon de chasser et les méthodes qu'ils utilisent à cette fin doivent inévitablement être restreintes par la loi. Me Pollock, l'avocat des Indiens, a fait valoir que ceux-ci n'étaient astreints aux dispositions du *Game and Fisheries Act* que lorsqu'ils chassaient à des fins sportives ou commerciales. Je ne trouve pas cela dans la cl. 13 du *Manitoba Natural Resources Act*. Je ne pense pas qu'il soit défendu aux Indiens de chasser pour leur nourriture les 365 jours de l'année et ils peuvent chasser pour se nourrir sur toutes les terres inoccupées de la Couronne et sur toute terre à laquelle ils ont un droit d'accès. J'estime, toutefois, qu'ils n'ont aucun droit d'adopter une méthode ou une *façon* de chasser qui est contraire au *Game and Fisheries Act* parce que la cl. 13 du *Natural Resources Act* stipule bien que le *Game Act* de la province *s'applique* aux Indiens à certains égards.

Le juge d'appel Freedman, comme il était alors, exposant les motifs de la minorité, dit à la p. 242:

[TRADUCTION] A mon avis, le point fondamental de cette affaire c'est que, lors de la présumée infraction, les Indiens accusés chassaient pour se nourrir et non à des fins sportives ou commerciales. En vertu de l'art. 72(1) du *Game and Fisheries Act*, R.S.M. 1954, ch. 94, et de la cl. 13 du *Manitoba Natural Resources Act*, R.S.M., 1954, ch. 180, la situation particulière de l'Indien est reconnue lorsqu'il chasse en vue de se nourrir. Le but évident de ces dispositions est d'assurer aux Indiens, à

[4] [1964] R.C.S. 81.
[5] (1964), 40 W.W.R. 234.

ans, within certain given territories the unrestricted right to hunt for game and fish for their support and sustenance. The statement in sec. 13 of *The Manitoba Natural Resources Act* that the law of the province respecting game and fish shall apply to the Indians is, in my view, subordinate in character. Its operation is limited to imposing upon the Indian the same obligation as is normally imposed upon every other citizen, namely, that when he is hunting for sport or commerce he must hunt only in the manner and at the times prescribed by the Act. But the ordinary citizen does not hunt for food for sustenance purposes. The Indian does, and the statute, recognizing his right to sustenance, exempts him from the ordinary game laws when he is hunting for food in areas where he is so permitted.

The judgment of this Court was delivered by Hall J., *supra*, who adopted the reasons of Freedman J.A. in his dissenting judgment in the Court of Appeal, and also adopted the following statement by McGillivray J.A. in *Rex v. Wesley*, *supra*:

"If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

I think it is clear from *Prince and Myron* that an Indian of the Province is free to hunt or trap game in such numbers, at such times of the year, by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access. But that is not to say that he has the right to hunt dangerously and without regard for the safety of other persons in

l'intérieur de certains territoires, le droit absolu de chasser le gibier et de pêcher le poisson afin de pourvoir à leur subsistance. La disposition de la cl. 13 du *Manitoba Natural Resources Act* énonçant que la loi de la province sur le gibier et le poisson s'applique aux Indiens a, à mon avis, un caractère secondaire. Son effet se limite à imposer à l'Indien la même obligation qu'aux autres citoyens, c'est-à-dire que lorsqu'il chasse à des fins sportives ou commerciales, il ne doit chasser que de la façon et au temps prescrits par la loi. Le citoyen ordinaire, toutefois, ne chasse pas pour s'alimenter ou survivre. Mais l'Indien le fait, et la loi écrite, qui reconnaît son droit de subsistance, l'exempte des lois ordinaires relatives au gibier lorsqu'il chasse pour se nourrir dans des endroits où il a la permission de le faire.

L'arrêt de cette Cour fut rendu par le juge Hall, *supra*. Il adopta les motifs du juge d'appel Freedman dans sa dissidence à la Cour d'appel et fit sien l'énoncé suivant du juge d'appel McGillivray dans *Rex v. Wesley*, précité:

[TRADUCTION] «Si l'effet de la disposition n'est que de donner aux Indiens l'avantage supplémentaire de chasser pour leur nourriture «en dehors de la saison», et que, par ailleurs, ils sont assujettis aux lois de la province sur la chasse, il s'ensuit que le nombre d'animaux d'une espèce donnée qu'ils peuvent tuer en une année peut être limité même si ce nombre n'est pas suffisant pour assurer leur subsistance, et même si aucun autre gibier ne leur est accessible. Je ne crois pas que le texte de la clause indique que c'était l'intention des législateurs. Le but poursuivi, à mon sens, c'était que, lorsque l'Indien, comme l'homme blanc, chasse dans un but sportif ou commercial, il soit assujetti aux lois touchant la préservation du gibier mais que, lorsqu'il chasse les animaux sauvages pour la nourriture essentielle à sa subsistance, il soit considéré d'un point de vue tout à fait différent de l'homme blanc qui, en général, ne chasse pas pour se nourrir; et il est, par l'exception stipulée à la cl. 12, assuré de la continuité de l'exercice d'un droit dont il jouit depuis un temps immémorial.»

L'arrêt *Prince et Myron* montre bien qu'un Indien est libre de chasser ou de piéger le gibier autant qu'il le désire, quand il le désire et par les moyens qu'il choisit à condition que ce soit pour se nourrir personnellement et sur des terres inoccupées de la Couronne ou auxquelles il a un droit d'accès. Toutefois, il n'a pas le droit de chasser dangereusement au mépris de la sécurité des gens du voisinage. L'arrêt *Prince et Myron* traite des moyens permis. Ni cet arrêt ni ceux qui l'ont

the vicinity. *Prince and Myron* deals with "method". Neither that case nor those which preceded it dealt with protection of human life. I agree with what was said in the present case by Mr. Justice Hall in the Court of Appeal for Manitoba:

> In the present case the governing statute is *The Wildlife Act*, *supra*, and in particular Sec. 41(1) thereof. Section 10(1) under which the accused were charged does not restrict the type of game, nor the time or method of hunting, but simply imposes a duty on every person of hunting with due regard for the safety of others. Does that duty reduce, detract or deprive Indians of the right to hunt for food on land to which they have a right of access? If one regards that right in absolute terms the answer is clearly in the affirmative; but is that the case? Surely the right to hunt for food as conferred or bestowed by the agreement and affirmed by the statute cannot be so regarded. Inherent in the right is the quality of restraint, that is to say that the right will be exercised reasonably. Section 10(1) is only a statutory expression of that concept, namely that the right will be exercised with due regard for the safety of others, including Indians.

précédé n'ont traité de la protection de la vie humaine. Je suis d'accord avec ce qu'a dit le juge Hall à la Cour d'appel du Manitoba dans la présente cause:

> [TRADUCTION] La loi applicable est le *Wildlife Act*, *supra*, notamment l'art. 41(1). L'art. 10(1), en vertu duquel les accusés ont été inculpés ne restreint pas le type de gibier, le temps ou la méthode de chasse, il impose seulement l'obligation de chasser en ayant égard à la sécurité d'autrui. Cette prescription est-elle une restriction ou une atteinte au droit des Indiens de chasser pour leur nourriture sur les terres auxquelles ils ont un droit d'accès? Si l'on prend ce droit en termes absolus, la réponse est clairement affirmative; mais est-ce le cas? Non, le droit de chasser pour se nourrir, conféré ou attribué par l'accord et ratifié par la loi, ne peut pas être vu de cette façon. Il y a une restriction inhérente au droit, il faut l'exercer raisonnablement. L'article 10(1) n'est que l'énoncé législatif de ce concept, à savoir que le droit sera exercé en ayant égard à la sécurité d'autrui, y compris celle des Indiens.

In my opinion there is no irreconcilable conflict or inconsistency in principle between the right to hunt for food assured under para. 13 of the Memorandum of Agreement approved under *The Manitoba Natural Resources Act* and the requirement of s. 10(1) of *The Wildlife Act* that such right be exercised in a manner so as not to endanger the lives of others. The first is concerned with conservation of game to secure a continuing supply of food for the Indians of the Province and protect the right of Indians to hunt for food at all seasons of the year; the second is concerned with risk of death or serious injury omnipresent when hunters fail to have due regard for the presence of others in the vicinity. In my view the Court of Appeal for Manitoba properly answered in the negative the question upon which leave to appeal to that Court was granted, namely:

> Did the learned trial judge err in holding that paragraph 13 of the Schedule of *The Manitoba Natural Resources Agreement Act*, 1930, did not provide immunity to the accused from the restrictions on hunting set out in *The Wildlife Act*, and specifically section 10(1) thereof.

A mon avis, il n'y a, en principe, ni conflit ni contradiction entre le droit de chasser pour se nourrir, droit assuré par la cl. 13 de la Convention approuvée par le *Manitoba Natural Resources Act*, et la prescription de l'art. 10(1) du *Wildlife Act*, en vertu duquel l'exercice de ce droit ne doit pas mettre la vie d'autrui en danger. La première disposition vise la protection du gibier pour assurer aux Indiens de la province un approvisionnement continu en vivres et protéger leur droit de chasser pour se nourrir en toute saison de l'année; la seconde concerne le risque omniprésent de mort ou de blessure grave qui existe lorsque des chasseurs ne tiennent pas compte de la présence d'autres personnes dans le voisinage. A mon avis, la Cour d'appel du Manitoba a eu raison de répondre négativement à la question sur laquelle l'autorisation d'en appeler à cette Cour a été accordée, à savoir:

> [TRADUCTION] Le juge du procès a-t-il fait erreur en décidant que la clause 13 de l'annexe du *Manitoba Natural Resources Agreement Act*, 1930, ne donne pas d'immunité aux accusés contre les restrictions de chasse édictées par le *Wildlife Act* et, plus particulièrement, l'art. 10(1)?

Another question which arose during argument of this appeal concerns the words "any other lands to which the said Indians may have a right of access", found in para. 13. There may be differing opinions on whether the finding of the trial judge that the accused had a right of access to the lands upon which they were hunting when apprehended can be impeached in this Court, but the leave to appeal was not limited to the single question before the Court of Appeal and, having regard to the concern among farmers to which, we were told, the majority judgment of the Manitoba Court of Appeal in the earlier case of *Prince and Myron* has given rise, I think it may be opportune and appropriate to make some observations upon the phrase "right of access" on the occasion of, though not as a ground of decision of, the present appeal. The complainant in the present case, Mr. Baron, had not given the accused permission to be on his land for hunting or any other purpose; they were not known to him. His lands were not posted. Subsections (1) and (2) of s. 40 of *The Wildlife Act* of Manitoba read as follows:

40(1). The owner or lawful occupant of any land other than Crown land may give notice that the hunting and killing of wildlife or exotic animals is forbidden on or over the land or any part thereof by posting and maintaining signs of at least one square foot in area on or along the boundary of the land facing away from the land at intervals of not more than two hundred and twenty yards with the words "Hunting by Permission Only" or "Hunting Not Allowed" or words to the like effect.

40(2). A person who hunts wildlife or exotic animals upon or over any land in respect of which notice is given as prescribed in Subsection (1) without the consent of the owner or lawful occupant thereof, is guilty of an offence and is liable, on summary conviction on private prosecution, to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding one month, or to both such a fine and such imprisonment.

When the charges against the present accused were heard in the first instance, the Magistrate said:

In the instant case there is no evidence before me of any prohibition from hunting upon the land of the complainant and it is my respectful opinion that the four accused persons had a right of access for the purpose of hunting.

Une autre question a été soulevée au cours des plaidoiries, c'est le sens qu'il faut donner aux mots «toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès», à la fin de la cl. 13. Il n'est pas clair que l'on puisse attaquer en cette Cour la conclusion du juge de première instance selon qui les accusés avaient droit d'accès aux terres où ils chassaient lorsqu'ils ont été arrêtés. Toutefois, l'autorisation d'appel ne se limite pas à la seule question soumise à la Cour d'appel et, considérant l'inquiétude des fermiers soulevée, nous a-t-on affirmé, par l'arrêt majoritaire de la Cour d'appel du Manitoba dans *Prince et Myron* précité, j'estime qu'il peut être opportun et à propos de faire quelques observations sur l'expression «droit d'accès», sans en faire un motif décisif. Baron, le plaignant, n'a pas donné aux accusés la permission d'aller sur sa terre pour chasser ou à toute autre fin; il ne les connaissait pas. Il n'avait pas mis d'écriteaux sur ses terres. Les paragraphes (1) et (2) de l'art. 40 du *Wildlife Act* du Manitoba disent ceci:

[TRADUCTION] 40(1). Le propriétaire ou l'occupant légal de toute terre autre qu'une terre de la Couronne peut donner avis qu'il est défendu de chasser ou de tirer le gibier ou des animaux exotiques sur sa terre, en apposant et maintenant alentour des écriteaux d'au moins un pied carré faisant face à l'extérieur, à intervalle de deux cent vingts verges au plus, portant l'inscription «Chasse par autorisation seulement» ou «Chasse interdite» ou toute autre inscription au même effet.

[TRADUCTION] 40(2). Quiconque, sans le consentement du propriétaire ou occupant légal, chasse le gibier ou des animaux exotiques sur une terre où des écriteaux sont apposés conformément au par. (1), est coupable d'une infraction et passible sur poursuite sommaire intentée par un particulier d'une amende de deux cents dollars au plus et d'emprisonnement pour un mois au plus ou de l'une de ces peines.

Au premier procès, le magistrat a dit:

[TRADUCTION] En l'espèce, je n'ai aucune preuve qu'il était défendu de chasser sur la terre du plaignant, et suis d'avis que les quatre accusés avaient un droit d'accès pour chasser.

On the trial *de novo* the County Court judge made no reference to right of access. He considered there were two issues only, first, hunting, and second, hunting dangerously; and he held against the accused on both issues. In the Court of Appeal, Mr. Justice Hall, on behalf of the Court, said:

> Having regard to the limited nature of the appeal we feel bound to accept the implicit findings of the trial Judge that the accused were Treaty Indians and that, at the time, they were hunting for food on lands to which they had a right of access.

It would seem that the Magistrate, as a matter of law, found the accused had a right of access to the farm lands upon which they were hunting and that this finding was accepted by the Court of Appeal. The law which supports this position is said to derive from the statement of Miller C.J.M. in *Regina v. Prince and Myron*, *supra*; the learned Chief Justice, after quoting subss. 76(1) and (2) of *The Game and Fisheries Act*, the earlier counterpart of subss. 40(1) and (2) of *The Wildlife Act*, continued, p. 238:

> I am satisfied that unless notices are posted on the land pursuant to sec. 76(2) a person has access thereto for shooting purposes. It is true that the owner or occupant might specifically warn people off the land and, if this were done, the person intending to shoot, whether he be Indian or not, would be prohibited from going on that land to shoot and would not be deemed to have access thereto, but in the absence of a prohibition, either by notice or otherwise, the Indians would have access to the land upon which they were found hunting. The fact that the land was cultivated does not make any difference. The fact that the common-law rights as to trespass are preserved does not make any difference to the right of access above mentioned.

In this Court there was an admission that the accused Prince and Myron had a right of access to the land in question. Hall J., for the Court, stated at p. 83, [1964] S.C.R.:

> It was admitted in this Court that at the time in question in the charge the appellants were Indians; that they were hunting deer for food for their own use and that they were hunting on lands to which they had the right of access. These admissions are fundamental to the determination of this appeal.

Au second procès, le juge de la cour de comté n'a rien dit du droit d'accès. Il a considéré qu'il n'y avait que deux points en litige: d'abord, la chasse, ensuite, le danger; il a statué contre les accusés sur ces deux points. En Cour d'appel, le juge Hall, au nom du tribunal, a dit:

> [TRADUCTION] Vu que le droit d'appel est restreint, nous nous sentons obligés d'accepter les conclusions implicites du juge du procès que les accusés sont des Indiens assujettis à un traité qui chassaient pour se nourrir sur des terres auxquelles ils avaient un droit d'accès.

Apparemment, le magistrat avait conclu, comme question de droit, que les accusés avaient un droit d'accès aux terres où ils chassaient et cette conclusion a été acceptée par la Cour d'appel. On prétend fonder cette thèse sur l'énoncé du juge en chef Miller du Manitoba dans *La Reine c. Prince et Myron*, *supra*; après avoir cité les par. (1) et (2) de l'art. 76 du *Game and Fisheries Act* (aujourd'hui les par. (1) et (2) de l'art. 40 du *Wildlife Act*, il poursuivit (p. 238):

> [TRADUCTION] Je crois qu'à moins que des écriteaux soient apposés sur la terre, conformément à l'art. 76(2), tout le monde a le droit d'y pénétrer pour chasser. Il est vrai que le propriétaire ou l'occupant peuvent signifier aux gens de s'en aller et, s'ils le font, personne, même un Indien, n'a le droit de chasser sur cette terre et y a droit d'accès; mais, en l'absence d'une interdiction, par écriteau ou autrement, les Indiens avaient un droit d'accès à la terre où ils ont été trouvés en train de chasser. Le fait que la terre était cultivée ne fait aucune différence. Le fait que les droits de *common law* relatifs à l'entrée sans autorisation sur une propriété privée sont sauvegardés ne fait aucune différence non plus.

Devant la présente Cour, il fut admis que les accusés *Prince et Myron* avaient droit d'accès à la terre en question. Le juge Hall, au nom de la Cour, dit à la p. 83, R.C.S. [1964]:

> [TRADUCTION] Dans cette Cour, il fut admis que les appelants étaient des Indiens, qu'ils chassaient le chevreuil en vue de se procurer de la nourriture pour leur usage personnel et qu'ils chassaient sur des terres où ils avaient un droit d'accès. Ce sont là des éléments essentiels pour l'issue de ce pourvoi.

Thus the issue was not argued in this Court and the point was not decided.

It is unnecessary in the present case to express any concluded view on the point, but I must say that if the quoted words of Miller C.J.M. are a correct statement of the law, the results are far-reaching; any person can enter any land in Manitoba which is not posted and hunt thereon without permission of the owner, at least until ordered off; the carrying of a fire-arm immunizes an act which would otherwise be trespass. I would have grave doubt that this can be the law. Section 40 of *The Wildlife Act* does not deal with interests in property. It is intended, I would have thought, to create a separate offence under the provincial statute in respect of posted lands and not to confer entry rights in respect of unposted lands. Posting of land and maintaining signs is a tiresome and costly business the purpose of which is to identify the land as private property, to discourage hunters and to underpin a s. 40(2) charge against those who enter without permission. A Manitoba farmer is surely not to be faced, by reason of the enactment of s. 40(1) of *The Wildlife Act*, with the choice of either posting his land or suffering the entry of those who would hunt his land without permission. With great respect, in my opinion the majority of the Manitoba Court of Appeal in *Prince and Myron v. The Queen* may have erred in their view of the import of s. 76 of *The Game and Fisheries Act*, the antecedent of s. 40, in failing to appreciate the importance of s. 76(4) reading:

> 76. (4) Nothing in this section limits or affects the remedy at common law of any such owner or occupant for trespass.

strengthened in s. 40(4) of *The Wildlife Act* to include statutory remedies:

> 40(4). Nothing in this section limits or affects any rights or remedies that any person has at common law or by statute for trespass in respect of land.

La question n'a donc pas été débattue en cette Cour et elle n'a pas fait l'objet de la décision.

Dans la présente affaire, il n'est pas nécessaire d'exprimer une opinion décisive sur ce point, mais je dois dire que si l'énoncé précité du juge en chef Miller du Manitoba est un exposé fidèle de la loi, les conséquences en sont bien étendues. A ce compte, au Manitoba, n'importe qui peut pénétrer sur n'importe quelle terre où il n'y a pas d'écriteau et y chasser sans la permission du propriétaire, du moins jusqu'à ce qu'on l'expulse; le port d'une arme à feu justifie un acte qui, autrement serait une intrusion. Je doute sérieusement que la loi soit ainsi. L'article 40 du *Wildlife Act* ne traite pas du droit de propriété immobilière. L'objectif en est plutôt, me semble-t-il, d'établir une infraction distincte en vertu de la loi provinciale à l'égard des terres munies d'écriteaux et non pas de conférer un droit d'accès à celles où il n'y en a pas. Tout le travail et les dépenses de la pose et l'entretien des écriteaux sont un travail fastidieux et onéreux qui ont pour objet d'indiquer qu'il s'agit d'une propriété privée, d'en détourner les chasseurs et de donner lieu à une infraction en vertu de l'art. 40(2) à l'égard de ceux qui y pénètrent sans permission. Un fermier manitobain ne doit pas se voir contraint, par l'art. 40(1) du *Wildlife Act*, à poser des écriteaux sur sa terre sous peine de devoir tolérer l'intrusion de chasseurs sans permission. Avec grand respect, j'estime que dans *Prince et Myron c. La Reine*, la majorité de la Cour d'appel du Manitoba peut avoir fait erreur dans son opinion sur l'art. 76 du *Game and Fisheries Act*, aujourd'hui l'art. 40, en omettant de reconnaître l'importance du par. (4) qui se lit comme suit:

> [TRADUCTION] 76. (4) Rien dans cet article ne limite ni n'atteint le recours en *common law* d'un tel propriétaire ou occupant pour intrusion sur le fonds d'autrui.

Le paragraphe (4) de l'art. 40 du *Wildlife Act*, a renforcé cette disposition en ajoutant la mention des recours prévus par loi écrite:

> [TRADUCTION] 40(4). Rien dans cet article ne limite ni n'atteint les droits ou recours qu'une personne a, en vertu de la *common law* ou de la loi écrite, pour intrusion sur le fonds d'autrui.

Miller C.J.M. did recognize that an owner could demand that hunters leave his property. In this way, he acknowledged that the "right of access" was a qualified right, however he would accord to hunters a special status and access rights above and beyond the ordinary trespasser. Although the point does not fall squarely before us for decision in this appeal, I think it can properly be said that there is considerable support for the view that in Manitoba at the present time hunters enter private property with no greater rights than other trespassers; that they have no right of access except with the owner's permission; and, lacking permission, are subject to civil action for trespass and prosecution under s. 2 of *The Petty Trespasses Act*, R.S.M. 1970, c. P50. The question of right of access will normally have to be decided in each particular case, as a question of fact and not one of law, on the totality of the evidence in the case.

Le juge en chef Miller du Manitoba reconnaissait le droit du propriétaire d'obliger des chasseurs à quitter sa propriété. Il admettait aussi que le «droit d'accès» est un droit limité; il accordait tout de même aux chasseurs un statut spécial et un droit d'accès que n'a pas en général celui qui se rend coupable de violation du droit de propriété. Même si nous n'avons pas à trancher définitivement cette question dans la présente affaire, je crois pouvoir affirmer qu'il y a beaucoup à dire en faveur de la thèse que, au Manitoba, les chasseurs n'ont pas plus de droits que les citoyens ordinaires à l'égard de ce qui est propriété privée; ils n'ont aucun droit d'accès à une terre sans la permission du propriétaire et, sans cette permission, ils s'exposent à une poursuite pour intrusion sur le fonds d'autrui en vertu de l'art. 2 du *Petty Trespasses Act*, R.S.M. 1970, c. P50. La question du droit d'accès doit normalement être tranchée dans chaque cas particulier, comme une question de fait et non comme une question de droit, sur l'ensemble de la preuve dans l'affaire.

I would dismiss the present appeals.

Appeals dismissed.

Solicitors for the appellants: Pollock & Conner, Winnipeg.

Solicitor for the respondent: Attorney General for Manitoba, Winnipeg.

Je suis d'avis de rejeter les présents pourvois.

Appels rejetés.

Procureurs des appelants: Pollock & Conner, Winnipeg.

Procureur de l'intimée: Procureur général du Manitoba, Winnipeg.

SASKATCHEWAN

DISTRICT COURT MAHER, D.C.J.

Regina v. Nippi

Game Laws — Treaty Indian Hunting in Game Preserve — Whether Offence under Game Act.

Appeal by the crown from the dismissal by a magistrate of an information charging respondent, a treaty Indian, with unlawfully hunting in a game preserve contrary to sec. 5 of *The Game Act*, RSS, 1965, ch. 356. Appeal allowed.

It was *held* by Maher, D.C.J., on a review of the authorities, that the present state of the law in Saskatchewan was that while forest preserves had been held to be unoccupied crown lands and legislation declaring them to be otherwise was *ultra vires* of the provincial legislature, lands designated as game preserves ceased to be unoccupied crown lands and treaty Indians were bound by the provisions of *The Game Act* prohibiting hunting thereon: *Rex v. Smith* [1935] 2 WWR 433, at 437, 64 CCC 131, 20 Can Abr 1157 (Sask. C.A.); *Reg. v. Strongquill* (1953) 8 WWR (NS) 247, at 257, 262, 16 CR 194, 105 CCC 262, 5 Abr Con (2nd) 582 (Sask. C.A.) applied.

[Note up with 12 CED (2nd ed.) *Game Laws*, sec. 2.]

M. H. Dokken, for crown, appellant.

R. Price Jones, for respondent.

August 25, 1969.

MAHER, D.C.J. — This is an appeal on behalf of the crown from the dismissal by H. D. Parker, judge of the magistrates' court, of an information charging the respondent with unlawfully hunting in a game preserve, contrary to sec. 5 of *The Game Act*, RSS, 1965, ch. 356.

Evidence led on behalf of the crown satisfied me that the respondent is a treaty Indian and that he shot and killed a moose for food within the boundaries of the Pasquia Game Preserve, an area designated as a game preserve by order in council 205/62 dated February 2, 1962, issued pursuant to the provisions of *The Game Act*.

The relevant sections of *The Game Act* are as follows:

> "4.—(1) The Lieutenant Governor in Council may constitute any area of land a game preserve for the protection, propagation and perpetuation of birds and animals, and may alter any order made for that purpose and rescind any order made pursuant to this subsection.
>
> "(2) Every order made under subsection (1) shall be published in *The Saskatchewan Gazette* and shall take effect on and from a date to be named in the order.

"5. Except as otherwise provided in this Act and *The Fur Act,* or in the regulation under either of those Acts, no person shall:

"(*a*) hunt, shoot, trap, snare, poison or otherwise destroy or molest any animal or bird in a game preserve; or

"(*b*) carry or have in his possession in, or discharge over, a game preserve, any firearm or any bow and arrow.

* * *

"8. The minister may, when necessary, authorize the capture within the boundaries of a game preserve of birds or animals for propagation, exhibition or proper control, and may permit the collection of specimens for scientific purposes, and may exempt from protection and permit the destruction of such species as he deems injurious to public improvements, agricultural pursuits, beneficial wild life or domestic stock.

* * *

"15.—(1) Notwithstanding anything in this Act, and in so far only as is necessary in order to implement the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the statutes of 1930, Indians within the province may hunt for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

"(2) For the purpose of subsection (1) the lands designated by or pursuant to *The Provincial Lands Act* as school lands and the lands within game preserves, provincial forests, provincial parks, registered traplines, or fur conservation areas established pursuant to the regulations under *The Fur Act*, shall be deemed not to be unoccupied Crown lands or lands to which Indians have a right of access."

It is contended on behalf of the crown that the respondent had no right to kill the moose, as he did so within the confines of a game preserve, which is neither unoccupied crown lands or lands to which Indians have a right of access. Counsel for the crown does not rely on the provisions of subsec. (2) of sec. 15 of the Act, which has been held to be *ultra vires* by the court of appeal for Saskatchewan, but on the decision of the same court in *Rex v. Smith* [1935] 2 WWR 433, 64 CCC 131, which held game preserves to be occupied crown lands and not lands to which Indians had any special right of access.

491

Counsel for the respondent contends that the decision in *Reg. v. Strongquill* (1953) 8 WWR (NS) 247, 16 CR 194, 105 CCC 262 (Sask. C.A.), holding that the present sec. 15 (2) was *ultra vires* of the powers of the legislature has the effect of finding game preserves to be "unoccupied Crown lands" on which Indians may hunt for food at all seasons of the year.

I have read and considered a number of decisions of the courts of other provinces but I do not deem it necessary to refer to them as I have come to the conclusion that the matter falls squarely within the two foregoing decisions which are binding on this court. I might add that I have checked the wording of the legislation that was in effect when each of these cases were decided and found them to be substantially identical with the present *Game Act,* 1967, ch. 78. Any changes are in form only and have not altered the law applicable at the time the cases arose.

A careful study of the *Smith* and *Strongquill* cases satisfied me that there is no conflict in the decisions. In *Rex v. Smith* an appeal from the conviction of a treaty Indian charged with carrying a fire-arm on a game preserve was dismissed, the court unanimously holding that a game preserve was neither unoccupied crown lands or lands to which Indians had a right of access. I do not consider it necessary to refer to either the relevant treaties made between the crown and the Indians or to the agreement with respect to the transfer of natural resources to the province. Both were dealt with at length by the court which held unanimously that the provisions of *The Game Act* prohibiting anyone from hunting, shooting, trapping or carrying fire-arms on a game preserve were binding on treaty Indians. Turgeon, J.A. said at p. 437:

> " * * * When the treaty was made in 1867 the necessity for game preservation was probably not present in the minds of the parties. Nevertheless it was within reason that the time might come in this, as in all populated countries, when the establishment of game preserves would be beneficial to all interested in hunting and fishing, including the Indians themselves. But a game preserve would be one in name only if the Indians, or any other class of people, were entitled to shoot in it."

It follows that, in the absence of changes in the legislation, this finding is still the law of the province unless it has been overruled, modified or altered by a later decision. I have been unable to find any such decision unless it is *Reg. v. Strongquill, supra.* In that case the court of appeal, by majority

decision, held that a provincial forest preserve was unoccupied crown land on which Indians had a right to hunt for food at all seasons and that sec. 13 (2) of *The Game Act* (now sec. 35 [2]), was *ultra vires*. It is to be noted that in arriving at their decision the majority members of the court were careful to point out the distinction between a game preserve and a provincial forest.

Gordon, J.A. said at p. 257:

> "For the crown it was contended that the decision of this court in *Rex v. Smith* [*supra*], was conclusive against the accused. With every deference I think there is a material difference. In the *Smith* case the accused Indian was hunting on a game preserve on which all hunting was absolutely prohibited."

And Proctor, J.A. said at p. 262:

> "Thereafter Turgeon, J.A. held in effect that it was originally contemplated in the old Indian treaties and carried forward into par. 12 [of the Natural Resources Agreement of 1929], that various areas might be established as game preserves in the province to conserve and propagate game, and that upon the establishment of such a game preserve the area became 'occupied Crown Land' within the meaning of par. 12 and the Indian for whose benefit the area had been occupied had no longer the right to hunt and shoot thereof."

It seems almost unnecessary to add that Martin, C.J. in dissent, Culliton, J.A. concurring, followed *Rex v. Smith*.

The present state of the law therefore is, that while forest preserves have been held to be unoccupied crown lands and legislation declaring them to be otherwise is *ultra vires* of the provincial legislature, lands designated as game preserves cease to be unoccupied crown lands and treaty Indians are bound by the provisions of *The Game Act* prohibiting hunting thereon.

While it is not relevant to these proceedings, it is of some significance that in the present *Game Act*, game preserves are still included in lands deemed to be unoccupied crown lands but forest preserves have been deleted: *Vide* sec. 8 (2).

It was contended by counsel for the respondent that the facts in the case at bar were distinguishable from the *Smith* case by reason of the fact that there was evidence that permits were issued for the hunting of big game on the Pasquai Game

493

Preserve while in the *Smith* case it was found from the facts that hunting on the Fort A La Corne Game Preserve was absolutely prohibited. As pointed out above there have been no meaningful changes in the provisions of *The Game Act* dealing with the matters in issue before me. The provisions prohibiting hunting on a game preserve are the same and I can only conclude that any permits that may have been issued permitting hunting on the Pasquai Game Preserve were issued by the minister under the authority of the present sec. 8 of the Act, which section, in almost identical terms, was in effect at the time of the offence in the *Smith* case as sec. 71 of RSS, 1930, ch. 208.

The appeal will be allowed and the respondent found guilty as charged. I would ask that the matter of penalty and costs be spoken to in chambers on Thursday, September 11, at 10:30 a.m.

BRITISH COLUMBIA

SUPREME COURT CHAMBERS — MCINTYRE, J.

Berg v. Walker

Illegitimacy — Affiliation Order against Juvenile — Effect of Juvenile Delinquents Act on Affiliation Proceedings.

Proceedings under the *Children of Unmarried Parents Act*, RSBC, 1960, ch. 52 are civil in character and not criminal, and the *Juvenile Delinquents Act*, RSC, 1952, ch. 160, which is criminal legislation in a broad sense, has no application to such proceedings. Thus it was held than an affiliation order made against the putative father of an illegitimate child who, at the time when the child was conceived, was a juvenile within the meaning of the *Juvenile Delinquents Act*, was not barred by the statute: *Atty.-Gen. of B.C. v. Smith* (1967) 61 WWR 236, [1967] SCR 702, 2 CRNS 277, [1969] 1 CCC 244, affirming (1965) 53 WWR 129, [1966] 2 CCC 311, Can Abr (2nd) Cum Supp 575; *Morrison v. Heide* (1967) 59 WWR 222, at 228, 1967 Can Abr 308 (B.C. C.A.); *Vatai v. Vatai* (1963) 43 WWR 212, 1963 Can Abr 563 (Man. C.A.) applied.

[Note up with 12 CED (2nd ed.) *Illegitimacy*, secs. 7, 13.]

D. F. McEwen, for appellant.

J. E. Hall, for attorney-general of B.C. and respondent, Berg.

September 12, 1969.

MCINTYRE, J. — This is a stated case by a provincial judge involving an affiliation order made against the appellant under the *Children of Unmarried Parents Act*, RSBC, 1960, ch. 52. as amended. The learned judge found that the appellant was

put forward in the case of *Atty.-Gen. of Can. v. Advance T.V. & Car Radio Centre Ltd. and Freeman* (1969) 66 WWR 595. In his judgment in that case my brother Dickson, speaking for the court, gave great weight to the principles enunciated by the Supreme Court of Canada in *Corcoran v. Reg.* [1968] SCR 765, 69 DLR (2d) 174. And he referred to several other cases relating to the same problem. Again leave to appeal to the Supreme Court of Canada was denied by the Supreme Court of Canada on December 19, 1968. I would affirm those principles and I am of the view that they apply in the case before us and ought to be followed.

I would answer the first question in the affirmative and allow the appeal. The order made by the learned magistrate quashing the information should be reversed and set aside and the matter remitted to the learned magistrate for trial.

In the circumstances the second question does not require an immediate answer. However, if during the course of the trial it should appear that particulars are needed in order that the case for the accused may be fully and propery presented, they should be ordered.

SASKATCHEWAN

MAGISTRATE'S COURT — JOHNSON, P.M.

Regina v. Paus

Game Laws — Following Tracks of Deer — Whether "Hunting" — Game Act, S. 2 (g).

Sec. 2 (*g*) of *The Game Act, 1967*, 1967, ch. 78, as amended reads: "'hunting' includes * * * chasing, pursuing, worrying, following after or on the trail of, searching for, shooting at, stalking or lying in wait for any animal or bird." A distinction is to be drawn between locating an area in which to hunt game at some future time, and searching for a particular animal by following its tracks; the latter constitute an offence under the Act.

[Note up with 12 CED (2nd ed.) *Game Laws*, secs. 3, 5; 3 CED (CS) *Words and Phrases* (1947-1967 Supps.).]

D. L. Tennent, for crown.

C. R. Wimmer, for defendant.

January 27, 1969.

JOHNSON, P.M. — In this case, Mr. Paus was charged with an offence under sec. 19 (1) (*b*) of *The Game Act, 1967*, 1967,

ch. 78. The case came before me and was tried in Balcarres on December 24, 1968, and was adjourned to Fort Qu'Appelle on this date, namely, January 27, for judgment.

Counsel were to give written arguments to me on or before January 17, 1969, which have been done. I thank counsel for the able and constructive briefs submitted. At the conclusion of the trial I made certain findings of the facts which were tape recorded and I shall not repeat them at this time.

References in my judgment to "the Act," or *"Game Act,"* refer to *The Game Act, 1967,* as amended by 1968, ch. 26. Any reference to deer or game shall mean big game defined in sec. 2 (*a*) of the said *Game Act.* All sections referred to even if not read in full shall be to sections of *The Game Act, 1967,* including the 1968 amendments.

The issue is, "Does searching or looking for deer tracks come within the definition of hunting in *The Game Act, 1967?"* The issue may be a narrow one, but it is also a difficult one.

I quote from the interpretation section, sec. 2 of *The Game Act, 1967*:

> "2 (*a*) — 'big game' includes pronghorn antelope, bear, and any member of the deer family whether known as caribou, deer, elk, moose, or otherwise.
>
> * * *
>
> "(*g*) — 'hunting' includes * * * chasing, pursuing, worrying, following after or on the trail of, searching for, shooting at, stalking or lying in wait for any animal or bird."

It is to be observed that in the definition section the word "hunting" includes certain things. Where a defining section of the statute states that the word to be interpreted or defined includes so and so, the interpretation or definition is extensive, and must be construed as comprehending not only such things as they signify according to their natural import, but also the things as they are interpreted in the section that they shall include. If the section had employed the word "means" instead of "includes" the definition would then have been explanatory and restrictive. The authority for this proposition is *Dilworth v. New Zealand Commnr. of Stamps* [1899] AC 99, 68 LJPC 1, and *In re Sask. Co-op. Elevator Co.* [1933] 3 WWR 669, at 671 (Sask.).

Therefore, I may look to the plain, ordinary and natural meaning of the word "hunting." The following cases have

considered the definition of this word: *Rex v. Oberlander* (1910) 13 WLR 643, 15 BCR 134, 16 CCC 244, *per* Gregory, J. The only evidence in this case was that the defendant went out with a gun to look for deer but did not find any. The Act under which the charge was laid made it unlawful to at any time hunt, take, or kill any animal. However, there was no definition of the word "hunt" or "hunting" in the Act under which the charge was laid. It was held in that case that the word "hunt" in that statute meant to pursue some particular animal, and as there was no evidence of this the charge was dismissed.

Gregory, J. states at p. 646: " * * * and the word 'hunt' in its natural sense means to pursue, to shoot at, or at least do something more than look for."

In *Reg. v. Huskins* (1960) 32 CR 276 (N.S.), Rand, P.M. gave the judgment. The headnote reads:

> "Accused was charged that he hunted a migratory game bird during the night, contrary to s. 16 (1) of the regulations under the Migratory Birds Convention Act. The defence was that in the late afternoon on the day in question the accused went to the area to hunt, that he shot at a goose and believed he killed it. He later tried to find the bird but darkness set in. Game wardens checking the area gave evidence of hearing shots being fired. The accused denied shooting at night. A question arose whether the actions of accused came within the definition of 'hunt' in s. 3 (*e*) of the regulations.
>
> *"Held,* the charge should be dismissed as it was not illegal to search after sunset with the object of recovering a migratory game bird which had been shot and killed before the legal time for hunting had expired."

Rand, P.M. referred to the *Oberlander* case, *supra,* at pp. 277, 278 and 279. I quote from p. 279:

> "Coming back to the definition in the *Oberlander* case, the word 'hunt' in its natural sense means to 'pursue, shoot at, or at least do something more than look for.' The definition of 'hunt' in the migratory birds regulations, s. 3 (*e*) in addition to meaning in its natural sense to pursue, to shoot at, or at least do something more than look for, 'hunt' under the provisions of the regulations includes 'chasing, pursuing, worrying, following after, or on the trail of, stalking, or lying in wait for the purpose of taking, a migratory bird, whether or not the migratory bird is then or

subsequently captured, killed or injured.' In addition to its natural sense, under the migratory birds regulations 'hunting' includes these things also."

Prince and Myron v. Reg. (1964) 46 WWR 121, [1964] SCR 81, 41 CR 403, [1964] 3 CCC 1, reversing (1962) 40 WWR 234, 39 CR 43, [1963] 1 CCC 129:

This is a Supreme Court case, and the judgment was delivered by Hall, J. The definition of the word "hunt" as used in *The Games and Fisheries Act,* RSM, 1954, ch. 94, sec. 72 (1) as used in that section was under consideration. I quote from the judgment of Hall, J. at p. 124:

"The word 'hunt' as used in the section under review must be given its plain meaning. 'Hunt' is defined in the *Oxford English Dictionary* as:

" 'The act of chasing wild animals for the purpose of catching or killing them; to chase for food or sport; to scour a district in pursuit of game.'

"*Webster's Third New International Dictionary* defines 'hunt' as, 'To follow or search for game for the purpose and with the means of capturing or killing.' "

Rex v. Jackson (1937) 68 CCC 134 (N.B.). Judgment was given in the county court by Bennett, C.C.J. The headnote reads:

"The presence on a game reserve in the middle of the night of a person dressed in hunting clothes and equipped with loaded rifle and spot light available for use with a moment's adjustment to shoot at 'moose, caribou or deer,' without satisfactory explanation of being in that neighbourhood at such time, held sufficient circumstantial evidence of 'hunting' within the meaning of s. 4 of the Game Act (N.B.), regardless of whether or not any game was 'captured, killed or injured,' and constitutes a prima facie case warranting conviction."

Bennett, C.C.J. (at p. 137) stated that the *Game Act* of the province of New Brunswick at that date defined "hunts" as follows:

" * * * 'hunts' is defined by the Act to mean and include 'any chasing, pursuing, worrying, following after or on the trail of or in search for, shooting at, stalking or lying in wait for any game or fur bearing animal, whether or not such game or fur bearing animal is then or subse-

quently captured, killed or injured,' and game is defined as meaning moose, caribou, deer and partridge."

Bennett, C.C.J. held in this case that the defendant was in fact hunting in the sense that he was lying in wait for game, and this, of course, comes within the definition that I have just quoted.

I also refer to *Reg. v. Speight* (1958) 27 CR 300, 40 MPR 186 (N.B.), *per* Groom, P.M. The headnote (CR) reads:

> "Accused was charged with unlawfully hunting game with the assistance of an artificial light contrary to *The Game Act*, RSNB, 1952, ch. 95, sec. 22 (*g*). The evidence established that the accused along with others was observed at about 2 o'clock in the morning in an automobile parked in deer country sweeping lights over a field. He was intercepted by a game warden as he ran from the car. A rifle was picked up about 20 feet from the car. Accused denied they were hunting deer at night.
>
> "*Held*, accused was guilty of the offence as charged."

At p. 303, Groom, P.M. refers to the *Jackson* case, *supra*, as an "authority for the proposition that one may hunt without getting out of an automobile."

The *Oberlander* case, which is the first case to which I referred, was also referred to by Groom, P.M. However, I do not think it necessary to quote any or all the references as the *Oberlander* case deals with the definition of the word "hunt," and no definition section was contained in the Act under which the charge was laid in that case.

The definition of "hunting" as contained in *The Game Act* of this case is as follows:

> "1 (*j*) 'hunts' means any chasing, pursuing, worrying, following after or on the trail of, or any searching for, shooting at, stalking, or lying in wait for any game or fur bearing animal, whether or not such game or fur bearing animal is then or subsequently captured, killed or injured, and 'hunting' shall have a corresponding meaning."

I quote again from the judgment of Groom, P.M. at p. 305:

> "The definition of 'hunts' in s. 1 (*j*), includes the words 'any searching for.' Among other meanings given in the dictionary for the word search is hunt. In my opinion the words 'any searching for' in s. 1 (*j*) are to be given their ordinary meaning of looking for something regardless of the intention of doing anything with such when found."

This case also refers and deals with *prima facie* evidence as provided for under the Act in this case, and also to the defence evidence necessary to rebut *prima facie* evidence. I shall refer later again in the judgment to this case.

From the above cases, it will be seen that the definition contained in our *Game Act* is much wider than the plain ordinary natural meaning given to the word "hunt," and this is so even though the definition is not restricted to all the things mentioned therein. The consideration of the meaning of the word "hunt" does not therefore provide an answer to the issue as previously stated. Further, none of the cases cited above deal directly with the issue in question, namely: "Is there a distinction between 'hunting' as defined in *The Game Act, 1967,* and spotting or locating an area in which to hunt game?" In my opinion, there is a distinction and if facts are proven to show that a person is searching for an area in which to hunt at some future time, rather than searching for an animal as stated in the definition, this would *not* constitute hunting as defined. Therefore, if a person was searching for deer tracks for the purpose of locating an area in which to hunt at some future time, and the said person finds deer tracks and has no intention of immediately following after, chasing or pursuing any game animal who presumably made the tracks, this would *not* constitute hunting as defined in the Act. On the other hand, if a person is searching for deer tracks for the purpose of immediately following along the deer tracks or deer trail in order to pursue, chase, stalk, or lay in wait for any big game animal, this *would* constitute hunting as defined in the Act. Under the rules of statutory interpretation other sections of an Act may be referred to in order that the sections of an Act may be read in context. Sec. 30 of *The Game Act, 1967,* makes it an offence to locate game and communicate the location thereof to a person on the ground for the purpose of hunting game. Therefore, this section makes it an offence to locate big game in a certain manner, hence it would appear there is a distinction between locating game and hunting game.

Further, a person might wish to locate or spot game for purposes other than hunting, such as photographers or naturalists who might only wish to take pictures or to observe the animal itself in its natural habitat. To determine whether a person is hunting or locating or spotting game is a question of fact. Matters which may be included in reaching such a determination are: The area where the person is found, the presence of game in the area or reputed presence thereof, whether riding in a vehicle or on foot, the manner of dress,

the hunting equipment in possession of the person and, if the equipment is found in a vehicle, the place or position where found; and such intent of the person as can be ascertained by word of mouth or by the person's actions. The above matters are not an all-inclusive list as there may be and usually are other relevant facts to be considered in each separate case. Further, the intent of the person when found, and the time when found are matters to be considered. With all due respect I do not agree with the views expressed by Groom, P.M. in the *Speight* case on p. 305, and I quote:

> "The definition of 'hunts' in s. 1 (*j*) incudes the words 'any searching for.' Among the other meanings given in the dictionary for the word search is hunt. In my opinion the words 'any searching for' in s. 1 (*j*) are to be given their ordinary meaning of looking for something regardless of the intention of doing anything with such when found."

If such a proposition is correct then there would be no distinction between locating an area to hunt game, *i.e.*, locating game and hunting game. Further, I believe the case can be distinguished by a comparison between the definition section in that case, and the definition section in our present *Game Act*. The words "is then or subsequently captured" appear in the definition of "hunt" in the *Speight* case, they do not appear in the definition of our *Game Act*. I also refer to the Migratory Bird Regulations under the *Migratory Birds Convention Act*, RSC, 1952, ch. 179. These are 1968 regulations and at sec. 2 (h) the definition of "hunting" is given, and the same words appear at the end of that definition, that it, "is then or subsequently captured or killed or injured."

This is practically the same definition as in the *Speight* case, but is different again as I pointed out from the definition contained in *The Game Act, 1967*.

Again, in the *Speight* case, the definition contains the words " 'hunts' means," whereas in our *Game Act* the definition contains the words " 'hunting' includes," and I have previously referred in my judgment to the difference between the wording in definition sections where the word "means" is used and where the word "includes" is used.

Also, under the definition contained in our *Game Act*, I do not believe it is necessary to consider the meanings of the words "hunt" and "hunts for" in the manner those words were considered in the *Speight* case, and the other cases referred to therein, including the *Oberlander* case, by Groom, P.M. on pp. 304 and 305.

Further, the facts that were found in the *Speight* case were that two lights were shone out of the ranchwagon vehicle, and the defendants were looking for deer.

Applying the law as I have interpreted it to the facts of the present case, I am satisfied beyond reasonable doubt that the accused was searching for deer tracks for the purpose of hunting, rather than for the purpose of locating an area in which to hunt game in the morning.

At the conclusion of the trial on September 24 last, I found as a fact that the defendant and his wife went into the stubble field for the purpose of "romance," *and* for the purpose of searching for deer tracks in the car lights. On the other hand, I also found as a fact that the defendant was apprehended by Cst. Yatskowski of the R.C.M.P. approximately five miles north and four miles west of Balcarres in the province of Saskatchewan at about 1:30 a.m. on November 13, 1968. The defendant was accompanied by his wife in a Cadillac car and inside the vehicle a 410 shotgun, a 308 rifle, a spotlight, a cardboard box, contents consisting of eight 410 shotgun shells, nine 16 gauge shotgun shells, 37 308 shells soft point cartridges, a belt, hunting knife and sheath, binoculars and red hunting overalls, all of which were seized later at the detachment in Balcarres and were put in as exhibits at trial. All the said equipment was accessible. However, the guns were encased in the gun cases and they were not loaded. The spotlight would not work because the cigarette lighters in the Cadillac auto were not in working order. Also there was no evidence that the spotlight itself was used.

Cst. Yatskowski in his evidence said the defendant told him he was searching for or looking for deer tracks. The accused in his evidence denied making this statement to the constable. Therefore, there was a conflict in respect of this testimony and I accepted the evidence of Cst. Yatskowski in this regard. My decision was made on the matter of credibility of the two witnesses, and in my opinion the credibility of the defendant was necessarily weakened by my finding.

Further, the statement of the defendant that he went to the field for the purpose of "romancing with his wife" was not made to the constable in the country, nor later that morning at the detachment, nor the next day at the detachment, but for the first time at trial. Argument has been submitted as to whether this explanation was a reasonable one and worthy of belief considering its nature and the time when it was made.

502

I found as a fact that the defendant did go to the field for this purpose, but not for this purpose alone.

I cannot and do not give as much weight to this evidence as if it had been made to Cst. Yatskowski in the country or even later the same morning when the defendant was in the R.C.M.P. detachment in Balcarres for approximately three hours.

The weight that I do attach to this evidence is not sufficient for me to make a finding that they went to the country for one purpose mainly, namely, "romance."

The weight which I attach to the evidence of the defendant that he was not hunting in that he did not intend to follow up any deer tracks or pursue, chase or shoot any deer, is not sufficient to create a real doubt in my mind that this was his intention; nor is that part of the defence evidence which I have accepted sufficient to create a real doubt in my mind that the defendant was not hunting, as against the crown evidence which, in my opinion, establishes a *prima facie* case under sec. 84 of *The Game Act, 1967*.

Sec. 84 of *The Game Act, 1967*, provides:

> "84. The carrying of a gun or rifle in a locality where any big game animal or game bird may reasonably be expected to be found is *prima facie* evidence of hunting within the meaning of this Act."

In regard to the legal aspects of *prima facie* evidence created by statute I have considered the following cases: *Vachon v. Reg.* (1965) 44 CR 238 (Que. C.A.): To rebut the presumption of guilt the accused must produce plausible, logical and reasonable explanations. Also *Richler v. Reg.* [1939] SCR 101, 72 CCC 399: The explanation must reasonably be true; *Reg. v. Jones* (1960) 128 CCC 230 (B.C. C.A.): The evidentiary value of the explanation being reasonable is a question of weight of evidence and that is essentially a question of fact for the learned trial judge; *Reg. v. Chutskoff* (1963) 42 WWR 655 (Sask.): Hughes, D.C.J. stated the principle that a real doubt must be raised by accused to rebut a *prima facie* case in order to be acquitted; *Reg. ex rel Bourque v. Pace* (1968) 3 CRNS 285: This is a judgment of the county court in Nova Scotia in 1968 by O'Hearne, C.C.J. See also the annotation to this case by Kenneth L. Chasse as contained on pp. 290-301. This annotation is entitled "Presumptions and inferences" and gives a comprehensive review of the cases in

regard to *prima facie* evidence and the shifting onus sections contained in various statutes.

In applying that law I have already stated the weight which I attached to the evidence of the crown and the accused in regard to *prima facie* evidence as contemplated in sec. 84 of *The Game Act, 1967.*

Therefore, viewing the evidence as a whole and giving the weight to certain parts of that evidence as above indicated, I find the defendant guilty of the offence as charged.

Pursuant to sec. 73 (1) (*b*) of *The Game Act, 1967,* I find that none of the articles seized and filed as exhibits was used in connection with the offence charged, and make an order that Exs. P 1 to P 5 inclusive shall be returned to the defendant after time for appeal has expired. Ex. P 6, a second unused deer seal, shall be retained on file and is not included in the above order.

In view of the possible importance of having an appellate decision on the legal definition of "hunting" in *The Game Act, 1967,* I fix the cost of appeal in the sum of $50, this, of course, being in addition to the fine imposed.

SASKATCHEWAN

DISTRICT COURT — MAHER, D.C.J.

Regina v. Kilgore

Criminal Law — Impaired Driving — Blood Sample Analysis — Break in Continuity of Possession — Effect of — Certificate of Analysis — Cr. Code, S. 224.

Where, on a charge under the *Criminal Code,* 1953-54, ch. 51, sec. 223, the crown proposes to put in evidence a certificate of analysis of a sample of the blood of the accused, such certificate is not rendered inadmissible by reason only that there appears to be a break in the continuity of possession, if there is evidence establishing that the tube or other vessel containing the blood came into the hands of the analyst with its original seals, placed when the sample was taken, intact: *Reg. v. Donald* (1958) 41 MPR 127, 28 CR 206, 121 CCC 304, 1958 Can Abr 314 (N.B. C.A.); *Rex v. Kolkiczka* [1933] 1 WWR 299, 24 Can Abr 545 (Man.) applied; *Rapchalk v. Atlas Assur. Co.* (1967) 60 WWR 747, at 752, 1967 Can Abr 225 (Sask.) distinguished.

It is no objection to a certificate under sec. 224 (5) (added 1959, ch. 41) that the analyst describes by its proper name the substance which is the subject of his analysis, or that he describes the vessel in which it was contained: *Schroeter v. Leys* (1969) 66 WWR 303 (Sask.) distinguished.

The written notice required to be served on an accused by *Cr. Code,* sec. 224 (7) (added 1959, ch. 41) does not have to be served a second time where, following trial by a magistrate, there is an

REGINA v. PENASSE AND McLEOD

Provincial Court (Criminal Division), District of Nipissing, Ontario, Lunney, Prov.Ct.J. March 17, 1971.

Game and fisheries — Selling fish caught without a licence — Statute providing that onus on accused to prove lawful excuse in prosecutions in respect of "taking, killing, procuring, or possessing" fish — Whether offence charged within terms of section — Whether onus on accused to prove lawful excuse — Game and Fish Act, 1961-62 (Ont.), ss. 64(2), 81(a), 38(1).

A prosecution for being concerned in the sale of fish taken without a commercial licence contrary to s. 64(2) (am. 1970, c. 53, s. 9(2)) of the *Game and Fish Act*, 1961-62 (Ont.), c. 48 (now R.S.O. 1970, c. 186, s. 69(2)), is not within the terms of s. 81(*a*) (now s. 89(*a*)), which provides that in a prosecution in respect of "taking, killing, procuring or possessing . . . fish" the onus is upon the person charged to prove the fish was lawfully taken. None of possession, taking, killing or procuring of fish is an ingredient of the offence charged, which can be committed without any of these acts being proved against the accused. Therefore the onus remains on the Crown to prove the unlawful taking.

Indians — Fishing rights — Charge of unlawfully selling fish caught without a licence — Application of statute made "Subject to terms of any treaty" — Treaty in effect reserving "full and free privilege . . . to fish . . . as they have heretofore been in the habit of doing" — No evidence to show any acts of accused going beyond rights secured by treaty — Accused acquitted — Crown must prove inapplicability of treaty beyond reasonable doubt — Robinson Treaty, 1850 — Game and Fish Act, 1961-62 (Ont.), ss. 81(a), 64(2).

[*R. v. Moses*, [1970] 5 C.C.C. 336, [1970] 3 O.R. 314, 13 D.L.R. (3d) 50, refd to]

EDITORIAL NOTE: This decision only recently came to our attention but was thought of sufficient importance to report at this time.

TRIAL of the accused on a charge of selling fish caught without a licence contrary to s. 64(2) of the *Game and Fish Act, 1961-62* (Ont.).

J. J. Blais, for accused.
John Inch, for the Crown.

LUNNEY, PROV.CT.J.:—In this case George Penasse, Rita Penasse, Stella McLeod, Dennis Goulais and Dwylla Goulais, are charged that between the dates of September 1, 1970, and October 2, 1970, at the Nipissing Indian Reserve No. 10, in the District of Nipissing, unlawfully did be concerned in the sale of yellow pickerel taken from Ontario waters by a person or persons without a commercial fishing licence, contrary to s-s. (2) of s. 64 of the *Game and Fish Act*, 1961-62 (Ont.), c. 48 as amended [now R.S.O. 1970, c. 186, s. 69(2)].

505

Subsection (2) of s. 64 of the *Game and Fish Act* as amended by 1970, c. 58, s. 9(2), now reads as follows:

> (2) No person shall sell, offer for sale, purchase or barter, or be concerned in the sale, purchase or barter, of yellow pickerel (also known as pike-perch, walleye or dore), pike, lake trout or sturgeon taken from Ontario waters by angling or taken in any other manner by a person with a commercial fishing licence.

At the conclusion of the Crown's case it was conceded that there was no evidence to connect Dennis Goulais or Dwylla Goulais with the offence charged and it was accordingly dismissed against them. The Crown abandoned the prosecution of the charge against Rita Penasse. The matter has now come before me for judgment on the issue of the guilt of the two remaining defendants, namely — George Penasse and Stella McLeod.

The evidence establishes that George Penasse requested one Clifford Peer to see if he could sell some fish. Clifford Peer is a 62-year-old resident of the City of Hamilton, Ontario, who operates a truck through the resort areas of this part of Northern Ontario during the summer months selling produce, fresh vegetables and the like. It was part of his ordinary round of calls to stop in at Garden Village which is located in Nipissing Indian Reserve No. 10. Acting upon the said request of the defendant George Penasse, Mr. Peer established an outlet for fish by an arrangement with a company known as Hamilton Findlay Fish Company and he subsequently delivered fish to the Hamilton Findlay Fish Company on several occasions, received money for these fish from Hamilton Findlay Fish Company and with that money or some part of it, purchased produce which he then gave to, among others, George Penasse. The evidence of Clifford Peer is that at least on one occasion he got fish from the defendant Stella McLeod for delivery and sale to Hamilton Findlay Fish Company. There are no commercial fishing licences permitting the taking of yellow pickerel from any Ontario waters in this part of Ontario.

One of the several defences proposed to the Court by counsel for the defendants is based upon their status and rights as Indians under a treaty known as the Robinson Treaty, 1850, and dealt with recently in the case of *R. v. Moses*, [1970] 5 C.C.C. 356, [1970] 3 O.R. 314, 13 D.L.R. (3d) 50.

For the purposes of this decision it is admitted that these defendants are descendants of a signatory of the Robinson Treaty and would be in the same position to enjoy the rights

conferred by the Robinson Treaty as the defendant in the *Moses* case.

I believe that I am bound by this decision and, if it is applicable to the facts in the case before me, I must apply it.

In the *Moses* case, Little, D.C.J., held that [at pp. 365-6]: ". . . no derogating legislation has been enacted by the Parliament of Canada to restrict in any way the right of Indians entitled to the benefits under the Robinson Treaty from hunting moose at any time on unoccupied Crown lands". His Honour further held that the defendant had satisfied the onus cast upon him by s. 81(*a*) of the *Game and Fish Act, 1961-62*, and therefore, did not commit an infraction of s. 38(1) of the *Game and Fish Act, 1961-62*, in hunting moose without a licence during a closed season.

Section 81(*a*) [now s. 89(*a*)] of the *Game and Fish Act, 1961-62*, reads as follows:

> 81. In prosecutions under this Act in respect of,
>
> (*a*) taking, killing, procuring or possessing game or fish, or any part thereof, the onus is upon the person charged to prove that the game or fish or part thereof was lawfully taken, killed, procured or possessed by him;

This prosecution is not one of those contemplated by s. 81(*a*) of the *Game and Fish Act, 1961-62*. Neither the possession, taking, killing nor procuring of fish is an ingredient of the charge. The offence of being concerned in the sale of fish contrary to s. 64(2) could be committed without any of these things beings proved against the accused. For instance a go-between who brings a buyer and seller together in a transaction prohibited by s. 64(2) could be properly charged and convicted of an offence under this section. This prosecution is simply not "in respect of taking, killing, procuring or possessing fish". Evidence of one or more of these acts might be adduced in a prosecution on a charge of being concerned in the sale of fish contrary to s. 64(2) but that still would not make the prosecution a prosecution in respect of these matters, it would still be a prosecution in respect of being concerned in the sale of fish etc., as set out in s. 64(2).

The application of the onus section is a very important distinction between this case and that of the *Moses* case.

The Robinson Treaty, which has been filed as an exhibit in these proceedings, provides in part: ". . . and further to allow the said Chiefs and their Tribes the full and free privilege to hunt over the Territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing; . . .".

507

If the onus were on the defendants under s. 81 it might well be argued that to make out a defence under the treaty they would have to show by evidence what were the actual fishing practices "heretofore" *i.e.*, prior to the execution of the treaty in 1850, and that the actions of the defendants giving rise to the present charge against them came within the intent and meaning of the treaty. The onus on the Crown does not shift, however, and the evidence must show beyond any reasonable doubt that the defendants are subject to the provisions of s. 64(2) of the *Game and Fish Act, 1961-62*. The fact-question implicit in the wording of the treaty therefore, namely, the meaning and effect of the limiting words "as heretofore" are a problem for the prosecution and not the defence in this case. There is no evidence to suggest, let alone show, that these defendants were acting outside the scope of their rights under the treaty.

It may be put forward that it is not incumbent on the Crown to negative any and every possible exception, excuse or exclusion of the application of a general statute. To apply this principle here would be to put the cart before the horse. The treaty preceded the statute. The treaty secures substantive rights to the defendants. These rights are theirs unless they have been subsequently abrogated, derogated from or otherwise diminished. In the trial of an issue involving Indians asserting rights under such a treaty where the treaty is older than the statute on which the prosecution is founded, it would seem that the onus should be on the Crown to show that the statute abrogated, derogated from or diminished the treaty right asserted. Further, the application of the *Game and Fish Act, 1961-62*, to these defendants, is, by s. 87 of the *Indian Act*, R.S.C. 1952, c. 149 [now s. 88, R.S.C. 1970, c. I-6] "Subject to the terms of any treaty . . .". In the absence of the availability to the Crown of an onus section such as s. 81 of the *Game and Fish Act, 1961-62*, it is up to the Crown to bring the defendants within the statute, and not the other way about.

I can only repeat, in paraphrase, the decision of Little, D.C.J., that in the case at bar no derogating legislation has been enacted by the Parliament of Canada to restrict in any way the rights these Indians are entitled to under the Robinson Treaty, and the Crown has failed to show that the evidence in this case discloses any act on the part of the defendants that goes beyond the rights secured to them by the Robinson Treaty.

On this basis, therefore, this case must be dismissed and it is not necessary to go further into the evaluation of the evi-

dence to determine whether there has or has not been a failure on the part of the prosecution to prove its case under s. 64(2) irrespective of the question of the treaty rights of the defendants.

The dismissal of this prosecution against these Indians may for them however prove to be Pyrrhic victory because it is difficult to see how their status as beneficiaries of the Robinson Treaty would constitute a defense for anybody else who becomes concerned in the sale of yellow pickerel taken from Ontario waters by a person without a commercial fishing licence, even if it were proved that the fishermen involved were beneficiaries of the Robinson Treaty.

There is a further serious aspect of this matter and that is that if there is not at the present time any effective control on the quantity of fish that may be taken from the waters of Lake Nipissing and adjacent Ontario waters regardless of the status or treaty or other rights of the person so taking such fish, then the entire Nipissing fishery and with it a very considerable tourist industry in Northern Ontario from which Indians too derive benefits, is gravely threatened.

Effective legislation to protect and preserve the fishery, whether it is enacted by the Band council, the Parliament of Canada or some other competent authority is urgently required. If the fishery is not protected all the residents of this part of Northern Ontario whether Indians or not will be seriously adversely affected. In view of the seriousness of these issues, I take the liberty of expressing the hope that this matter will be pursued, either by way of appeal of this decision, or effective legislation or both.

Accused acquitted.

REGINA v. FRY

Ontario High Court of Justice, Lacourciere, J. September 14, 1972.

Motor vehicles — Traffic ticket information — Duplicity — Printed form charging "speeding" with blanks for speed and speed limit or other offences contrary to Highway Traffic Act — Accused charged with careless driving — Portion of printed form relating to speeding not crossed out — Whether traffic ticket duplicitous — Cr. Code, s. 721(1)(b) — Summary Convictions Act (Ont.), ss. 2, 7(5) — O.Reg. 276/71 — Highway Traffic Act (Ont.), ss. 83, 82.

A traffic ticket charging an accused with careless driving contrary to the *Highway Traffic Act*, R.S.O. 1970, c. 202, which reads "speeding (over limit)——m.p.h. in a——m.p.h. zone", or "Careless driving contrary to

1963

DEMENOFF v. THE QUEEN

Fauteux J.

Hence, this Court has no jurisdiction and the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: Rankin, Dean & Munro, Vancouver.

Solicitors for the respondent: Ewart, Kelley, Burke-Robertson, Urie & Butler, Ottawa.

1963

RUFUS PRINCE AND ROBERT MYRON ..... APPELLANTS;

*Nov. 18
Dec. 16

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Indians—Game laws—Hunting with night light contrary to s. 31(1) of The Game and Fisheries Act, R.S.M. 1954, c. 94—Whether prohibition applies to Treaty Indians—Whether word "hunt" in s. 72(1) of the Act subject to limitations in s. 31(1)—The Manitoba Natural Resources Act, R.S.M. 1954, c. 180, s. 13.

The appellants were charged with unlawfully hunting big game by means of night lights, contrary to s. 31(1) of *The Game and Fisheries Act*, R.S.M. 1954, c. 94. The appellants were Treaty Indians and were hunting deer for food for their own use and on lands to which they had the right of access. They were acquitted by the magistrate, but their acquittal was set aside by the Court of Appeal. They were granted leave to appeal to this Court.

Held: The appeal should be allowed and an acquittal directed.

In regard to Indians, the word "hunt" as used in s. 72(1) of *The Game and Fisheries Act* was not ambiguous nor subject to any of the limitations which are imposed by s. 31(1) upon non-Indians.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], setting aside the appellants' acquittal by a magistrate on a charge under s. 31(1) of *The Game and Fisheries Act* of Manitoba. Appeal allowed.

Duncan J. Jessiman, Q.C., for the appellants.

Benjamin Hewak, for the respondent.

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

[1] (1962), 40 W.W.R. 234.

1963

PRINCE AND MYRON v. THE QUEEN

Gerald LeDain, Q.C., for the Attorney-General of Quebec, intervenant.

S. Freedman, for the Attorney General of Alberta, intervenant.

The judgment of the Court was delivered by

HALL J.:—The appellants, both of them Treaty Indians, were charged before Magistrate Bruce McDonald of Portage la Prairie, Manitoba:

> That they did on or about the 27th day of October, A.D. 1961, at or near the Rural Municipality of South Cypress, in the Province of Manitoba, unlawfully hunt big game by means of night lights, contrary to the Provisions of the Game and Fisheries Act and Regulations, Section 31(1).

Section 31(1) of *The Game and Fisheries Act*, R.S.M. 1954, c. 94, provides as follows:

> 31(1) No person shall hunt, trap or take any big game protected by this Part and the regulations by means of night lights of any description, traps, nets, snares, baited line, or other similar contrivances, or set such traps, nets, snares, baited line, or contrivance for such big game at any time, and, if so set, they may be destroyed by any person without incurring any liability for so doing.

The learned Magistrate acquitted the appellants because the term "night lights"

> . . . as used in the above subsection was not capable of definition, that the land upon which the hunting was being done was land to which the Indians had access in that there were no prohibition signs posted, and that the Indians were entitled, in any event, to hunt in any manner they saw fit on land to which they had access.

The Crown took an appeal by way of stated case to the Court of Appeal for Manitoba[1]. The questions propounded were as follows:

> (*a*) having found that Rufus Prince, George Prince, and Robert Myron were hunting big game by means of a spotlight was I right in holding that such spotlight was not a night light within the meaning of Section 31(1) of The Game and Fisheries Act, R.S.M. 1954, Cap. 94;
>
> (*b*) was I right in interpreting the term "night lights" as contained in Section 31(1) of The Game and Fisheries Act, R.S.M. 1954, Cap. 94, as a classification or description of an object rather than a method or means of hunting;
>
> (*c*) having found that the land upon which Rufus Prince, George Prince and Robert Myron were hunting was land that was occupied

[1] (1962), 40 W.W.R. 234.

and under cultivation and privately owned land, was I right in holding that such land was land to which the said Rufus Prince, George Prince, and Robert Myron had a "right of access";

(*d*) having found that the land upon which Rufus Prince, George Prince and Robert Myron were hunting was land to which the said Rufus Prince, George Prince and Robert Myron had "a right of access", was I right in dismissing the charge under Section 31(1) of The Game and Fisheries Act on this ground.

The Court of Appeal answered questions (*a*) and (*b*) in the negative; question (*c*) in the affirmative and question (*d*) in the negative, Schultz and Freedman JJ.A. dissenting as to (*d*). The Court accordingly directed that the case be referred back to the learned Magistrate with a direction that conviction should be entered against the three accused and that appropriate penalties should be imposed.

Leave to appeal to this Court was granted on January 22, 1963.

It was admitted in this Court that at the time in question in the charge the appellants were Indians; that they were hunting deer for food for their own use and that they were hunting on lands to which they had the right of access. These admissions are fundamental to the determination of this appeal.

Section 72(1) of *The Game and Fisheries Act*, R.S.M. 1954, c. 94, reads as follows:

72(1) Notwithstanding this Act, and in so far only as is necessary to implement The Manitoba Natural Resources Act, any Indian may hunt and take game for food for his own use at all seasons of the year on all unoccupied Crown lands and on any other lands to which the Indian may have the right of access.

The above section refers to *The Manitoba Natural Resources Act*, R.S.M. 1954, c. 180, of which s. 13 thereof reads as follows:

13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the law respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, with which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

There was a suggestion that the appeal involved a constitutional issue as to the validity of *The Game and Fisheries Act*, R.S.M. 1954, c. 94, in respect to Indians. The

1963

PRINCE AND MYRON v. THE QUEEN

Hall J.

Attorney-General for Ontario gave Notice of Intervention and the Provinces of Quebec and Alberta did likewise. Prior to the appeal being heard, the Province of Ontario filed a Notice of Withdrawal. The Provinces of Quebec and Alberta filed factums and were represented by counsel at the hearing. They were not heard as the Court held that no constitutional issue arose in the appeal. The agreement dated December 14, 1929, between the Government of Canada and the Government of the Province of Manitoba containing, *inter alia,* said s. 13, pursuant to which *The Manitoba Natural Resources Act* was passed acquired the force of law by virtue of *The British North America Act,* (1930), 21 George V, c. 26.

The sole question for determination is whether the word "hunt" as used in s. 72(1) of *The Game and Fisheries Act,* R.S.M. 1954, c. 94, in regard to Indians is ambiguous in any way or subject to the limitations contained in s. 31(1) of the said Act.

With respect, I agree with the reasons of Freedman J.A. in his dissenting judgment and also with the statement by McGillivray J.A. in *Rex v. Wesley*[1], when he said:

> If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.

The word "hunt" as used in the section under review must be given its plain meaning. "Hunt" is defined in the Oxford English Dictionary as:

> The act of chasing wild animals for the purpose of catching or killing them; to chase for food or sport; to scour a district in pursuit of game.

Webster's Third New International Dictionary defines "hunt" as: "To follow or search for game for the purpose

[1] (1932), 2 W.W.R. 337 at 344, 26 Alta. L.R. 433, 58 C.C.C. 269.

and with the means of capturing or killing." It is not ambiguous nor subject to any of the limitations which s. 31(1) imposes upon the non-Indian.

I would allow the appeal with costs throughout and direct that the acquittal of the appellants be confirmed. There should be no order as to costs for or against the Attorneys-General of Quebec and Alberta.

Appeal allowed and acquittal directed, with costs.

Solicitors for the appellants: Johnston, Jessiman, Gardner & Johnston, Winnipeg.

Solicitor for the respondent: The Attorney General for Manitoba.

1963

ENGA CHRISTINE CAMPBELL (*Plaintiff*) ..... APPELLANT; *Oct. 9, 10 Dec. 16

AND

THE ROYAL BANK OF CANADA (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Invitor and invitee—Water accumulation on bank floor result of people entering with snow on footwear—Customer slipping and falling—Unusual danger—Failure to use reasonable care—Defence of volenti non fit injuria.

The plaintiff sustained injuries in a fall occasioned by slipping in some water which had gathered on the floor of the defendant's bank. It was a snowy day and the water had accumulated as the result of people entering the bank with snow on their footwear. The plaintiff, who was not a regular customer of the bank in question, entered the premises for the purpose of cashing a cheque, and after having endorsed the cheque she walked to one of the tellers' cages where she was told that she would have to get the cheque initialled by the accountant or the manager. As she left to attend to this, her feet slipped from under her and she fell heavily to the watery floor and was injured. The plaintiff recovered substantial damages at trial, but, on appeal, the Court of Appeal reversed the judgment of the trial judge by a majority decision.

Held (Martland and Judson JJ. dissenting): The appeal should be allowed.

Per Judson, Hall and Spence JJ.: The state of the floor on the afternoon of the accident constituted an "unusual danger". Not even the

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

administered a form of lumbar roll to him, with disastrous results. Extrusion of the disc occurred, with partial paralysis resulting, for which immediate surgery became necessary.

I agree that the defendant must be held accountable for the plaintiff's injury. I would dismiss the appeal with costs.

GUY, J.A. concurs in the reasons of Schultz, J.A.

MANITOBA

COURT OF APPEAL

Before Miller, C.J.M., Schultz, Freedman, Guy and Monnin, JJ.A.

Regina v. Prince et al

Game Laws — Indians — Application of Provincial Game Laws — Game and Fisheries Act, S. 72 (1) — Manitoba Natural Resources Act, S. 13 — Whether Indians Hunting for Food Restricted by Provincial Game Laws — Hunting with "Night Lights" — Game and Fisheries Act, S. 31 (1) — "Right of Access" to Private Occupied Lands — SS. 72 (1). 76 (2).

Per curiam: Sec. 31 (1) of *The Game and Fisheries Act*, RSM, 1954, ch. 94, prohibits hunting with the assistance of night lights of any description. "Night lights" therein means illumination of any kind.

In the absence of a prohibition, either by the posting of notices pursuant to sec. 72 (2) of said Act or otherwise, a person has access to private, occupied land for hunting purposes; cultivation of the land is immaterial. Preservation of common-law rights as to trespass does not affect this right of access.. Such land is land to which an Indian "may have the right of access" within the meaning of sec. 72 (1) of said Act.

Per Miller, C.J.M., Guy and Monnin, JJ.A., concurring:

It is clear from sec. 13 of *The Manitoba Natural Resources Act*, RSM, 1954, ch. 180, that Indians are not wholly free from the restrictions of *The Game and Fisheries Act, supra*. The manner in which they may hunt and the methods pursued by them in hunting must, of necessity, be restricted by said Act, regardless of whether said hunting is for food, sport or commercial purposes. *Rex v. Wesley* [1932] 2 WWR 337, at 345, 352, 58 CCC 269, 20 Can Abr 1156 (Alta. App. Div.) (which fails to appreciate or recognize the important principle of conservation), not agreed with. However, there can be no restriction on the quantity of game killed by Indians for food and Indians require no licence to hunt.

Conviction directed of Indian for hunting for food with night lights.

Per Freedman, J.A., Schultz, J.A. concurring, dissenting in part: *Rex v. Wesley, supra*, was correctly decided and should be applied. Sec. 72 (1) of *The Game and Fisheries Act, supra*, and sec. 13 of *The Manitoba Natural Resources Act, supra*, recognize the special position of Indians hunting for food and secure, within certain given

territories, their unrestricted right to hunt for game and fish for their support and sustenance. The provisions in said sec. 13, that provincial fish and game laws shall apply to Indians, is subordinate in character; its operation is confined to Indians only when hunting for sport or commerce. The fact that a hunting practice is unsporting is irrelevant when the hunt is not for sport, but food. That indiscriminate use of unsporting practices is prejudicial to the supply of game is true; the answer lies in the education of Indians that conservation is in their own interest.

[Note up with 12 CED (2nd ed.) *Game Laws*, secs. 2, 4, 5; 3 CED (CS) *Words and Phrases* (1946-1961 Supps.).]

B. Hewak, for the crown, appellant.

H. I. Pollock, for accused, respondents.

October 19, 1962.

MILLER, C.J.M. — This is an appeal by way of stated case from a decision of Bruce McDonald, P.M. of Portage la Prairie against the acquittal of the three accused, all of them treaty Indians and members of the band of the Long Plain Indian Reserve. The three accused had been charged with hunting deer by the use of a night light. Sec. 31 (1) of *The Game and Fisheries Act,* RSM, 1954, ch. 94, provides as follows:

> "31. (1) No person shall hunt, trap or take any big game protected by this Part and the regulations by means of night lights of any description, traps, nets, snares, baited line, or other similar contrivances, or set such traps, nets, snares, baited line, or contrivances for such big game at any time, and, if so set, they may be destroyed by any person without incurring any liability for so doing."

The magistrate acquitted the Indians because the term "night lights" as used in the above subsection was not capable of definition, that the land upon which the hunting was being done was land to which the Indians had access in that there were no prohibition signs posted, and that the Indians were entitled, in any event, to hunt in any manner they saw fit on land to which they had access.

The questions propounded in the stated case are as follows:

> "(a) Having found that Rufus Prince, George Prince and Robert Myran were hunting big game by means of a spotlight, was I right in holding that such spotlight was not a night light within the meaning of sec. 31 (1) of *The Game and Fisheries Act* [*supra*]?
>
> "(b) Was I right in interpreting the term 'night lights' as contained in sec. 31 (1) of *The Game and Fisheries Act,* [*supra*] as a classification or description of an object rather than a method or means of hunting?

"(c) Having found that the land upon which Rufus Prince, George Prince and Robert Myran were hunting was land that was occupied and under cultivation and privately owned land, was I right in holding that such land was land to which the said Rufus Prince, George Prince, and Robert Myran had 'a right of access'?

"(d) Having found that the land upon which Rufus Prince, George Prince and Robert Myran were hunting was land to which the said Rufus Prince, George Prince and Robert Myran had 'a right of access,' was I right in dismissing the charge under sec. 31 (1) of *The Game and Fisheries Act* on this ground?"

I have no difficulty at all in disposing of (a) and (b). I can see no ambiguity in sec. 31 (1). In my opinion it can only mean that hunting with the assistance of night lights of any description is clearly prohibited by the section in question. To read it otherwise would mean that the words mean nothing or that they are subject to a ridiculous interpretation. It is well known, and indeed counsel for the accused commented on it, that a light at night does attract animals and makes it very easy to kill them. These three Indians had a spotlight and one of them was sitting on the hood of the car using same to attract a deer. They had in their possession one deer which they admitted shooting earlier in the day. They also admitted they were endeavouring to shoot more. There is no dispute that the Indians were definitely using this light for the purpose of attracting deer. The other two accused were sitting in the car with the means to kill the deer when they were attracted by the light. There is nothing in the well-known rules of interpretation to be invoked. To me there is no ambiguity or uncertainty about the intention of the words of the section in question.

In addition, sec. 13 of *The Interpretation Act*, 1957, ch. 33, reads as follows:

"13. Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best insures the attainment of its objects."

This disposes, therefore, of the first two questions, both of which should be answered in the negative.

With question (c), I also find little difficulty. In my opinion the land in question, although cultivated land, was land to which the Indians had access.

Sec. 72 (1) of *The Game and Fisheries Act* reads as follows:

> "72. (1) Notwithstanding this Act, and in so far only as is necessary to implement *The Manitoba Natural Resources Act,* any Indian may hunt and take game for food for his own use at all seasons of the year on all unoccupied Crown lands and on any other lands to which the Indian may have the right of access."

The above section refers to *The Manitoba Natural Resources Act,* RSM, 1954, ch. 180, of which sec. 13 reads as follows:

> "13. *In order to secure to the Indians of the Province* the *continuance* of the *supply* of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, with which the Province hereby assures to them, of hunting,. trapping and fishing game and fish *for food at all seasons of the year* on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

The italics are mine. The italicized words emphasize that an important reason for making the *Game Act* apply is to "secure the continuance" of game and not deplete the same.

I would add that the protection given to the Indians to hunt for food and so carefully preserved to the Indians has also been accompanied by an equally urgent desire to conserve the game so the Indian food supply would continue to be available. Otherwise, the right given to the Indians to hunt for food would not be of lasting value.

Subsecs. 76 (1) and (2) of *The Game and Fisheries Act* read as follows:

> "76. (1) No person shall hunt any bird or any animal mentioned in this Part if it is upon or over any land with regard to which notice has been given under this Part, without having obtained the consent of the owner or lawful occupant thereof.
>
> "(2) Notice may be given under this Part by maintaining signs at least one foot square on or near the boundary of the land intended to be protected, or upon the shores of any water covering it or any part thereof, containing a notice in the following form, or to the like effect: 'Hunting or shooting is forbidden;' and the signs shall be not more than eighty rods apart posted in prominent places."

518

I am satisfied that unless notices are posted on the land pursuant to sec. 76 (2) a person has access thereto for shooting purposes. It is true that the owner or occupant might specifically warn people off the land and, if this were done, the person intending to shoot, whether he be Indian or not, would be prohibited from going on that land to shoot and would not be deemed to have access thereto, but in the absence of a prohibition, either by notice or otherwise, the Indians would have access to the land upon which they were found hunting. The fact that the land was cultivated does not make any difference. The fact that the common-law rights as to trespass are preserved does not make any difference to the right of access above mentioned.

The answer to question (c) should therefore be in the affirmative.

The answer to question (d) is the only one that gives difficulty. This question involves the broader question as to the extent to which Indians are subject to the provisions of *The Game and Fisheries Act*. Indian treaties were discussed in argument before us and Mr. Hewak for the crown also mentioned various historical facts as to what was said to the Indians at the time the treaties were signed. These facts were very interesting but, of course, do not give me much help in answering this particular question. A great deal of latitude was given to both counsel in presenting argument in view of the novelty of this question in Manitoba.

I have already set out sec. 13 of *The Manitoba Natural Resources Act*. It is clear from that section that the Indians are not wholly free from the restrictions of *The Game and Fisheries Act*, because the section (and the same law has been confirmed by an imperial statute) provides

> "that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof"

subject to the right of the Indians to hunt, trap and fish for food at all seasons of the year, etc.

The point is: Just what restrictions in *The Game and Fisheries Act* do apply to Indians? It seems to me that the manner in which they may hunt and the methods pursued by them in hunting must, of necessity, be restricted by the said Act. Mr. Pollock, counsel for the Indians, argued that they were only restricted by the provisions of *The Game and Fisheries Act* when hunting for sport or commercial purposes. I can only say

that I am unable to read any such provision into sec. 13 of *The Manitoba Natural Resources Act*. I do not think Indians are debarred from hunting for food during any one of the 365 days of any year, and can hunt for food on all unoccupied crown lands and on any land to which Indians have a right of access. I am of the opinion, though, that they have no right to adopt a method or *manner* of hunting that is contrary to *The Game and Fisheries Act*, because sec. 13 of *The Natural Resources Act* specifically provides that the *Game Act* of the province *shall* apply to Indians in some respects.

There does not appear to be any authority in this province regarding the matter, but there are at least two cases in Alberta and one in Saskatchewan, as well as a recent Northwest Territories case. This last mentioned is *Reg. v. Kogogolak* (1959) 28 WWR 376, 31 CR 12, a decision of Sissons, J. which, although it relates to Eskimo rights, nevertheless follows the principles of the *Wesley* case, *infra*.

The Saskatchewan case is *Rex v. Smith* [1935] 2 WWR 433, 64 CCC 131, wherein an Indian was convicted on a charge of carrying firearms on a game preserve contrary to *The Game Act* of Saskatchewan (then RSS, 1930, ch. 208). The appeal against conviction was dismissed by the Saskatchewan court of appeal on a stated case.

In the Alberta case of *Rex v. Wesley* [1932] 2 WWR 337, 58 CCC 269, an Indian was convicted of shooting a deer having antlers less than four inches in length, contrary to *The Game Act* of Alberta (then RSA, 1922, ch. 70). This offence took place on unoccupied crown land. On appeal by way of stated case, the court quashed the conviction.

McGillivray, J.A. in referring to *The Alberta Natural Resources Act* (then 1930, ch. 21) said at p. 344:

> "It seems to me that the language of sec. 12 is unambiguous and the intention of parliament to be gathered therefrom clearly is to assure to the Indians a supply of game in the future for their support and subsistence by requiring them to comply with the laws of the province, subject however to the express and dominant proviso that care for the future is not to deprive them of the right to satisfy their present need for food by hunting and trapping game, using the word 'game' in its broadest sense, at all seasons on unoccupied Crown lands or other lands to which they may have a right of access.

520

"I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

And at p. 345:

"It seems to me that the enacting of the section subjecting Indians to the game laws of the province in general terms is subject to a clear excepting and qualifying proviso in favour of Indians who are hunting for food to whom the game laws of the province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access."

And at p. 352:

"This does not in any wise imply that *The Game Act* of this province is *ultra vires*. I merely hold that it has no application to Indians hunting for food in the places mentioned in this section.

"It is satisfactory to be able to come to this conclusion and not have to decide that 'the Queen's promises' have not been fulfilled."

The other Alberta case is *Reg. v. Little Bear* (1958) 25 WWR 580, 28 CR 333, 122 CCC 173. This judgment was confirmed by the appellate division without written reasons in (1958) 26 WWR 335. The reasons of Turcotte, D.C.J., *supra*, were followed. This judgment of Turcotte, D.C.J. relates mainly to the right of access with which, with respect, I agree. Of course the law in Alberta prohibits anyone from shooting big game on occupied land without first obtaining the consent of the owner or occupant of the land. This provision is not in our Act and consent is only necessary in Manitoba when notices are posted on the land pursuant to the Act as above mentioned.

Certainly the reasons for judgment of McGillivray, J.A. would seem to soundly support the argument of counsel for the accused in this case but I am unable to accept that learned judge's reasoning where he says (at p. 345):

" * * * subject to a clear excepting and qualifying proviso in favour of Indians who are hunting for food to

whom the game laws of the province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access."

Nor do I agree with the learned judge's statement at p. 352 of his judgment above quoted where he states:

"I merely hold that it [*The Game Act*] has no application to Indians hunting for food in the places mentioned in this section."

Also I am unable to accept the statement of the same learned judge when he says at p. 345:

"In the result I hold that in turning over to Alberta the public domain of the province the Dominion has sought and the Province has given them assurance, which has been confirmed by the Imperial Parliament, that Indians hunting for food may kill all kinds of wild animals regardless of age or size wherever they be found on unoccupied Crown lands or other lands to which they have a right of access at all seasons of the year and that they may hunt such animals with dogs or otherwise as they see fit and that they need no licence beyond the language of sec. 12 to entitle them so to do."

Even with the great respect that I have for the opinions of McGillivray, J.A., I am unable to agree that the Indians may hunt with the freedom indicated by that learned judge. It seems to me the *Wesley* case, *supra,* failed to appreciate or recognize the important conservation principle of sec. 12 of *The Natural Resources Act of Alberta* (our sec. 13).

I do not think there can be any restriction on the quantity of game killed by Indians so long as it is for food and it is clear no licence to hunt is required, otherwise the provisions which protect the Indians and enable them to hunt for food would be meaningless. Although it was not set out in the stated case before us that these Indians were hunting for food, both counsel made to the court an admission that they were, and that the evidence before the learned magistrate so disclosed.

I would therefore say that the three Indians were guilty of the offence for which they were charged and would answer the fourth question in the negative.

I would refer the matter back to the learned magistrate with a direction that conviction should be entered against the three accused and that appropriate penalties should be imposed.

SCHULTZ, J.A. (dissenting in part) concurs with Freedman, J.A.

FREEDMAN, J.A. (dissenting in part) — The judgment of my lord the chief justice, which I have been privileged to read, makes my task measurably easier. I am in agreement with him with respect to the disposition that should be made of the first three questions in the stated case. With great respect, however, I find myself in disagreement upon the fourth question.

I have come to the conclusion that *Rex v. Wesley* [1932] 2 WWR 337, 58 CCC 269 (Alta. App. Div.), was correctly decided and that its reasoning should be applied to the matter now before us. Because the judgment of my lord the chief justice contains extensive quotations from the decision of McGillivray, J.A. in that case, I do not need to repeat those quotations here. The learned chief justice does not agree with the reasoning of McGillivray, J.A. I, however, do.

The fundamental fact of this case, as I see it, is that the accused Indians at the time of the alleged offence were hunting for food. It was not a case of hunting for sport or for commercial purposes. By sec. 72 (1) of *The Game and Fisheries Act*, RSM, 1954, ch. 94, and by sec. 13 of *The Manitoba Natural Resources Act*, RSM, 1954, ch. 180, the special position of the Indian when hunting for food is acknowledged and recognized. The clear purpose of those sections is to secure to the Indians, within certain given territories, the unrestricted right to hunt for game and fish for their support and sustenance. The statement in sec. 13 of *The Manitoba Natural Resources Act* that the law of the province respecting game and fish shall apply to the Indians is, in my view, subordinate in character. Its operation is limited to imposing upon the Indian the same obligation as is normally imposed upon every other citizen, namely, that when he is hunting for sport or commerce he must hunt only in the manner and at the times prescribed by the Act. But the ordinary citizen does not hunt for food for sustenance purposes. The Indian does, and the statute, recognizing his right to sustenance, exempts him from the ordinary game laws when he is hunting for food in areas where he is so permitted.

The matter was put thus by McGillivray, J.A. (at p. 344) in a passage not quoted in the judgment of the learned chief justice:

> "If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food 'out of sea-

son' and they are otherwise subject to the game laws of the province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

To hunt game with the aid of a night light is clearly unsportsmanlike. Here, however, the accused Indians were not engaged in sport. They were engaged in a quest for food. Once that quest was satisfied they would then be subject to the restrictions of the Act.

That indiscriminate resort to unsportsmanlike methods of hunting and fishing would be prejudicial to the supply of game and fish is no doubt true. The answer, however, lies in the education of the Indian so he will appreciate that what is in the best interests of the citizenry of Manitoba is also in his own best interests. The answer does not consist in construing the section contrary to what appears to me to be its plain and dominant purpose.

My answer to Q. 4 would be: Yes.

I would dismiss the appeal accordingly.

GUY and MONNIN, JJ.A. concur with Miller, C.J.M.

the conclusion that Koons was on duty and doing that which he was employed to do, but doing it in an unauthorized, improper and negligent manner.

We would therefore agree with the finding of the trial Judge and dismiss the appeal with costs.

Appeal dismissed.

REGINA v. PRITCHARD

Saskatchewan District Court, Battleford Judicial Centre, Bendas, D.C.J. October 23, 1972.

Indians — Charge of hunting in closed season — Exemption for "Indians" — Meaning of Indian — Game Act, 1967 (Sask.), ss. 12(1), 8 — Indian Act (Can.), ss. 110, 2(1), 11, 12 — B.N.A. Act, 1867, s. 91(24).

Game and fisheries — Hunting in closed season — Exemption for "Indians" — Meaning of Indian — Game Act, 1967 (Sask.), ss. 12(1), 8 — Indian Act (Can.), ss. 110, 2(1), 11, 12 — B.N.A. Act, 1867, s. 91(24).

The term "Indian" in the *Game Act*, 1967 (Sask.), c. 78, exempting such persons from hunting season requirements has the same meaning as in the *Indian Act*, R.S.C. 1970, c. I-6, and therefore means a person entitled to be registered as an Indian as well as a person registered as an Indian.

Evidence — Burden of proof of exception, excuse or qualification shifted by statute to accused — Charge of hunting in closed season — Exemption for Indians — Accused acquitted — Burden discharged by preponderance of evidence that accused an Indian — Cr. Code, s. 730 — Provincial Magistrates Act, R.S.S. 1965, c. 111, s. 15 — Game Act, 1967 (Sask.), ss. 12(1), 8 — Indian Act (Can.), ss. 110, 2(1), 11, 12.

Indians — Charge of hunting in closed season — Exemption for Indians — Burden of proof of exception, excuse or qualification shifted by statute to accused — Accused acquitted — Burden discharged by preponderance of evidence that accused an Indian — Cr. Code, s. 730 — Provincial Magistrates Act, R.S.S. 1965, c. 111, s. 15 — Game Act, 1967 (Sask.), ss. 12(1), 8 — Indian Act (Can.), ss. 110, 2(1), 11, 12.

APPEAL by the Crown by way of trial *de novo* from a decision of Policha, J.M.C., dismissing a charge against the accused of unlawfully hunting deer in a closed season, contrary to s. 12(1) of the *Game Act, 1967* (Sask.).

Norman F. Millar, for the Crown, appellant.
E. L. Burlingham, for accused, respondent.

BENDAS, D.C.J.:—This is an appeal by the Crown against the dismissal by Policha, J.M.C., of the information charging the respondent (accused) that "on the 18th of January, 1971, he did unlawfully hunt big game, to wit: deer, in a closed

he needed meat for food for himself and his family. That was the evidence in this case.

Counsel for the Crown did not seriously dispute that the land where the respondent was found with the carcass was unoccupied Crown land or that he had a right of access to the land where the animal was allegedly killed. I also find that the respondent was hunting "big game" in a "closed season" as those terms are defined in the *Game Act*, 1967 (Sask.), c. 78.

The chief argument of both counsel centred around the meaning of the term "Indian" as used in s. 8 of the *Game Act, 1967*, and whether the respondent was such an "Indian".

I was unable to find any reported Canadian cases dealing with that question. In 31 C.J. at p. 480, the name "Indian" is defined as follows:

> "Indians" is the name given by the European discoverers of America to its aboriginal inhabitants, Frazee v. Spokane County, 29 Wash. 278, 286. The term "Indian," when used in a statute without any other limitation, includes members of the aboriginal race, whether now sustaining tribal relations or otherwise: Frazee v. Spokane County, 29 Wash. 278, 286.

In my opinion the above definition would also be valid in Canada. However, the word "Indian" as used in s. 8 of the *Game Act, 1967*, has a limited meaning and it must be considered with reference to the *Indian Act*, R.S.C. 1970, c. I-6. The latter Act is a successor of a number of such enactments passed by the Parliament of Canada since Confederation. It should be noted that in all those Acts, the definition of the term Indian is essentially the same.

Those Acts were passed for the protection of the aboriginal Indian population. Prior to Confederation it was the reigning sovereign who assumed wardship over the Indians: see Norris, J.A., in *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613 at pp. 637 *et seq.*, 52 W.W.R. 193 [affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi]. Under s. 91(24) of the *B.N.A. Act, 1867*, the Parliament of Canada assumed exclusive legislative authority over "Indians, and Lands reserved for the Indians". By an agreement between the Government of Canada and the Province of Saskatchewan of March 20, 1930 (confirmed by 1930 (Sask.), c. 87), Canada transferred its natural resources within the Province to Saskatchewan. Section 12 of said agreement provides:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall

the conclusion that Koons was on duty and doing that which he was employed to do, but doing it in an unauthorized, improper and negligent manner.

We would therefore agree with the finding of the trial Judge and dismiss the appeal with costs.

Appeal dismissed.

REGINA v. PRITCHARD

Saskatchewan District Court, Battleford Judicial Centre, Bendas, D.C.J. October 23, 1972.

Indians — Charge of hunting in closed season — Exemption for "Indians" — Meaning of Indian — Game Act, 1967 (Sask.), ss. 12(1), 8 — Indian Act (Can.), ss. 110, 2(1), 11, 12 — B.N.A. Act, 1867, s. 91(24).

Game and fisheries — Hunting in closed season — Exemption for "Indians" — Meaning of Indian — Game Act, 1967 (Sask.), ss. 12(1), 8 — Indian Act (Can.), ss. 110, 2(1), 11, 12 — B.N.A. Act, 1867, s. 91(24).

The term "Indian" in the *Game Act*, 1967 (Sask.), c. 78, exempting such persons from hunting season requirements has the same meaning as in the *Indian Act*, R.S.C. 1970, c. I-6, and therefore means a person entitled to be registered as an Indian as well as a person registered as an Indian.

Evidence — Burden of proof of exception, excuse or qualification shifted by statute to accused — Charge of hunting in closed season — Exemption for Indians — Accused acquitted — Burden discharged by preponderance of evidence that accused an Indian — Cr. Code, s. 730 — Provincial Magistrates Act, R.S.S. 1965, c. 111, s. 15 — Game Act, 1967 (Sask.), ss. 12(1), 8 — Indian Act (Can.), ss. 110, 2(1), 11, 12.

Indians — Charge of hunting in closed season — Exemption for Indians — Burden of proof of exception, excuse or qualification shifted by statute to accused — Accused acquitted — Burden discharged by preponderance of evidence that accused an Indian — Cr. Code, s. 730 — Provincial Magistrates Act, R.S.S. 1965, c. 111, s. 15 — Game Act, 1967 (Sask.), ss. 12(1), 8 — Indian Act (Can.), ss. 110, 2(1), 11, 12.

APPEAL by the Crown by way of trial *de novo* from a decision of Policha, J.M.C., dismissing a charge against the accused of unlawfully hunting deer in a closed season, contrary to s. 12(1) of the *Game Act, 1967* (Sask.).

Norman F. Millar, for the Crown, appellant.
E. L. Burlingham, for accused, respondent.

BENDAS, D.C.J.:—This is an appeal by the Crown against the dismissal by Policha, J.M.C., of the information charging the respondent (accused) that "on the 18th of January, 1971, he did unlawfully hunt big game, to wit: deer, in a closed

season, contrary to sec. 12(1) [rep. & sub. 1968, c. 26, s. 3; 1970, c. 24, s. 7] of The Game Act, S.S. 1967, c. 78". The appeal was heard by way of trial *de novo*.

The alleged offence was committed in the Baljennie District, Saskatchewan. On January 18, 1971, Conservation Officer Harry Minnifie was in the Lizzard Lake Community Pasture inspecting the land and removing game preserve signs. At about 3:45 p.m., Mr. Minnifie came upon fresh snowmobile tracks. It appeared that something had been dragged behind the machine. After following the track for about half a mile Mr. Minnifie came upon the respondent, who was sitting on a snowmobile and with a loaded gun in his hand. The carcass of a recently killed deer was attached to the rear of the machine.

When asked by Mr. Minnifie where he got the deer the respondent replied that he had shot the animal on his father's quarter nearby and that he was taking the carcass home for food for himself and his family. The respondent further stated that he was an Indian but not a Treaty Indian, and that his occupation was farming.

According to Mr. Minnifie, the Lizzard Lake Community Pasture is federal Crown land. During winter there are no people or cattle in the pasture. During the summer months farmers from the surrounding districts are allowed to graze their cattle in the pasture upon payment of certain fees.

Mr. Minnifie further testified that there was no open season "anywhere in Saskatchewan during the month of January 1971". In cross-examination the officer was unable to indicate the exact spot where the animal was killed.

The only witness called for the defence was Mr. George Pritchard, father of the respondent. In his evidence Mr. Pritchard stated that he was a North American Cree Indian, his wife also a member of the Cree nation and that all his ancestors were Indians. During the rebellion of 1885 his father was at Frog Lake. Until about 1930 George Pritchard and his family lived at the Red Pheasant Indian Reserve. At that time he was considered a member of the Red Pheasant Indian Band. His son, Bert Pritchard, was born on the reserve. Finally, George Pritchard stated that neither his wife or his son Bert were registered Treaty Indians, but that they could be so registered if they were to apply. Both he and the respondent had always been known as Indians. George Pritchard is presently farming in the Baljennie District. He owns seven quarters of land and rents four quarters. The respondent lives with him. On January 18, 1971, he sent Bert to shoot a deer as

he needed meat for food for himself and his family. That was the evidence in this case.

Counsel for the Crown did not seriously dispute that the land where the respondent was found with the carcass was unoccupied Crown land or that he had a right of access to the land where the animal was allegedly killed. I also find that the respondent was hunting "big game" in a "closed season" as those terms are defined in the *Game Act*, 1967 (Sask.), c. 78.

The chief argument of both counsel centred around the meaning of the term "Indian" as used in s. 8 of the *Game Act, 1967*, and whether the respondent was such an "Indian".

I was unable to find any reported Canadian cases dealing with that question. In 31 C.J. at p. 480, the name "Indian" is defined as follows:

> "Indians" is the name given by the European discoverers of America to its aboriginal inhabitants, Frazee v. Spokane County, 29 Wash. 278, 286. The term "Indian," when used in a statute without any other limitation, includes members of the aboriginal race, whether now sustaining tribal relations or otherwise: Frazee v. Spokane County, 29 Wash. 278, 286.

In my opinion the above definition would also be valid in Canada. However, the word "Indian" as used in s. 8 of the *Game Act, 1967*, has a limited meaning and it must be considered with reference to the *Indian Act*, R.S.C. 1970, c. I-6. The latter Act is a successor of a number of such enactments passed by the Parliament of Canada since Confederation. It should be noted that in all those Acts, the definition of the term Indian is essentially the same.

Those Acts were passed for the protection of the aboriginal Indian population. Prior to Confederation it was the reigning sovereign who assumed wardship over the Indians: see Norris, J.A., in *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613 at pp. 637 *et seq.*, 52 W.W.R. 193 [affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi]. Under s. 91(24) of the *B.N.A. Act, 1867*, the Parliament of Canada assumed exclusive legislative authority over "Indians, and Lands reserved for the Indians". By an agreement between the Government of Canada and the Province of Saskatchewan of March 20, 1930 (confirmed by 1930 (Sask.), c. 87), Canada transferred its natural resources within the Province to Saskatchewan. Section 12 of said agreement provides:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall

> have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

The terms of the agreement were implemented by the Province when it enacted s. 8 of the *Game Act, 1967*.

The section reads:

> 8 (1) Notwithstanding anything in this Act, and in so far only as is necessary in order to implement the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the *Statutes of Saskatchewan, 1930*, Indians within the province may hunt for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.
>
> (2) For the purpose of subsection (1) the lands within game preserves, bird sanctuaries, provincial parks and wildlife management areas are deemed not to be unoccupied Crown lands or lands to which Indians have a right of access.
>
> (3) No person other than an Indian shall [illegible] in his possession the flesh of any big game or game bird which has been taken by an Indian for food as permitted under subsection (1).
>
> (4) No person other than an Indian may assist, aid, hunt with or accompany any Indian hunting big game or game birds for food as permitted under subsection (1).

Now, the term "Indian" in the said section must have the same meaning as in the *Indian Act* previously referred to. It applies to a certain group of people who have Treaty arrangements with the Government of Canada. Any other interpretation of the name "Indian", used in the said section would lead to absurdity. Should the term be given such a generic meaning then it would include Indians from the United States, temporarily visiting Canada. They have no Treaty agreements with Canada and yet they would be entitled to all the rights and privileges now enjoyed by "Indians", as defined in the *Indian Act*.

In this connection I would like to refer to s. 110 of the *Indian Act*, which provides:

> 110. A person with respect to whom an order for enfranchisement is made under this Act shall, from the date thereof, or from the date of enfranchisement provided therein, be deemed not to be an Indian within the meaning of this Act or any other statute or law.

The section would indicate that the term Indian, as used in the Act and, by inference as used in the *Game Act, 1967*, has a limited meaning and refers only to a certain class of people of Indian descent but does not include all descendants of the aboriginal inhabitants of Canada. That special class of people is defined in the present *Indian Act* as follows:

2(1) ..."Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

In ss. 11 and 12 the Act defines persons "entitled to be registered as Indians". The applicable portions of the said sections provide:

11(1) Subject to section 12, a person is entitled to be registered if that person

(a) on the 26th day of May 1874 was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(b) is a member of a band

(i) for whose use and benefit, in comman, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b);

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or

(ii) a person described in paragraph (c);

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

(2) Paragraph (1)(e) applies only to persons born after the 13th day of August 1956.

12(1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted halfbreed lands or money scrip,

(ii) is a descendant of a person described in subparagraph (i),

(iii) is enfranchised, or

In his evidence John Pritchard stated that he was born on the reserve and was a member of the Red Pheasant Indian Band until he left the reserve some 30 years ago. Mr. Pritchard averred that his wife was an Indian and his son, Bert Pritchard, was born on the Red Pheasant Indian Reserve. According to Mr. Pritchard he is a direct descendant of

male line of Indians and his father took part in the Rebellion of 1885. The witness further stated that he and the respondent are entitled to be registered.

There is no evidence before me that either John Pritchard or Bert Pritchard was at any time enfranchised.

Under s. 730 of the *Criminal Code* the burden of proving that an exception, excuse or qualification prescribed by the law operates in favour of the defendant is on the defendant, and that the prosecutor is not required, except by way of rebuttal, to negative the exception. By s. 15 [rep. & sub. 1966, c. 73, s. 1] of the *Provincial Magistrates Act*, R.S.S. 1965, c. 111, provisions of the *Criminal Code* relating to summary convictions apply to provincial offences.

It is a generally accepted principle of our law that the defendant discharges the burden placed upon him by s. 730 of the *Criminal Code* if he establishes, by a preponderance of evidence, that he comes within the exception. On the facts in the case at bar I have come to the conclusion that the respondent has discharged that burden. In my opinion the respondent has satisfactorily established that he is an "Indian" within the meaning of the *Game Act, 1967*, and that at the time in question he was hunting for food on the land to which he had a right of access.

I, therefore, find the respondent not guilty of the charge. The appeal will be dismissed. There will be no costs to either party.

Appeal dismissed.

HEINTZMAN & CO. LTD. v. HASHMAN CONSTRUCTION LTD.

Alberta Supreme Court, Trial Division, Cullen, J. November 16, 1972.

Negligence — Duty of care — Contractor erecting high-rise building — Debris accumulating on roof of adjoining building — Blocking drains — Flooding — Whether contractor under duty to adjoining owner.

Torts — Strict liability — Building under construction — Contractor bringing materials on to premises — Whether liable for damage done by escape.

Torts — Nuisance — Contractor erecting high-rise building — Debris accumulating on roof of adjoining building — Blocking drains — Flood following heavy rainstorm — Whether contractor had created nuisance.

Defendant contractor was erecting a 24-storey building next to plaintiff's building. Litter and debris from the construction site, including paper and plastic material, dropped from the new building and blew on to the flat roof of the plaintiff's building. There was some organized

within 60 days from November 25, 1966; in the case of the latter, it was served on the 60th day. The affidavits of service on the Judge and on the respondent were filed on the 60th and 61st days following the order in appeal, or, on the 23rd and 24th days following the expiry of the seven-day period for such filing under s. 722(1)(*c*).

The sole point at issue is whether the affidavit of service on the respondent was filed out of time. Were it not for the concluding words of the order of Rogers, Co. Ct. J., extending the time ("which period is within 30 days after the 25th day of November, 1966"), there could be no doubt that by expressly referring to the time fixed by paras. (*b*) and (*c*) of s. 722(1), the learned County Court Judge had extended the time for filing the affidavit of service to January 31, 1967, that is to a time 30 days following the expiry of the total of 37 days prescribed under paras. (*b*) and (*c*). In this respect, the terms of the extension order differ from those involved in both *R. v. Bates*, [1965] 3 C.C.C. 128, 45 C.R. 409, 50 W.W.R. 86, and *R. v. Nedelec*, [1967] 1 C.C.C. 280.

We do not think it proper interpretation to whittle down the force of what was so specifically said in the extension order, by fastening on the concluding words. They either create an ambiguity, which should be resolved in favour of allowing the appeal to be heard, or they are surplusage. In either case, the conclusion must be that the affidavit of service on the respondent was filed within the time permitted by the extension order.

Appeal allowed.

REGINA v. RIDER

Magistrate's Court, Alberta, L.W. Hudson, Magistrate. *May 25, 1968.*

Indians — Hunting rights — Treaty Indian hunting game for food within boundaries of National Park contrary to National Parks Act (Can.), s. 8(1) — Whether Parliament in violation of treaty promise, and, if so, whether accused must still be convicted.

A Treaty Indian who hunts game for food within the boundaries of a National Park is guilty of an offence under s. 8(1) of the *National Parks Act*, R.S.C. 1952, c. 189. Under the treaty in question the

531

Indians' hunting rights are withdrawn with respect to those parts of the treaty area required for "settlement, mining, or other purposes". The creation of a National Park in the treaty area comes within the words "other purposes", and, therefore, Parliament in creating a National Park and prohibiting all hunting therein is not in violation of any treaty promise made by the Crown to the Indians. Even if Parliament were in violation of such a promise, the Court would still be bound to convict the accused because there is nothing to prevent Parliament from breaching treaty promises.

[*R. v. Smith*, 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 433; *R. v. Sikyea*, [1964] 2 C.C.C. 325, 43 C.R. 83, 43 D.L.R. (2d) 150, 46 W.W.R. 65; affd [1965] 2 C.C.C. 129, 44 C.R. 266, 50 D.L.R. (2d) 80, 49 W.W.R. 306, [1964] S.C.R. 642, folld]

PROSECUTION of a Treaty Indian for hunting in a National Park contrary to the provisions of the *National Parks Act* (Can.).

R.A. Jacobson, for the Crown.
M. Hoyt, for accused.

HUDSON, MAGISTRATE:—Waterton Lakes National Park is constituted a National Park of Canada by the *National Parks Act*, R.S.C. 1952, c. 189, and by virtue of s. 7(1)(*c*) of the said Act the Governor in Council may make Regulations for the protection of wild animals. Section 4(*a*) of the National Parks Game Regulations, P.C. 1954-1431, SOR Con. 1955, vol. 3, p. 2350, reads as follows: "(*a*) no person shall at any time molest, chase, harass or pursue, hunt, shoot at, trap, take, wound, kill, capture or destroy any game within a Park."

The evidence clearly establishes that on the date in question the accused, a Treaty Indian, did hunt game, namely, deer, within the boundaries of the Park, and that said game was so hunted for food.

Some evidence was given by the defence to the effect that the accused did not know he was hunting within the Park boundaries but were this a material defence, the evidence indicates that the accused, an intelligent youth with a Grade X education, passed numerous signs indicating clearly the entrance and boundary of the Park, and I have not a shadow of doubt that he knew full well that he was hunting in the Park.

As his principal and serious defence, counsel for the accused refers to the provisions of Treaties Nos. 4 and 7 containing the following covenant:

> "And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the

Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government."

It would therefore appear that the question I must decide is whether or not Waterton Lakes National Park falls within the exception mentioned in the foregoing covenant, as, being "tracts as may be required or taken up from time to time for settlement, mining or other purposes".

Various cases have been suggested by counsel. These I read, along with other cases which I considered might have some bearing on the matter before me. In the majority of the cases I have read, the Courts in question have been dealing with provincial Regulations, the preservation of game, areas where game may be hunted during certain periods or by licence or permit, and many of the decisions have dealt mainly with the rights of the Provinces to legislate with relation to game and Indians, the necessity of a permit to hunt, etc. In *R. v. Smith*, 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 433, however, the Court deals with a certain area set aside for a particular purpose. Turgeon, J.A., in his judgment states as follows [p. 135 C.C.C., pp. 705-6 D.L.R.]:

"Counsel submits that, having regard to this provision, the words 'unoccupied Crown lands' in para. 12 [of the Agreement], should be defined as all Crown lands not required or taken up for settlement, mining, lumbering or for other purposes, and that the expression 'other purposes' should be interpreted as not including the setting aside of areas for the preservation of game. This submission resolves itself into an argument that the Crown by specifying in the treaty the purposes of settlement, mining, and lumbering, excluded itself for all time from setting aside tracts of land as game preserves, the words 'other purposes' not being sufficiently broad to include such setting aside. Counsel invokes the *ejusdem generis* rule. On the ground so chosen by counsel I find I must differ from him. Looking at the words, 'settlement' 'mining' and 'lumbering,' I do not see how they can be grouped into any *genus* to which the *ejusdem generis* rule can be applied. I do not think the words 'other purposes' were meant to be construed in such a manner."

533

Following the reasoning of the foregoing I am of the opinion that Parliament, by establishing a park of the area in question, brings such area within the exception mentioned in the Treaty and can therefore make such Regulations, applicable to all persons, with regard to hunting, trapping or fishing, as it sees fit without violating any promise made by the Crown to the Indians.

Had I not found as above I should nevertheless have felt bound to convict the accused of the offence charged. The Regulation is clear in its prohibition that "no person shall . . . hunt . . ." I find no exception in the case of Indians. In *R. v. Sikyea*, [1964] 2 C.C.C. 325 at p. 330, 43 C.R. 83, 43 D.L.R. (2d) 150 at p. 154, 46 W.W.R. 65, Johnson, J.A., states:

> "It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. The 'promise and agreement', like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the *B.N.A. Act*, from doing so."

Further Mr. Justice Johnson states [p. 335 C.C.C., p. 158 D.L.R.]:

> "It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations."

On appeal to the Supreme Court of Canada [[1965] 2 C.C.C. 129, 44 C.R. 266, 50 D.L.R. (2d) 80, 49 W.W.R. 306, [1964] S.C.R. 642] Hall, J., in delivering the judgment of the Court dismissing the appeal agrees with the reasons for judgment and conclusions of Johnson, J.A.

In view of the foregoing I feel bound to find that notwithstanding the wording of the Treaty, Indians are prohibited from hunting in Waterton Lakes national Park.

I find the accused guilty.

Accused convicted.

Man.

C.A.

1923.

(Ont.) 462); and the papers will be amended to conform to the practice.

Judgment accordingly.

REX v. RODGERS.

Manitoba Court of Appeal. Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Prendergast, JJ.A. April 16, 1923.

Game laws—Game Protection Act, 1916, (Man.) ch. 44, sec. 20 (4)—Treaty Indian killing fur-bearing animal on Reserve—Disposal of pelt outside of Reserve—Not within Act—Indian Act R.S.C. 1906, ch. 81, sec. 66—B.N.A. Act, sec. 91 (24).

In the absence of any declaration by the Superintendent-General under sec. 66 of the Indian Act, R.S.C. 1906, ch. 81, the Game Protection Act, 1916 (Man.), ch. 44, does not apply to a Treaty Indian who hunts and kills fur-bearing animals upon his Reserve, and in so doing, he is not a trapper within the meaning of the provincial Act and is not required to have a permit, nor does he, in disposing of the pelts of such animals outside of the Reserve become a trapper within the meaning of the Act and a purchaser is not guilty of an offence under sec. 20 (4) in failing to obtain at the time of the purchase his name and the number of his trapper's permit.

[*Rex* v. *Hill* (1907), 15 O.L.R. 406; *Rex* v. *Martin* (1917), 39 D.L.R. 635, 41 O.L.R. 79, 29 Can. Cr. Cas. 189; *St. Catherines Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46, referred to.]

APPEAL, by way of case stated, from the conviction by a Police Magistrate under the Game Protection Act, 1916 (Man.), ch. 44, and amendments. Conviction quashed.

J. W. Morrison and *E. R. Mills*, for accused, appellant.

John Allen, K.C., for Crown.

PERDUE, C.J.M.:—This is a case stated by A. E. Caldwell, Police Magistrate at Hodgson, Manitoba. The accused was charged that he did buy or acquire a skin or pelt of a fur-bearing animal without at the time of purchase ascertaining, taking and recording the name of the trapper, with the number of the trapper's permit, contrary to the provisions of the Game Protection Act, 1916 (Man.), ch. 44.

The Magistrate found the accused guilty but stated a case for the opinion of this Court. It was proved that the accused received the mink skin in question by way of pledge for goods obtained from him by one Henry Smith, treaty Indian No. 891 of the Peguis Indian Reserve. Subsequently, the pledge became a purchase. At the time he received it, the accused was informed by Smith that the latter was a treaty Indian.

Accused asked him for his certificate of identity number. Smith went to the Indian agent, obtained his treaty number and accused put it on the required form. The purchase was then completed. It appeared that the purchase was made outside the Indian Reserve and that there had been no declaration by the superintendent general under sec. 66 of the Indian Act, R.S.C. 1906, ch. 81, that the game laws of the Province of Manitoba applied to Indians in the Province. I take it that the mink had been killed on the reserve.

The magistrate submitted the following questions for the opinion of this Court:—"1. Is the Manitoba Game Protection Act *ultra vires* in so far as it concerns a Treaty Indian? 2. Does the Manitoba Game Protection Act of the Province of Manitoba apply to a Treaty Indian? 3. Does the word 'trapper' in the Manitoba Game Protection Act include a Treaty Indian? 4. Did the said Robert G. Rodgers comply with the provisions of the Manitoba Game Protection Act, when he obtained and entered the Treaty Number? 5. Should the conviction be quashed?"

Section 20 (4) of the Game Protection Act, as amended by 1920 (Man.), ch. 44, sec. 7, enacts that no person shall buy or acquire any of the skins of fur-bearing animals protected by the Act, mink skins being included in these, "from any trapper unless such trapper is provided with a permit issued under this Act or without at the time of purchase or trade, ascertaining, taking and recording the name of such trapper, together with the number of the trapper's permit."

By sec. 91 (24) of the B.N.A. Act, the Parliament of Canada is given exclusive legislative authority over "Indians, and lands reserved for the Indians." It would, therefore, seem clear that no statutory provision of regulation made by the Province in regard to the hunting of game or fur-bearing animals on an Indian reserve would apply to treaty Indians residing on the reserve. Section 57 of the Game Protection Act declares that the Act shall not apply to Indians within the limits of their reserves, "with regard to any animals or birds killed at any period of the year for their own use for food only, and not for purposes of sale or traffic;" leaving the inference that if the clause cited does not apply to the case, the Act will apply to such Indians.

I do not think that the Provincial Legislature has any power to pass laws interfering with the rights of treaty Indians to hunt, fish and trap on their own reserves. If a treaty Indian

Man.

C.A.

1923.

REX v. RODGERS.

Perdue, C.J.M.

leaves his reserve and takes up any calling or occupation outside of it, he comes under the control of the provincial laws as an ordinary citizen: *Rex* v. *Hill* (1907), 15 O.L.R. 406. If he commits an offence against a provincial law outside his reserve he is liable: *Rex* v. *Martin* (1917), 39 D.L.R. 635, 41 O.L.R. 79, 29 Can. Cr. Cas. 189.

In *Rex* v. *Martin*, 39 D.L.R. 635, the accused, an Indian, was convicted of an offence against the provisions of the Ontario Temperance Act, 1916 (Ont.), ch. 50, committed outside the limits of an Indian reserve. Long before that Act was passed, the Parliament of Canada appears to have occupied the field of liquor prohibition in so far as Indians are concerned. The Indian Act, R.S.C. 1906, ch. 81, contains stringent provisions against giving or selling liquor to Indians, whether on or outside an Indian reserve, and also against giving or selling liquor to any person on any such reserve, or having liquor in his possession on a reserve etc., etc.: See secs. 135-146. Where the offence against the provincial law was committed beyond the limits of an Indian reserve, it was held in the above case that the Indian offender might be convicted and punished under the provincial law.

The right of an Indian to hunt or fish on his reserve without restraint or interference is often essential to the well-being of himself and of those dependent upon him. Any legislation, therefore, affecting this right would naturally come under sec. 91 (24) of the B.N.A. Act. From an expression used by Lord Watson in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46, I would take it that this was the view adopted by that eminent authority. He said at p. 60:—

"The fact that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario."

On the previous page (p. 59) he had said:—

"It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority."

The rights of the Indian come under consideration in this case only in this way: if he had a right to catch the mink on his reserve, had he not a right to deal with his own property

Man.

C.A.

1923.

REX v. RODGERS.

Dennistoun, J.A.

legally acquired? The prohibition in sec. 20 (4) of the Game Protection Act is, that no person shall buy or acquire any of the skins of fur-bearing animals protected by the Act from any trapper unless the trapper is provided with a permit under the Act. But if the Legislature cannot compel a treaty Indian to take out a permit to hunt on his reserve, the subsection is inapplicable. It can only apply where the "trapper" is a person coming within the provisions of the Act and, therefore, bound to take out a permit.

I would answer question No. 5 in the affirmative. It is not necessary to give any formal answers to the other questions.

CAMERON, J.A., was present at the hearing but died before judgment.

FULLERTON, J.A., concurs with PERDUE, C.J.M., and PRENDERGAST, J.A.

DENNISTOUN, J.A. (dissenting):—A. E. Caldwell, one of His Majesty's Police Magistrates in and for the Province of Manitoba, at Hodgson, Manitoba, submits the following stated case for the opinion of this Court:—

"1. On December 7, 1921, an information was laid, under oath, before me by the above named Clifford Ostle, for that the said Robert G. Rodgers on December 6, 1921, did buy or otherwise acquire a skin or pelt of a fur-bearing animal without at the time of purchase or trade ascertaining, taking and recording the name of such trapper together with the number of the trapper's permit, contrary to the provisions of the Game Protection Act, 1916 (Man.), ch. 44, sec. 20 (4), (as added by 1920 (Man.), ch. 44, sec. 7).

2. On December 19, 1921, the said charge was duly heard before me in the presence of both parties, and, after hearing the evidence adduced and the statements of the said constable, Clifford Ostle and Robert G. Rodgers and T. H. Carter, Indian agent, and counsel, I found the said Robert G. Rodgers guilty of the said offence and convicted him thereof, but at the request of the counsel for the said Robert G. Rodgers I state the following case for the opinion of this Honourable Court.

It was shewn before me that the said Robert G. Rodgers had the mink in question in his possession by way of pledge for goods obtained by one Henry Smith, Treaty Indian No. 891, Peguis Reserve, but that, subsequently, the pledge was turned into a purchase, and at the time of the said acquisition, the said Robert G. Rodgers had asked from the trapper his num-

Man.

C.A.

1923.

REX v. RODGERS.

Dennistoun, J.A.

ber but had been informed that he, the said person was a Treaty Indian.

The said Rodgers then asked him for his Indian's certificate of identity number. He kept the fur in pledge until the Indian had gone to the Indian Agent and had obtained the Treaty number, which the said Robert G. Rodgers then put on the required form.

The defence submitted that no evidence was adduced to shew that sec. 66 of the Indian Act was complied with whereby the Game Laws of the Province of Manitoba apply to Treaty Indians, and the defence submitted evidence of the Indian agent that this section had not been complied with.

The counsel for the said Robert G. Rodgers desires to question the validity of the said conviction on the ground that it is erroneous in point of law, the question submitted for the judgment of this Honourable Court being: [See judgment of Perdue, C.J.M., p. 415.]"

The conviction is under sec. 20 the Game Protection Act, 1916, as amended by 1916 (Man.), ch. 45, sec. 1, and by 1920 (Man.), ch. 44, sec. 7, to read in part as follows:—

"20. (1) No person shall hunt, shoot at, trap, take, wound, kill or capture any of the animals mentioned in secs. 17 and 18 of this Act without having first obtained a permit to do so, which permit shall be issued by the Department of Agriculture and Immigation, in such form, as the Minister in charge of the Department may approve, and shall be valid for the then current or next ensuing open season, and for which the following fees shall be paid:—(a) By any person actually domiciled and resident within the Province of Manitoba, fifty cents. [See amendment 1918 (Man.), ch. 28, sec. 6.]

(2) The holder of a permit issued under the provisions of this section, shall carry the said permit on his person and produce the same on demand of any person.

(4) No person shall buy or otherwise acquire any of the skins or pelts of fur-bearing animals protected by this Act from any trapper unless such trapper is provided with a permit issued under this Act or without at the time of purchase or trade, ascertaining, taking and recording the name of such trapper, together with the number of the trapper's permit."

The accused has been found guilty of an infraction of the second part of clause (4) in that he did not take and record the number of the trapper's permit.

It must be assumed that the Magistrate duly found the In-

dian who sold the pelt to be a "trapper" within the meaning of the section.

It was argued by Mr. Morrison that the meaning of the word must be limited to the persons referred to in secs. 17 and 18 of the Act, that is to say, to persons who are compelled to take out a license before they are permitted to trap, and that as an Indian is permitted by sec. 57 to trap for certain purposes on his reserve, he is not a trapper within the meaning of the Game Protection Act.

The point is ingenious but is, I think too fine to be apprehended as the intention of the Legislature.

"Trapper" should, in my view, be given its ordinary, common meaning without any restriction, and includes an Indian who lawfully traps an animal upon his reserve, and takes the skin outside the reserve for the purpose of sale. When he leaves his reserve and offers his pelts for sale he is subject to the general laws of the Province in respect to property and civil rights.

In this case, the Magistrate has decided that the vendor is a trapper, unless his status as an Indian protects him from the obligations and duties of trappers who offer furs for sale.

Having heard the evidence and having exercised his judicial discretion in determining the point, which is within his jurisdiction, an Appellate Court will not disturb the finding, unless it involves legal error.

Had the vendor of this pelt been a "white man" there can be no doubt that the conviction would be valid.

Does it make any difference that he is an Indian? I do not think so.

It is to be noted that the Act refers to Indians in two secs. only, 56 and 57.

Section 56 refers to game north of the 53rd parallel of north latitude, and does not concern this case.

Section 57 is as follows:—

"This Act shall not apply to Indians within the limits of their reserves, with regard to any animals or birds killed at any period of the year for their own use for food only; and not for purposes of sale or traffic."

Outside an Indian reserve, and south of the 53rd parallel, the Act applies to citizens of Manitoba without restriction, moreover, the defendant is not an Indian, but a white man. This does not appear in the stated case, but was admitted on

Man.

C.A.

1923.

REX v. RODGERS.

Dennistoun, J.A.

the argument, and the fact is assumed for the purpose of this judgment.

In *Rex* v. *Martin*, a judgment of the Appellate Division of Ontario, 39 D.L.R. 635, at pp. 638-9. 41 O.L.R. 79, 29 Can. Cr. Cas. 189, Riddell, J., quoting from, and paraphrasing, *C.P.R. Co.* v. *Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, at pp. 372, 373, says:—

"The B.N.A. Act, whilst it gives the legislative control of the Indian defendant, *qua* Indian, to the Parliament of the Dominion, does not declare that the defendant shall cease to be a denizen of the Province in which he may be, or that he shall, in other respects, be exempted from the jurisdiction of the provincial Legislatures . . . It therefore appears . . . that any attempt by the Legislature of Ontario to regulate by enactments his conduct *qua* Indian, would be in excess of its powers. If, on the other hand, the enactment had no reference to the conduct of the defendant *qua* Indian, but provided generally, that no one was to sell etc., liquors, then the enactment would . . . be a piece of legislation competent to the Legislature."

The headnote of the case, 39 D.L.R. 635, says that an Indian is punishable as other persons are, for offences committed outside a reservation against provincial laws, and Meredith, C.J. C.P., Riddell, Lennox and Rose, JJ., concurred in that opinion.

Rex v. *Hill*, 15 O.L.R. 406, deals with the case of an Indian who practised medicine for hire, but not upon the Reserve, without being registered pursuant to the provisions of the Ontario Medical Act, R.S.O. 1897, ch. 91. Osler, J.A., says, at p. 410:—

"Section 111 [R.S.C. 1906, ch. 81] assumes that an Indian may become a member of any of the learned professions, and I find nothing in the Act to indicate that, except where provisions are made, which expressly or by implication declare his obligations and the consequences which attach to their breach or otherwise specially deal with him, the conduct and duty of an Indian in his relations with the public outside the reserve are not subject to the control of the provincial laws in the same manner as those of ordinary citizens. Parliament may, I suppose, remove him from their scope, but, to the extent to which it has not done so, he must in his dealings outside the reserve govern himself by the general law which applies there. He is no more free to infringe an Act of the Legislature than to

disregard a municipal by-law, the general protection of both of which he enjoys when he does not limit the operations of his life to the reserve, but, though unenfranchised, seeks a wider sphere."

I find nothing in the Indian Act, R.S.C. 1906, ch. 81, which permits an Indian when off his Reserve to act in defiance of provincial game protection laws. Section 66 says that such game laws may be made applicable to Indians by public notice by the superintendent-general, but does not say that, in the absence of such notice, they shall have no effect.

In the absence of express legislation to the contrary by the Dominion, an Indian whether on or off his reserve is, I think, subject to the general law of the Province.

The B.N.A. Act, sec. 91 (24) enables the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to Indians, and lands reserved for Indians.

By the same Act, sec. 92 (13) the Provinces may exclusively make laws in relation to property and civil rights in the province.

In cases where the jurisdiction of the Dominion and the Provinces may overlap and the field is clear, either Legislature may occupy it. If in such domain the two Legislatures meet, then the Dominion legislation must prevail. *G.T.R. Co.* v. *Att'y-Gen'l for Canada*, [1907] A.C. 65. The Province, therefore, has jurisdiction to legislate in respect to property and civil rights of all citizens, with an over-riding power on the part of the Dominion, by special legislation, to take possession of the field, in so far as Indians are concerned. The Dominion has not seen fit to interfere with the general law of this Province in respect to the buying and selling of pelts, in order to remove Indians from its operation, and, in my view, the provincial law is enforceable against Indians until the Dominion Parliament sees fit to act.

In my view, the defendant in this case when dealing for this pelt was not protected by the fact that the vendor was an Indian, and I would answer the questions of the Magistrate as follows:—1. The sections of the Manitoba Game Protection Act in question do not purport to deal with Indians, as such. They apply to all citizens alike, and are within the competence of the provincial Legislature. 2. The Manitoba Game Protection Act applies to treaty Indians when off their Reserves in the absence of legislation by the Dominion to the contrary.

542

Man.

C.A.

1923.

REX v. RODGERS.

Prendergast, J.A.

3. The word "trapper" may include a Treaty Indian in the absence of legislation by the Dominion to the contrary. 4. Robert G. Rodgers did not comply with the provisions of the Manitoba Game Protection Act when he obtained and entered the treaty number of the Indian, without taking and recording the name and permit number of the trapper. 5. The conviction should be affirmed.

PRENDERGAST, J.A.:—This is a case stated by a Police Magistrate under sec. 761 of the Cr. Code in the matter of a conviction under the Game Protection Act, 1916 (Man.), ch. 44.

The facts are that an Indian, apparently not recognized as such at the moment, who was purchasing goods from the accused (a white man) in his store at Hodgson, offered him a mink skin in payment. Upon being asked by the accused for his name and the number of his trapper's permit, he replied that his name was John Smith and that he was a treaty Indian. Being next required to produce a certificate of identity shewing his number as a treaty Indian, he went and procured the same from the Indian agent and brought it back to the accused who took note of its contents and then accepted the skin in payment of the goods.

It is also to be assumed from the statement of the case and from counsel's argument, that the mink had been trapped or otherwise captured by this Indian in open season on the reserve to which he belonged, and Hodgson, where the accused acquired the skin, is not, of course, in any reserve.

Upon these facts, the accused was convicted under sec. 20 (4) of the Game Protection Act, as amended by 1920 (Man.), ch. 44, sec. 7, which section is as follows: [See judgment of Dennistoun, J.A., *ante* p. 415.]

Of the four questions submitted in the case, there are three that it is not necessary to consider, in my opinion.

The other: "Does the word 'trapper' in the Manitoba Game Protection Act apply to a treaty Indian?" is altogether too broad, and should be made to read: "Was the treaty Indian in this case a 'trapper' under the Act?"

Stated in these terms, the question raises the only point that need be considered in my view of the case.

Section 20, under sub-sec. (4) of which the conviction was made, is found in a division of the Act coming under the heading, Fur Bearing Animals, where it is preceded by two others (being secs. 17 and 18) which provide that "no person shall hunt, shoot at, trap, take, wound, kill or capture" certain fur-bearing animals at certain times of the year, and cer-

Ont.

App. Div.

1923.

regulate to the extent of their being done on territory submitted to its jurisdiction, which excludes Reserves.

This Indian, having captured the mink on the Reserve, is not then a trapper within the meaning of the Act.

There can be no doubt that an unenfranchised Indian, when out of his reservation, is subject to provincial legislation in precisely the same way as a non-Indian: *C.P.R. Co. v. Parish of Nôtre Dame de Bonsecours*, [1899] A.C. 367; *Rex v. Hill*, 15 O.L.R. 406, and *Rex v. Martin*, 39 D.L.R. 635, 41 O.L.R. 79, 29 Can. Cr. Cas. 189.

But in *Rex v. Hill, supra*, Meredith, J.A., said at p. 414:—"It is not needful to say what would have been the result if the defendant had confined his practice to Indians."

I am of the opinion that the Game Protection Act does not extend to Reserves and that sec. 57 is of no effect whatsoever.

The Legislature could, undoubtedly, prohibit the purchase of mink skins from *anyone*, and this term would of course include a Treaty Indian.

In the present case, however, the prohibition is not with reference to acquiring a mink skin from anyone, but from one who is a trapper in the meaning of the Act.

Had this Indian captured the mink outside the Reserve, he would have been doing one of the things provided for in secs. 17, 18 and 20 (1), and that would have made him a trapper, which he is not as he secured the animal on the Reserve.

The answer should be: the Indian in question was not a trapper under the Act.

The conviction should be quashed.

BATT v. VILLAGE of BEAVERTON.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Kelly, Masten and Rose, JJ. January 5, 1923.

Highways I.A—Establishment—Dedication—Intention of parties—Mortgagor in possession—Consent of mortgagee necessary.

A mortgagor in possession cannot defeat his mortgagee's title by dedicating the land to the public as a highway, and any attempted dedication without the consent or ratification of the mortgagee is ineffectual.

[*Attorney-General v. Antrobus*, [1905] 2 Ch. 188, referred to.]

APPEAL from the judgment of Middleton, J., in an action to restrain the erection of an icehouse on land alleged to belong to the plaintiff and to restrain the defendant corporation from interfering with the plaintiff's fences and for damages for trespass. Affirmed.

tain others at any time or at all. [See also 1921 (Man.), ch. 26, sec. 1].

Now, these prohibitions, as well as those contained in sec. 20 (1) (and I think this is also true of the whole Act) were not meant to and cannot at all apply to Indian reserves which are placed under the jurisdiction of the Dominion Parliament by virtue of sec. 91 (24) of the B.N.A. Act. This is also emphasised by sec. 66 of the Indian Act, R.S.C. 1906, ch. 81, which provides that the superintendent-general of Indian affairs may, from time to time, declare by public notice that the game laws in force in the Province shall apply to Indians.

Provincial statutes, even of general application, do not, as a rule, expressly state the territory to which they are meant to apply. They are generally worded as if they applied to all the territory comprised within the boundaries of the Province. But everyone understands that they cannot apply to regions in the Province (if any) over which the Legislature has no jurisdiction in the particular matter, and that, however broad the terms, these regions were meant to be excepted.

Clearly, in this case, secs. 17, 18 and 20 (1), which all provide in the same words that "No person shall hunt, shoot at, trap, take, etc.," must be read, consistently with the territorial jurisdiction, as if they contained in each case the words:—"within the Province but excepting Reserves."

Now, what is a "trapper" under this statute?

It seems to me clear, upon reading this division of the Act as a whole, that this term "trapper" is not used therein in its strict or technical meaning; that is to say, that it is not restricted to those who make an habitual occupation of capturing fur-bearing animals, nor to those only who use traps in that pursuit as distinguished from other means of capture.

"Trapper" in sec. 20 (4)—which is the only part of the Act where the word is used—refers, in my opinion, to sec. 20 (1) as it is natural that it should do, and also to secs. 17 and 18 as they are in the same terms and is meant for short to designate anyone who, as set forth in these three sections, "shall hunt, shoot at, trap . . . any of the animals mentioned," reading those prohibitions, as I expressed the opinion that we should do, as if they contained, to all intents and purposes, the words: "within the Province but excepting Reserves."

In other words, a "trapper" is one who does some one of these things provided for in secs. 17, 18 and 20 (1), and which the Legislature could only have undertaken to provide for and

car and was in good order; that the system of inspection followed and the things done to keep the car heated and the potatoes protected are in accord with the best practices of themselves and other carriers; but the evidence is quite consistent with a contrary state of fact, and the onus was on these defendants. In my opinion, they have failed to satisfy the onus put upon them by the authorities.

I am, for these reasons, of the opinion that the appeal should be allowed, and judgment should be entered for the plaintiff for the amount claimed with costs here and below.

Appeal allowed.

SERO v. GAULT.

Ontario Supreme Court, Riddell, J. March 20, 1921.

FISHERIES (§IB—7)—ONTARIO GAME AND FISHERIES ACT—STATUTES OF CANADA 1916, ORDERS IN COUNCIL P. CXC—VALIDITY—APPLICATION—RIGHTS OF INDIANS ON MOHAWK RESERVE.

The Ontario Game and Fisheries Act, R.S.O. ch, 262, as enacted by the Statutes of Canada 1916, Orders in Council, page cxc, which enacts (sec. 4) that "No one shall fish by means other than angling or trolling, excepting under lease, license or permit from a duly authorised officer of the provincial government," is within the powers of the Dominion Parliament and applies to the Mohawk Indians residing on the Indian Reservation in the township of Tyendinaga, who are subject to the general law of Canada.

[See Annotation, 35 D.L.R. 28.]

ACTION in trover for the value of a seine fishing net seized and taken away by the defendants.

The action was tried by RIDDELL, J., without a jury, at Belleville and Ottawa.

E. G. Porter, K.C., for the plaintiff.

William Carnew and *Malcolm Wright*, for the defendants.

Edward Bayly, K.C., for the Attorney-General for Ontario.

A. G. Chisholm, amicus curiæ.

RIDDELL, J.:—The plaintiff is a widow, a member of the Tyendinaga Band of Mohawks, residing on the Indian Reservation in the township of Tyendinaga, in the county of Hastings. She was the owner of a seine fishing net, partly made by her on the Reserve and partly purchased by her, nearly 400 feet in length (about 23 rods is given as the length), and with a mesh of about 3 inches. This was operated by a number of Indians of the same band, on shares,

Ont.

S.C.

SERO v. GAULT.

Riddell, J.

catching fish in the Bay of Quinté, opposite the Indian Reserve. The fishing was done to a certain extent for food for the operators, but also for commercial purposes—for sale of the fish to all who came desirous of buying.

The manner of fishing is well-known—a long rope attached to one end of the seine is wound round a "spool" on the shore; the net itself is loaded on a boat which is rowed out on the water, the rope being unwound from the spool correspondingly; beginning at a convenient distance, generally when the rope is wholly unwound, the seine is wholly paid-out as the boat proceeds; then the boat comes around to a convenient distance from the shore, and a rope at the other end of the seine is paid out, and the end brought to the shore to a spool, at a distance from the other approximately equal to the length of the seine. Then the ropes are both wound in simultaneously, with the effect that the fish captured by the net are brought to shore.

No license had been taken out by the plaintiff or the actual fishermen.

Thomas Gault, one of the defendants, is a fishery inspector; the other, John Fleming, is a game and fishery overseer—they went upon the Indian Reserve, where the seine was lying, seized it, and took it away.

This action is in reality in "trover" for the value of the seine seized and taken away.

The defence of want of notice is set up: while it is true that under *Venning* v. *Steadman* (1884), 9 Can. S.C.R. 206, a fishery inspector is an officer within the protection of the former statute in that behalf, the law was altered in 1911 by the Public Authorities Protection Act, 1 Geo. V. ch. 22—now R.S.O. 1914, ch. 89—so that no notice of action is now necessary.

The substantial defence is that the defendants had a right to act as they did by virtue of statutes of the Dominion and of the Province—and it is necessary to examine this legislation somewhat minutely.

The Dominion Fisheries Act. 1914, 4 & 5 Geo. V. ch. 8, by sec. (*c*), (*e*), (*f*), gives the Governor in Council power to "make regulations . . . . to regulate and prevent fishing . . . . to forbid fishing except under authority of leases or licenses . . . . prescribing the time when and the manner in which fish may be fished for and caught. . ."

Under and in virtue of that Act, an order in council was

Ont.

S.C.

SERO v. GAULT.

Riddell, J.

passed on the 29th October, 1915—Statutes of Canada, 1916, pp. cxc. sqq.—making the Dominion fishery regulations for the Province of Ontario. These regulations were in the same language as the regulations adopted by the Province of Ontario. Amongst these regulations was: "Section 4 . . . No one shall fish by means other than by angling or trolling excepting under lease, license, or permit from a duly authorised officer of the Provincial Government." It is contended that this regulation, adopted from those of the Province, is open to objection on the principle of law laid down by Strong, J. (afterwards Sir Henry Strong, C.J.), in the Supreme Court of Canada, in *St. Catharines Milling and Lumber Co.* v. *The Queen* (1887), 13 Can. S.C.R. 577, at p. 637: "That Parliament has no power to divest the Dominion in favour of the Province of a legislative power conferred on it by the British North America Act is, I think, clear." I cannot agree with that contention: Parliament gave certain powers to the Governor in Council; the Governor in Council exercised these powers; and that the Governor in Council was satisfied with regulations drawn up by another authority, and enacted the regulations in the same language, is no more an abdication of authority than if the Governor in Council had adopted the language of a scientist or a text-writer. Assuming that the law is correctly laid down by Mr. Justice Strong, it is not applicable here.

The Ontario legislation is the Ontario Game and Fisheries Act, R.S.O. 1914, ch. 262—taken from 3 & 4 Geo. V. ch. 69 (Ont.)—this by sec. 24 gives to the Lieutenant-Governor in Council the power (sub-sec. 1 (*a*) to make regulations "prohibiting fishing except under the authority of a license issued on the terms and conditions prescribed by the regulations." The Lieutenant-Governor in Council made regulations, the wording of which was followed in the Dominion regulations: Statutes of Canada 1916, pp. cxc. sqq.

It was not argued, and it is too late a day to argue, that the Dominion Parliament and the Ontario Legislature had not the power to empower the Governor-General in Council and the Lieutenant-Governor in Council to make regulations having the force of law in respect of a class of subjects within the ambit of the respective powers of the Dominion and Province.

Consequently, as the powers of the Dominion and Province cover the whole field of legislation, there is, *quâcunque viâ*, valid legislation forbidding such fishing as

Ont.
S.C.
SEBO
v.
GAULT.
Riddell, J.

is in question in this case without a license, etc.—there is no pretence that there was license, permit, or other authorisation; accordingly, unless other considerations prevail, the fishing in question was unlawful.

The Ontario Game and Fisheries Act, R.S.O. 1914, ch. 262, sec. 61 (5), makes it the duty of every overseer forthwith to seize, *inter alia*, all nets used contrary to the regulations; the Dominion Act, sec. 80, provides, *inter alia*, that all nets used in violation of any regulation made under the Act shall be confiscated to His Majesty and may be seized and confiscated, on view, by any fishery officer. By sec. 5 the Governor in Council is empowered to appoint fishery officers, and by the order in council already mentioned the Governor in Council in substance made every officer having authority from the Department of Game and Fisheries of the Province of Ontario a fishery officer under the Dominion Act (p. cxc.)

If then (1) there is power in either Dominion or Province or in both together to pass such legislation in respect of these Indians, and if (2) the legislation, etc., would, being valid, apply to Indians, the defendants should succeed; but, if either hypothesis fail, the plaintiff succeeds.

It is well-known that claims have been made from the time of Joseph Brant that the Indians were not in reality subjects of the King but an independent people—allies of His Majesty—and in a measure at least exempt from the civil laws governing the true subject. "Treaties" have been made wherein they are called "faithful allies" and the like, and there is extant an (unofficial) opinion of Mr. (afterwards Chief) Justice Powell that the Indians, so long as they are within their villages, are not subject to the ordinary laws of the Province.

As to the so-called treaties, John Beverley Robinson, Attorney-General for Upper Canada (afterwards Sir John Beverley Robinson, C.J.), in an official letter to Robert Wilmot Horton, Under Secretary of State for War and Colonies, March 14, 1824, said:—

"To talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada, upon lands purchased for them and given to them by the British Government, is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke street or with the French emigrants who have settled in England:" Canadian Archives, Q. 337, pt. II., pp. 367, 368.

Ont.

S.C.

SERO v. GAULT.

Riddell, J.

I cannot express my own opinion more clearly or convincingly. The unofficial view expressed by Mr. Justice Powell at one time, he did not continue to hold.

The question of the liability of Indians to the general law of the land came up in 1822. Shawanakiskie, of the Ottawa Tribe, was convicted at Sandwich of the murder of an Indian woman in the streets of Amherstburg, and sentenced to death. Mr. Justice Campbell respited the sentence, as it was contended that Indians in matters between themselves were not subject to white man's law, but were by treaty entitled to be governed by their own customs—Canadian Archives, Sundries, U.C., September, 1822. It was said that Chief Justice Powell had in the previous year charged the grand jury at Sandwich that the Indians amongst themselves were governed wholly by their own customs. Powell, when applied to by the Lieutenant-Governor, denied this, and sent a copy of his charge, which was quite to the contrary—ib., October, 1822; and all the Judges, Powell, C.J., Campbell and Boulton, JJ., disclaimed knowledge of any such treaty, and concurred in the opinion that an Indian was subject to the general law of the Province. The Indian was, however, respited that the matter might be referred to England: ib., October, 1822. It was referred to the Law Officers of the Crown, who reported in favour of the validity of the conviction: the Lieutenant-Governor, Sir Peregrine Maitland, was instructed that there was no basis for the Indian's claim to be treated according to his customary law, that the offence was very heinous, the prisoner bore the reputation of great ferocity, and there appeared to be no ground for clemency—but, as Maitland might be in possession of further facts, he was given discretionary power to mitigate the punishment—the warrant sent distinctly recognised the legality of the conviction and authorised the execution of the sentence, but left the discretion with the Lieutenant-Governor: Canadian Archives, Q. 342, pp. 40, 41, 1826.

The law since 1826 has never been doubtful. I may say that I have myself presided over the trial of an Indian of the Grand River when he was convicted of manslaughter, and sentenced. I can find no justification for the supposition that any Indians in the Province are exempt from the general law—or ever were.

But, whatever may have been the status of the original Indian population, the law as laid down by Blackstone in his Commentaries, bk. 1, p. 366, has never been doubted: "Natural-born subjects (as distinguished from aliens) are

Ont.

S.C.

SERO v. GAULT.

Riddell, J.

such as are born within the dominions of the Crown of England . . . and aliens, such as are born out of it." He adds (p. 369): "Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature:" *Eyre* v. *Countess of Shaftsbury* (1722), 2 P. Wms. 102, at p. 124.

Halsbury's Laws of England, vol. 1, pp. 302, 303, says: "Persons born within the allegiance of the Crown include every one who is born within the dominions of the Crown whatever may be the nationality of either or both of his parents," with certain well-defined exceptions not of importance here. See the Imperial Acts (1914) 4 & 5 Geo. V. ch. 17 and (1918) 8 & 9 Geo. V. ch. 38; and our Dominion Act (1919) 9 & 10 Geo. V. ch. 38, sec. 1.

Admittedly all parties to this action were born within the allegiance of the Crown; and indeed if they were not, they could claim no higher rights than those who were· Blackstone, Comm., bk. 1, pp. 369, 370; Halsbury's Laws of England, vol. 1, p. 306.

There is no overriding and prohibitive Imperial legislation in the way, and I must hold that the Dominion and the Province have the power to pass such legislation as is here concerned in respect of Indians.

I think, too, that the legislation does apply to Indians i.e., that Indians are not exempt from its operation.

The legislation is general, and there is nothing to indicate any exception in their favour.

The land of this band was beyond question the property of the King; the only rights the Indians have in the land came through royal grant, i.e., the "Simcoe deed" of April 1, 1793—a grant of "special grace. . . . and mere motion" of certain land "purchased . . . of the Messissague Nation . . . bounded in front by the Bay of Quinté . . . . to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages . . . ." with a proviso against alienation, etc. It is plain, I think, that these words "customs and usages" are words of tenure, setting out the estate of the grantees in the land, and not indicative of the manner in which they are to use the land. See *Battishill* v. *Reed* (1856), 18 C.B. 696; *Onley* v. *Gardiner* (1838), 4 M. & W. 496. For example, suppose that the custom of the Indians was to grow corn and not wheat, could it be contended that growing wheat would be beyond their rights under the grant—if to make

Ont.

App. Div.

maple syrup from the sap of the maple, would they be wrong to chop down the trees and form arable land? Or, if they were wont to break up land with mattocks or hoes, were they precluded from using ploughs?

Moreover, there is no evidence that fishing with a seine was one of the customs of the Indians in 1793.

There is nothing in the grant suggesting exclusion from the ordinary laws of the land—and I must hold that the Indians are subject to these laws.

The many other difficulties in the way of the plaintiff I do not think it necessary to discuss.

I think that the action must be dismissed with costs if asked.

I had hoped to find much in the Canadian Archives helpful in this inquiry, but have not been able to apply to this decision a great deal of the interesting information stored at Ottawa.

Mr. A. G. Chisholm, counsel for the Six Nations, whom I heard as amicus curiæ, made a very able and interesting argument, chiefly on historical grounds; but, for the reasons stated, I am unable to accede to it.

Of course, I deal only with the law as I find it, and express no opinion as to the generosity, wisdom, or advisability of the legislation.

SLOAN v. OTTAWA CAR MANUFACTURING Co. Ltd.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 10, 1921.

BILLS OF SALE (§IIA—5)—SALE OF CAR—NO POSSESSION—NO REGISTRATION — SUBSEQUENT ASSIGNMENT OF BARGAINOR — POSSESSION GIVEN TO BARGAINEE—BILL OF SALE TO TRUSTEE—RIGHTS OF PARTIES.

According to the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, a purchase, by bill of sale which is not registered, and no possession given is void as against creditors of the seller.

[*Clarkson* v. *McMaster* (1895), 25 Can. S.C.R. 96, referred to.]

THE following statement is taken from the judgment of FERGUSON, J. A.:—

Appeal by the plaintiffs from a judgment of the Chief Justice of the Common Pleas, dismissing with costs an action brought to recover a motor car, or, in the alternative, damages for conversion.

In October, 1919, the father of the plaintiff Howard Sloan

552

1966

DUPRÉ
v.
COMMISSAIRES D'ÉCOLE POUR LA MUNICIPALITÉ DE ST-BERNARD DE LACOLLE

Taschereau J.C.

Dans le cas qui nous est soumis il y a évidemment amplement de preuve sur laquelle le jury pouvait se baser pour conclure comme il l'a fait.

Je crois que l'appel doit être maintenu, que le verdict du jury doit être rétabli, ainsi que le jugement de M. le Juge Duranleau qui le confirmait, le tout avec dépens de toutes les Cours contre les intimés.

Appel maintenu avec dépens.

Procureur du demandeur, appelant: J. Cartier, Saint-Jean.

Procureurs de la défenderesse, intimée: Pagé, Beauregard, Duchesne & Renaud, Montréal.

1966

*May 5
May 24

SIGEAREAK E1-53 .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR NORTHWEST TERRITORIES

Eskimos—Criminal law—Game suitable for human consumption abandoned—Northwest Territories Act, R.S.C. 1952, c. 331, s. 13—Game Ordinance O.N.W.T. 1960 (Second Sess.), c. 2, s. 15 (1)(a).

The appellant, an Eskimo, was charged with killing and abandoning game fit for human consumption contrary to s. 15(1)(*a*) of the *Game Ordinance, O.N.W.T.* 1960 (Second Sess.), c. 2. There is no dispute that the appellant had killed three caribou and had abandoned parts of them which were fit for human consumption. The charge was dismissed by the Magistrate on the ground that the *Game Ordinance* did not apply to an Eskimo. On an appeal by way of stated case, the dismissal was confirmed for the same reason. The Court of Appeal reversed this finding and convicted the appellant. The appellant was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

The Royal Proclamation of 1763, upon which the appellant relied, has no application in the region in which the alleged offence took place.

The *Game Ordinance,* which was in force and which was validly enacted by the Commissioner-in-Council pursuant to powers conferred upon him by the Parliament of Canada, applies to the Eskimos. The caribou which were killed in this case were game within the meaning of the *Game Ordinance* and the offence here was in abandoning parts

* PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

1966

SIGEAREAK E1-53 v. THE QUEEN

thereof suitable for human consumption even if the appellant had the legal right to hunt them for food.

In so far as *Regina v. Kallooar* (1964), 50 W.W.R. 602, and *Regina v. Kogogolak* (1959), 28 W.W.R. 376, hold that the *Game Ordinance* does not apply to Indians or Eskimos in the Northwest Territories, they are not good law and must be taken as having been overruled.

Esquimaux—Droit criminel—Abandon de gibier apte à la consommation humaine—Loi sur les Territoires du Nord-Ouest, S.R.C. 1952, c. 331, art. 13—Ordonnance sur le Gibier, O.N.W.T. 1960 (2e Session), c. 2, art. 15(1)(a).

L'appelant, un Esquimau, a été accusé d'avoir tué et abandonné du gibier apte à la consommation humaine, le tout contrairement à l'art. 15(1)(*a*) de l'*Ordonnance sur le Gibier*, O.N.W.T. 1960 (2e Sess.), c. 2. Il n'est pas contesté que l'appelant avait tué trois caribous et avait abandonné des parties qui étaient aptes à la consommation humaine. L'acte d'accusation fut rejeté par le magistrat pour le motif que l'*Ordonnance sur le Gibier* ne s'appliquait pas à un Esquimau. Sur appel en vertu d'un dossier soumis, le rejet de l'accusation fut confirmé pour le même motif. La Cour d'appel a renversé cette décision et a trouvé l'appelant coupable. L'appelant a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

La Proclamation royale de 1763, sur laquelle l'appelant se basait, ne s'applique pas à la région où la présumée offense a été commise.

L'*Ordonnance sur le Gibier*, qui était en force et qui avait été validement édictée par le Commissaire-en-conseil en vertu des pouvoirs qui lui sont conférés par le Parlement du Canada, s'applique aux Esquimaux. Les caribous qui ont été tués dans le cas présent étaient du gibier dans le sens de l'*Ordonnance sur le Gibier* et l'offense dans l'espèce consistait dans l'abandon de certaines parties qui étaient aptes à la consommation humaine même si l'appelant avait le droit légal d'en faire la chasse en vue de se procurer de la nourriture.

En autant que les causes de *Regina v. Kallooar* (1964), 50 W.W.R. 602 et *Regina v. Kogogolak* (1959), 28 W.W.R. 376, décident que l'*Ordonnance sur le Gibier* ne s'applique pas aux Indiens ou aux Esquimaux dans les Territoires du Nord-Ouest, ces causes ne reflètent pas la loi et doivent être considérées comme ayant été cassées.

APPEL d'un jugement de la Cour d'appel des Territoires du Nord-Ouest[1], renversant un jugement du Juge Sissons. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for the Northwest Territories[1], reversing a judgment of Sissons J. Appeal dismissed.

[1] (1966), 55 W.W.R. 1, 55 D.L.R. (2d) 29.

1966

SIGEAREAK E1-53 v. THE QUEEN

W. G. Morrow, Q.C., and *A. E. Williams*, for the appellant.

D. H. Christie, Q.C., and *J. M. Bentley*, for the respondent.

The judgment of the Court was delivered by

HALL J.:—The appellant, an Eskimo, residing at Whale Cove, a settlement on the west coast of Hudson Bay about midway between Churchill and Chesterfield Inlet, was charged under s. 15(1)(*a*) of the *Game Ordinance*, being c. 2 of the Ordinances of the Northwest Territories, (1960) Second Session, that he, between the 20th day of July, 1964 and the 31st day of July, 1964 at or near a point two miles from an abandoned cabin on the north shore at the mouth of the Wilson River, Northwest Territories, did kill and abandon game fit for human consumption contrary to s. 15(1)(*a*) of the *Game Ordinance*.

Section 15(1)(*a*) referred to reads as follows:

15.(1) No person who has killed, taken or acquired game shall

(*a*) abandon any part thereof that is suitable for human consumption;

The *Game Ordinance* was enacted by the Commissioner in Council pursuant to powers confered by s. 13 of the *Northwest Territories Act*, R.S.C. 1952, c. 331. The relevant parts of s. 13 read:

13. The Commissioner in Council may, subject to the provisions of this Act and any other Act of the Parliament of Canada, make ordinances for the government of the Territories in relation to the following classes of subjects, namely,

* * *

(*q*) the preservation of game in the Territories;

By s. 1 of c. 20 of the Statutes of Canada 1960, s. 14 of the *Northwest Territories Act* was amended to read:

(2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make Ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and Ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.

(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting

555

1966

SIGEAREAK E1-53 v. THE QUEEN

Hall J.

Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

and s. 17 was amended by adding thereto the following:

(2) All laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.

Acting under s. 14(3) above, the Governor in Council passed an Order in Council on September 14, 1960, reading as follows:

AT THE GOVERNMENT HOUSE AT OTTAWA

WEDNESDAY, the 14th day of SEPTEMBER, 1960.

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

His Excellency the Governor General in Council, on the recommendation of the Minister of Northern Affairs and National Resources, pursuant to subsection (3) of section 14 of the Northwest Territories Act, is pleased hereby to declare musk-ox, barren-ground caribou and polar bear as game in danger of becoming extinct.

(*Seal*)

Certified to be a true copy.

(sgd.) D. F. Wall
Assistant Clerk of the Privy Council.

Counsel for the appellant made a point that this Order in Council was not referred to in the proceedings before the magistrate. Nothing, however, turns on that fact. The Order in Council was part of the relevant law applicable to the charge whether referred to or not.

The charge was heard by P. B. Parker, a police magistrate in and for the Northwest Territories under the provisions of s. 466(*b*) of the *Criminal Code* of Canada at Whale Cove aforesaid on February 26 and 27, 1965. Magistrate Parker, holding that he was bound by the decision of Sissons J. in *Regina v. Kallooar*[1], dismissed the charge on the ground that the *Game Ordinance* did not apply to an Eskimo.

The Attorney General of Canada applied to Magistrate Parker to state a case under s. 734 of the *Criminal Code* of Canada. The learned magistrate stated the case which concluded with asking the following question:

Was I right in holding that the Game Ordinance and particularly Section 15(1)(*a*) thereof does not apply to Eskimos?

[1] (1964), 50 W.W.R. 602.

1966

SIGEAREAK E1-53 v. THE QUEEN

Hall J.

The appeal, by way of stated case, was heard by Sissons J. who, adhering to the views expressed by him in *Regina v. Kogogolak*[1] and in *Kallooar* answered the question in the affirmative and upheld the dismissal of the charge. Sissons J. in *Regina v. Kogogolak* had held at p. 384:

> The *Game Ordinance* of the Northwest Territories cannot and does not apply to the Eskimos.

The Attorney General of Canada appealed by leave to the Court of Appeal for the Northwest Territories. The appeal was heard by the Chief Justice, Parker and McDermid JJ.A. The Court of Appeal[2] reversed Sissons J. and convicted the appellant, remitting the case to the Summary Conviction Court for the purpose of deciding what penalty should be imposed on the appellant. The appellant applied for and was given leave to appeal to this Court from the judgment of the Court of Appeal.

It was contended by the appellant that the Royal Proclamation of 1763 applied to Indians and Eskimos in the area in question here and was still in effect notwithstanding the *Northwest Territories Act* and the *Game Ordinance*. Sissons J. so held in *Kogogolak* and in *Kallooar*. Johnson J.A. in *Regina v. Sikyea*[3], whose judgment was adopted in this Court[4], expressed himself to the contrary. There is no need for any doubt on the point. The Proclamation, insofar as it related to Indians, declared:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean

[1] (1959) 28 W.W.R. 376, 31 C.R. 12.
[2] (1966) 55 W.W. 1, 55 D.L.R. (2d) 29.
[3] (1964), 46 W.W.R. 65, 43 C.R. 83, 2 C.C.C. 325.
[4] [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80.

1966

SIGEAREAK E1-53 v. THE QUEEN

Hall J.

from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or *within the Limits of the Territory granted to the Hudson's Bay Company*, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the *Sea from the West and North West as aforesaid;* (The italics are mine.)

The term "Indians" includes Eskimos: *Reference as to whether the term "Indians" in Head 24 of Section 91 of the British North America Act, 1867, includes Eskimo inhabitants of the Province of Quebec*[1].

The Letters Patent granted in 1670 to the Governor and Company of Adventurers of England, trading into Hudson's Bay, gave:

. . . unto the said company and their successors the sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks and sounds in whatsoever latitude they should be, that lay within the entrance of the straits commonly called Hudson's Straits together with all the lands and territories upon the countries, coasts, and confines of the seas, bays, lakes, rivers, creeks, and sounds aforesaid . . . . .

The Proclamation specifically excludes territory granted to the Hudson's Bay Company and there can be no question that the region in question was within the area granted to Hudson's Bay Company. Accordingly the Proclamation does not and never did apply in the region in question and the judgments to the contrary are not good law.

The substantive question which was fully and ably argued by counsel was whether the *Game Ordinance* and particularly s. 15(1)(*a*) thereof apply to Eskimos. In summary, the learned magistrate found as follows as set out in more detail in the stated case:

(1) That the appellant, an Eskimo, on the 20th day of July and the 31st day of July, 1964, killed three caribou being game within the meaning of the *Game Ordinance* and he took possession of them and removed the skin and rear parts of two caribou and the tongue of the third.

(2) That he showed intention to abandon and did abandon the parts of the three caribou he had killed and

[1] [1939] S.C.R. 104, 2 D.L.R. 417.

which he did not take, and that the meat abandoned was at that time fit for human consumption.

It was not questioned that the Whale Cove settlement is in the Barren Land region of the Northwest Territories, being a part of Canada under the legislative jurisdiction of the Parliament of Canada. Parliament, by s. 13 of the *Northwest Territories Act*, conferred legislative powers upon the Commissioner in Council to enact laws for the preservation of game in the Territories. The Commissioner in Council enacted the *Game Ordinance*. Parliament, by c. 20 of the Statutes of Canada, 1960, enacted by s. 2 thereof as follows:

> From the day on which this Act comes into force, the provisions of the Ordinances entitled
>
> (*a*) "An Ordinance respecting the Preservation of Game in the Northwest Territories", being chapter 42 of the Revised Ordinances of the Northwest Territories, 1956;
>
> (*b*) "An Ordinance to amend the Game Ordinance", being chapter 2 of the Ordinances of the Northwest Territories, 1956, 2nd Session;
>
> (*c*) "An Ordinance to amend the Game Ordinance", being chapter 1 of the Ordinances of the Northwest Territories, 1957, 1st Session;
>
> (*d*) "An Ordinance to amend the Game Ordinance", being chapter 1 of the Ordinances of the Northwest Territories, 1958, 1st Session; and
>
> (*e*) "An Ordinance to amend the Game Ordinance", being chapter 4 of the Ordinances of the Northwest Territories, 1959, 1st Session,
>
> have the same force and effect in relation to Indians and Eskimos as if on that day they had been re-enacted in the same terms.

and also provided that:

> (3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

The Governor in Council then passed the Order in Council of September 14, 1960 previously quoted, declaring barren-ground caribou as game in danger of becoming extinct.

The power of Parliament to enact the Northwest Territories Act and the amendments thereto is not questioned nor is the power of the Commissioner in Council to enact the *Game Ordinance*. It is not in dispute that the appellant abandoned parts of game as defined in s. 2 of the *Game Ordinance* then suitable for human consumption. The only factual issue pressed by the appellant was that it had not

1966

SIGEAREAK E1-53 v. THE QUEEN

Hall J.

been shown that the three caribou which he killed and abandoned in part were barren-ground caribou. I have no doubt that this Court can and should take judicial notice of the fact that the caribou in question here were barren-ground caribou. The Whale Cove region is deep in the Barren Lands of Northern Canada and no suggestion is made in any of the literature to which the Court was referred that any caribou other than barren-ground caribou are to be found that far north. In any event, the caribou he killed were game within the meaning of the *Game Ordinance* and the offence here was in abandoning parts thereof suitable for human consumption even if he had the legal right to hunt them for food.

I am of opinion that the question put by Magistrate Parker in the case stated by him must be answered in the negative, the conviction of the appellant by the Court of Appeal affirmed and the direction remitting the case to the Summary Conviction Court upheld.

I think it desirable to say specifically that insofar as *Regina v. Kallooar* and *Regina v. Kogogolak* hold that the *Game Ordinance* does not apply to Indians or Eskimos in the Northwest Territories, they are not good law and must be taken as having been overruled.

The appeal should, accordingly, be dismissed. The Attorney General states in his factum that he does not ask for costs. There will, therefore, be no Order as to costs.

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitor for the respondent: D. H. Christie, Ottawa.

REPORTS OF CASES

Decided in the Courts of

Alberta, British Columbia, Manitoba

and Saskatchewan

and Certain Decisions of the Supreme Court

of Canada in Western Appeals

NORTHWEST TERRITORIES

COURT OF APPEAL

Before Smith, C.J.A., Parker and McDermid, JJ.A.

Regina v. Sigeareak

Eskimos — Abandonment of Game Fit for Human Consumption — Applicability of Game Ordinance to Eskimos.

Appeal from the judgment of Sissons, J., dismissing an appeal by way of stated case from the acquittal of the respondent by a magistrate of an offence of abandoning game fit for human consumption, contrary to sec. 15 (1) (*a*) of the *Game Ordinance*, N.W.T., 1960, (2nd sess.), ch. 2. Appeal allowed.

Per Smith, C.J.A., Parker and McDermid, JJ.A. concurring: Sec. 15 (1) (*a*) of the *Game Ordinance* of the Northwest Territories makes it an offence for any person who has killed, taken or acquired game to abandon any part of it that is suitable for human consumption; the section applies to Eskimos. *Kallooar v. Reg.* (1965) 50 WWR 602 (N.W.T.) considered and not followed.

The abandonment of game fit for human consumption is not a part of the act of hunting for it, but is a separate and severable act. Subject to certain restrictions in the case of game in danger of becoming extinct, the commissioner in council cannot prohibit Eskimos from hunting for food on unoccupied crown lands; but he may prohibit an Eskimo from abandoning game fit for human consumption in pursuance of his powers to legislate for the preservation of game.

[Note up with 10 CED (2nd ed.) *Eskimos*, secs. 2, 3; 12 CED (2nd ed.) *Game Laws*, secs. 2, 5.]

M. M. de Weerdt, for crown, appellant.

W. G. Morrow, Q.C., and *A. E. Williams*, for accused, respondent.

December 9, 1965.

The judgment of the court was delivered by

SMITH, C.J.A. — This is an appeal from Sissons, J., who, sitting as a judge of the territorial court of the Northwest Territories, dismissed an appeal by way of stated case from an acquittal by Parker, P.M.

The charge was that the respondent between July 20, 1964 and July 31, 1964, at or near a point two miles from an abandoned cabin on the north shore at the mouth of the Wilson River, N.W.T. did kill and abandon game fit for human consumption contrary to sec. 15 (1) (*a*) of the *Game Ordinance,* NWT, 1960 (2nd sess.), ch. 2.

The Ordinance came into force on July 1, 1961, but was assented to on July 16, 1960. Sec. 15 (1) (*a*) of that Ordinance reads as follows:

> "15. (1) No person who has killed, taken or acquired game shall
>
> "(*a*) abandon any part thereof that is suitable for human consumption; * * * ."

The relevant portions of the sections of the *Northwest Territories Act,* RSC, ch. 331, dealing with the legislative power of the commissioner in council immediately prior to June 9, 1960, are the following portions of sec. 13 and all of sec. 14:

> "13. The Commissioner in Council may, subject to the provisions of this Act and any other Act of the Parliament of Canada, make ordinances for the government of the Territories in relation to the following classes of subjects, namely,
>
> * * *
>
> "(*h*) property and civil rights in the Territories;
>
> * * *
>
> "(*q*) the preservation of game in the Territories;
>
> * * *
>
> "(*w*) generally, all matters of a merely local or private nature in the Territories;
>
> "(*x*) the imposition of fines, penalties, imprisonment or other punishments in respect of the violation of the provisions of any ordinance; and
>
> "(*y*) such other matters as are from time to time designated by the Governor in Council.

"14. Nothing in section 13 shall be construed to give the Commissioner in Council greater powers with respect to any class of subjects described therein than are given to legislatures of the Provinces of Canada under sections 92 and 95 of the *British North America Act, 1867,* with respect to similar subjects therein described."

By sec. 1 of 1960, ch. 20, assented to on June 9, 1960, and which came into effect on the same day, it was provided as follows:

"1. (1) Section 14 of the *Northwest Territories Act* is amended by adding thereto the following subsections:

"'(2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make Ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and Ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.

"'(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.'

"(2) From the day on which this Act comes into force, the provisions of the Ordinances entitled

"(*a*) 'An Ordinance respecting the Preservation of Game in the Northwest Territories,' being chapter 42 of the Revised Ordinances of the Northwest Territories, 1956;

"(*b*) 'An Ordinance to amend the Game Ordinance,' being chapter 2 of the Ordinances of the Northwest Territories, 1956, 2nd Session;

"(*c*) 'An Ordinance to amend the Game Ordinance,' being chapter 1 of the Ordinances of the Northwest Territories, 1957, 1st Session;

"(*d*) 'An Ordinance to amend the Game Ordinance,' being chapter 1 of the Ordinances of the Northwest Territories, 1958, 1st Session; and

"(*e*) 'An Ordinance to amend the Game Ordinance,' being Chapter 4 of the Ordinances of the Northwest Territories, 1959, 1st Session,

"have the same force and effect in relation to Indians and Eskimos as if on that day they had been re-enacted in the same terms."

By sec. 2 of 1960, ch. 20, the following subsection was added to sec. 17 of the *Northwest Territories Act:*

"(2) All laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories."

In the stated case the magistrate found as facts:

"(a) The respondent between the 20th day of July and the 31st day of July, 1964 killed three caribou.

"(b) The respondent then reduced these caribou carcasses into possession and removed parts of them, that is to say:

"(i) the skin and rear parts of two caribou; and

"(ii) the tongue of the third.

"(c) The respondent took no steps towards either the use or preservation of the remaining parts of these three animals, but left the remaining parts on the land at or near the place where the caribou had been killed.

"(d) The respondent within a day or two, that is, about the end of July, 1964, left the area in a boat, taking with him those parts of the animals which he had removed.

"(e) At the time the respondent removed the parts of these caribou carcasses, the meat remaining was fit for human consumption.

"(f) The killing of these caribou and the removal of the parts as aforesaid took place near the mouth of the Wilson River, N.W.T."

In addition to the foregoing facts the magistrate stated that evidence was given of the following:

"(a) Caribou meat spoils in about three days' time during the month of July.

"(b) The respondent, after leaving the Wilson River area about the end of July, 1964, returned to Whale Cove,

N.W.T., and did not return to the Wilson River area before September, 1964. (There was no evidence that the respondent ever returned to the Wilson River area.)

"(c) In November, 1964, the remains of the carcasses of the three caribou were still where they had been left in July, 1964.

"(d) During the period July, 1964 to September, 1964, a number of other Eskimo fishermen and hunters made the journey between Whale Cove and the Wilson River area by boat."

The magistrate stated that the facts found by him seemed "to bring this case within all three parts of the definition * * *" of the word "abandon" quoted in the decision of Sissons, J. in *Kallooar v. Reg.* (1965) 50 WWR 602 (N.W.T.).

The magistrate went on to say:

"The decision of Mr. Justice Sissons * * * includes the following statement 'The *Game Ordinance* of the Northwest Territories cannot and does not apply to Eskimos,' and again * * * the following appears—'Ordinances for the preservation of game are not applicable to Eskimos hunting for food.' Also * * * the following appears—'The accused was certainly hunting for food. This charge of killing and abandoning game is certainly tied in with the hunting rights of the Eskimos.' Applying the foregoing to the present case, I found that the respondent was an Eskimo. I also found that he was hunting for food when he killed these caribou.

"In the result, I held that the respondent had killed and abandoned game fit for human consumption at the time and place specified in the charge. I stated that if the respondent had been a white man, I would have found him guilty. However, I held that the decision of *Kallooar v. Reg.* cited above was binding on me. Consequently, since it appeared to me that the *Game Ordinance* must be deemed not to apply to an Eskimo I acquitted the respondent.

"The Attorney-General of Canada desires to question the validity of the said acquittal on the grounds that it was erroneous in point of law, in that I erred in holding that section (15) (1) (*a*) of the *Game Ordinance* of the Northwest Territories does not apply to Eskimos, the question submitted for the judgment of the Honourable Court being:

"(a) Was I right in holding that the *Game Ordinance* and particularly section 15 (1) (*a*) thereof does not apply to Eskimos?"

When the appeal by way of stated case came before Sissons, J. he held that the magistrate was right in holding that the *Kallooar* case was binding upon him and consequently he dismissed the appeal and affirmed the acquittal. The learned judge referred to *Rex v. McDonnell* [1935] 1 WWR 175, 53 CCC 150, and the statement of Harvey, C.J.A. delivering the judgment of the appellate division of Alberta at pp. 175-6. He then stated:

"The question asked in the present Stated Case does not state the ground upon which the proceeding is questioned. The covert grounds of objection in this case are: that the lands herein are not the lands of the Eskimo; that the lands in question herein were never reserved to the Eskimo as their hunting grounds; that the Eskimos have no aboriginal hunting rights; that the Royal Proclamation of 1763 does not apply to Eskimos; that Eskimos have no Rights; that if Eskimos ever had Rights they have been abrogated by the Parliament of Canada; that the *Canadian Bill of Rights*, 1960, ch. 44, has no application to Eskimo rights; that *Reg. v. Kogogolak* (1959) 28 WWR 376, 31 CR 12 (N.W.T.); *Re Noah Estate* (1961-62) 36 WWR 577 (N.W.T.); *Katie's Adoption Petition* (1962) 38 WWR 100 (N.W.T.); *Reg v. Koonungnak* (1963-64) 45 WWR 282, 42 CR 143 (N.W.T.), and *Kallooar v. Reg., supra,* were wrongly decided by this Court. Unless these grounds are brought into the open and considered there can be no justice done in this case. These grounds and the issues involved are already before the Court of Appeal for the Northwest Territories for consideration in the Appeal from this Court which the Crown has taken in *Kallooar v. Reg.* (*supra*). The question asked is fictitious and deceitful. The Magistrate does not hold that the *Game Ordinance* and particularly section 15 (1) (*a*) thereof does not apply to Eskimos.

"He held 'that the decision in *Kallooar v. Reg.* [*supra*], cited above was binding on me. *Consequently,* since it appeared to me that the Game Ordinance must be *deemed* not to apply to an Eskimo I acquitted the respondent.' "

With the greatest respect for the distinguished and experienced judge of the territorial court of the Northwest Territories, I find that I am in disagreement with his statement that "the Magistrate does not hold that the *Game Ordinance* and

particularly section 15 (1) (*a*) thereof does not apply to Eskimos." To me it seems quite clear that the magistrate was following and applying the decision of Sissons, J. in *Kallooar v. Reg., supra,* as he was bound to do, and that because of that decision he found that sec. 15 (1) (*a*) of the *Game Ordinance* did not apply to Eskimos.

Nor do I agree with the learned judge that the question asked in the stated case did not state the grounds upon which the proceeding was questioned. Reading the question in the light of the findings of fact made by the magistrate which preceded the question, my view is that it is quite clear that the question asked did set forth the ground upon which the proceeding was questioned, namely, that sec. 15 (1) (*a*) of the *Game Ordinance* applied to the respondent, an Eskimo.

There was produced and filed with us on the argument of the appeal, a certified copy of an order of the governer in council dated September 14, 1960, reading as follows:

> "His Excellency the Governor General in Council, on the recommendation of the Minister of Northern Affairs and National Resources, pursuant to subsection (3) of section 14 of the Northwest Territories Act, is pleased hereby to declare musk-ox, barren-ground caribou and polar bear as game in danger of becoming extinct."

That order in council was not before the magistrate at the trial or the learned judge upon the appeal.

In the *Kallooar* case, *supra,* Sissons, J. (at p. 607) quoted from his reasons for judgment in *Reg. v. Kogogelak, supra;* the following statement:

> " 'Traditionally, this is the land of the Eskimos — the Innuit, i.e.—the People (par excellence) — and from time immemorial they have lived by hunting and fishing.
>
> " 'Historically, in accord with the equitable principles of the British Crown, they have been assured of their right to follow their vocations of hunting and fishing.'
>
> * * *
>
> " 'I think the Royal Proclamation of 1763 is still in full force and effect as to the lands of the Eskimos. The Queen has sovereignty and the Queen's writ runs in these Arctic "lands and territories." This is the Queen's court and it needs must be observant of the "Royal will and pleasure" expressed 200 year ago and of the rights royally proclaimed.

" 'The lands of the Eskimos are reserved to them as their hunting grounds. It is the royal will that the Eskimos "should not be molested or disturbed" in the possession "of these lands." Others should tread softly, for this is dedicated ground.

* * *

" 'There has been no treaty with the Eskimos and the Eskimo title does not appear to have been surrendered or extinguished by treaty or by legislation of the Parliament of Canada.

" 'The Eskimos have the right of hunting, trapping, and fishing game and fish of all kinds, and at all times, on all unoccupied Crown lands in the Arctic.

* * *

" 'The *Game Ordinance* of the Northwest Territories cannot and does not apply to the Eskimos.' "

Counsel for the respondent contended that the act of abandoning game which had been killed by a hunter is part and parcel of the process of hunting for food; that it was found as fact that the caribou abandoned by the respondent had been killed by him when he was hunting for food and that the game abandoned was fit for human consumption; and, therefore, that because of the provisions of subsec. 3 of sec. 14 of the *Northwest Territories Act*, the provisions of the *Game Ordinance*, in the language of McGillivray, J.A. in *Rex v. Wesley* [1932] 2 WWR 337, 58 CCC 269 (Alta. App. Div.) "has no application" to Eskimos hunting for food in the Northwest Territories. Briefly stated, the argument of counsel for the respondent was that to prohibit an Eskimo from abandoning game killed by him which is fit for human consumption, is to restrict or prohibit him from hunting for food, contrary to subsec. (3) of sec. 14. The respondent, he argued, should, therefore, be acquitted. He conceded that he could not succeed on the basis of this argument if the order in council of September 14, 1960, was applicable.

Counsel for the crown contended that, because of the provisions of the order in council already referred to, the respondent must be found guilty, even assuming that abandonment of the game could be said to be part and parcel of the act of hunting for food, and that, in any event, the legislative provision making it a punishable offence to abandon game which is fit for human consumption does not restrict or prohibit Eskimos from hunting for food on unoccupied crown lands.

It then becomes necessary to decide whether such legislative provision with respect to the abandonment of game that is suitable for human consumption by a person who has killed it, is within the limitation against restricting or prohibiting Indians or Eskimos from hunting for food on unoccupied crown lands, provided in subsec. (3) of sec. 14 of the *Northwest Territories Act*.

In *Prince and Myron v. Reg.* (1964) 46 WWR 121, [1964] SCR 81, [1964] 3 CCC 2, reversing (1962-63) 40 WWR 234, 39 CR 43, (1963) 1 CCC 129, Hall, J., delivering the judgment of the Supreme Court of Canada, said at p. 124:

> "The word 'hunt' as used in the section under review must be given its plain meaning. 'Hunt' is defined in the *Oxford English Dictionary* as:
>
> " 'The act of chasing wild animals for the purpose of catching or killing them; to chase for food or sport; to scour a district in pursuit of game.'
>
> "*Webster's Third New International Dictionary* defines 'hunt' as: 'To follow or search for game for the purpose and with the means of capturing or killing.' It is not ambiguous nor subject to any of the limitations which sec. 31 (1) imposes upon the non-Indian."

Clearly to me the abandonment of game that is suitable for human consumption by a person who has killed it is not a part of the act of hunting game for food. The act of abandoning game by a person who has killed it is subsequent to and severable from the chase of the animal for the purpose of killing it; the abandoning is not part of the following or searching for game for the purpose and with the means of killing it. To make such an abandonment an offence is a legitimate exercise of the power of the commissioner in council to legislate for the preservation of game, and in no way restricts or prohibits the Eskimo from hunting for food. In the absence of an order in council such as that of September 14, 1960, the commissioner in council cannot restrict or prohibit Eskimos from hunting for food on unoccupied crown lands; it can, however, prohibit an Eskimo from abandoning game fit for human consumption which he has killed while hunting for food. The essence of the offence of abandoning appears to me to be waste of game which has been killed and not a restriction or prohibition from hunting for food. The commissioner in council had the power to make ordinances in relation to the preservation of game in the Territories before 1960 because of sec. 15 (*a*) of the *Northwest*

Territories Act and after the enactment of 1960, ch. 20, the commissioner in council had the express power of making ordinances in relation to the preservation of game in the Territories that were applicable to and in respect of Indians and Eskimos, subject only to the limiting provisions of subsec. (3) of sec. 14. Subject to what I have to say in the next two paragraphs, the conclusion that the abandonment of game that is suitable for human consumption by a person who has killed it is not a part of the act of hunting game for food, appears to be a conclusion sufficient for the decision of this case. My view is that sec. 15 (1) (*a*) of the *Game Ordinance* applies to Eskimos.

As pointed out by Johnson, J.A., delivering the judgment of this division in *Reg. v. Sikyea* (1964) 46 WWR 65, at 66, 43 CR 83, [1964] 2 CCC 325, affirmed (1964) 49 WWR 306, "the Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the Proclamation" of 1763. The alleged offence was committed at or near the mouth of the Wilson River where it flows into Hudson Bay on the western side of it. This area was undoubtedly within "the Limits of the Territory granted to the Hudson's Bay Company." The Proclamation, therefore, has no application to the case which we are considering and it is unnecessary to decide whether the Proclamation is applicable to Eskimos as well as to Indians. My conclusions make it unnecessary to decide the question whether the order in council relating to the danger of musk-ox, barren-ground caribou and polar bear becoming extinct, can be taken into account.

Counsel for the respondent argued that the information was bad in that it charged the respondent that he "did kill and abandon * * * contrary to section 15 (1) (*a*)" and that if there can be any offence by the Eskimo under sec. 15 (1) (*a*) it must be to abandon game suitable for human consumption which the Eskimo has killed, taken or acquired, and not to kill and abandon such game. I think it is clear that the information could have been more artistically drawn than it was and that it properly should have charged the respondent that he, "having killed game, abandoned parts of the said game which were fit for human consumption, contrary to sections 15 (1) (*a*) of the *Game Ordinance.*" However, I am quite satisfied that the defect was a "defect therein in substance or in form" within sec. 727 (4) (*a*) of the *Criminal Code*, 1953-54, ch. 51. This objection, not having been taken at trial, is therefore no longer open to the respondent. In any event, I am of the opinion that the information sufficiently charged the respon-

dent with an offence under sec. 15 (1) (*a*) of the *Game Ordinance*. It is my opinion that it sets forth "the substance of the offence and contains allegations of all matters essential to be proved and that such allegations are expressed in words sufficient to give the accused notice of the offence with which she is charged; or, in other words, that it contains the averment of every fact or circumstance necessary to constitute the offence charged:" *Rex v. Steele* [1952] OWN 181, 14 CR 285, 102 CCC 273, Mackay, J.A. delivering the judgment of the Ontario court of appeal at p. 275.

In the result, my opinion is that the respondent should have been convicted of the offence with which he was charged. We therefore reverse the decision of Parker, P.M. and convict the respondent of the offence with which he was charged. The case is remitted to the summary conviction court for the purpose of deciding what penalty should be imposed upon the respondent.

ALBERTA

DISTRICT COURT — CULLEN, D.C.J.

Re Seizures Act

Re Exemptions Act

Re E. T. Marshall Co. Ltd. v. Fleming

Exemptions — Seizure under Execution — "Exempt from Seizure," Meaning of — Claim for Exemptions — Privilege of Debtor — Exemptions Act.

Application by the sheriff under sec. 10 of *The Exemptions Act*, RSA, 1955, ch. 104, to determine a dispute arising out of a seizure.

It was *held* that, notwithstanding that *The Exemptions Act* sets out a large number of items which are "exempt from seizure" there is no section which prohibits seizure; the Act merely confers a right or privilege which an execution debtor may, at his option, exercise, and this right is to be found in sec .27 (1) of the Act, reinforced in the case of dispute, by sec. 10. *Re Seizures Act; Re Exemptions Act; Re Seizure of Rodi & Wienenberger Aktiengesellschaft v. Kay* (1959-60) 30 WWR 229, 1960 Can Abr 671 (Alta.) not followed.

The sheriff is not required, at the time of seizure, to determine what goods of the debtor fall within the exemptions set out in sec. 2 of *The Exemptions Act;* so to interpret the statute would be to defeat, to a large extent, its purpose. It is for the debtor, after seizure, to assert his claim for exemptions, which claim must be determined by the court. *Love v. Bilodeau* (1912) 3 WWR 81, 22 WLR 689, 5 Alta LR 348, 19 Can Abr 197, applied.

[Note up with 11 CED (2nd ed.) *Executions*, secs. 31, 33; *Exemptions*, secs. 2, 4, 25, 26, 27; 3 CED (CS) *Words and Phrases* (1947-1965 Supps.).]

1964

LAFONTAINE v. RURAL MUNICIPALITY OF MONTCALM

Hall J.

throughout, but as the appeal was *in forma pauperis* her costs in this Court will be as provided in R. 142(4).

Appeal allowed with costs as provided in R. 142(4).

Solicitors for the defendant, appellant: Walsh, Micay and Company, Winnipeg.

Solicitors for the plaintiff, respondent: Arpin, Rich, Houston & Karlicki, Winnipeg.

1964

*May 20, 21, 22 Oct. 6

MICHAEL SIKYEA .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Criminal law—Constitutional law—Indians—Game laws—Shooting duck out of season in Northwest Territories—Migratory Birds Convention Act, R.S.C. 1952, c. 179, s. 12(1).

The appellant, a treaty Indian, was found guilty by a magistrate at Yellowknife in the Northwest Territories of killing a migratory bird during the closed season in violation of Reg. 5(1)(*a*) of the Migratory Bird Regulations, contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. The appellant admitted that he shot the bird for food. His defence was that under Treaty No. 11 made in 1921 he was entitled to hunt and shoot ducks for food regardless of any regulations or legislation, whether in season or not. The bird was identified as a female mallard duck. The conviction was set aside by the Territorial Court, which also expressed a doubt as to whether the duck was wild or domestic. On appeal to the Court of Appeal, the conviction was restored on the grounds that the Act was valid legislation and abrogated any rights given to Indians by treaty. Leave was granted to appeal to this Court.

Held: The appeal should be dismissed.

The doubt expressed by the trial judge as to whether the duck in question was a wild duck was a question of law alone, since the validity of this conclusion was dependant upon the true meaning to be attached to the words "wild duck" as used in the statute and regulations. There was no room for doubt that a mallard is a species of wild duck within the meaning of the Act, and under the circumstances the doubts expressed by the trial judge were only consistent with his erroneous opinion that a wild duck which once has been tamed or confined and is later found at large is not then a wild duck within the meaning of

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Ritchie and Hall JJ.

1964

SIKYEA
v.
THE QUEEN

the statute. *Hamps v. Darby*, [1948] 2 K.B. 311, referred to. Accordingly the Court of Appeal and this Court had jurisdiction to entertain the appeal. On the merits of the appeal, the reasons and conclusions of the Court of Appeal should be upheld.

APPEAL from a judgment of the Court of Appeal for the Northwest Territories[1], restoring the conviction of the appellant. Appeal dismissed.

W. G. Morrow, Q.C., and *Mrs. E. R. Hagel*, for the appellant.

D. H. Christie, Q.C., and *J. M. Bentley*, for the respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal, pursuant to leave, by Michael Sikyea from the judgment of the Court of Appeal for the Northwest Territories[1] allowing an appeal by the respondent from the judgment of Mr. Justice Sissons of the Territorial Court of the Northwest Territories who had allowed an appeal by the appellant by way of trial *de novo* from his conviction at Yellowknife, Northwest Territories, on May 7, 1962, by W. V. England, a Justice of the Peace in and for the Northwest Territories for an offence contrary to subs. (1) of s. 12 of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. The charge on which the appellant was convicted was that he—

> on the 7th day of May AD 1962 at or near the Municipal District of Yellowknife in the Northwest Territories did unlawfully kill a migratory bird in an area described in Schedule A of the Migratory Bird Regulations at a time not during an open season for that bird in the area in the aforementioned schedule, in violation of Section 5(1)(*a*) of the Migratory Bird Regulations, thereby committing an offence contrary to Section 12(1) of the *Migratory Birds Convention Act*, Chapter 179, R.S.C. 1952.

The regulation mentioned provides that:

> Unless otherwise permitted under these Regulations to do so, no person shall
>
> (*a*) in any area described in Schedule A, kill, hunt, capture, injure, take or molest a migratory bird at any time except during an open season specified for that bird and that area in Schedule A,

Section 12(1) of the Act provides that every person who violates any regulation is, for each offence, liable upon summary conviction to a fine of not more than three hundred

[1] [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65.

1964

SIKYEA v. THE QUEEN

Hall J.

dollars and not less than ten dollars, or to imprisonment for a term not exceeding six months, or to both fine and imprisonment.

Part XI of Schedule A to the Regulations defines the open season for ducks in the Northwest Territories as being from September 1 to October 15 inclusive.

Under s. 3(*b*)(i) "migratory game birds" include "wild ducks".

The appellant testified at the trial *de novo* before Sissons J. and in his evidence admitted having shot the duck which was in evidence as part of the Crown's case as testified to by Constable Robin. The appellant also said that he had shot the duck for his own use as food when he saw it swimming on a pond. This pond, according to Constable Robin, was in the open country in the Northwest Territories six miles out of Yellowknife.

The appellant's defence was in effect that he was a Treaty Indian, a member of the Yellowknife Band and that under Treaty No. 11 made in 1921 he was entitled to hunt and shoot ducks for food regardless of any regulations or legislation, whether in season or not.

Sissons J. made the following findings:

(1) THAT the appellant was a Treaty Indian and one of the Band included under Treaty No. 11;

(2) THAT on May 7, 1962 the appellant shot the duck for which he was being prosecuted;

(3) THAT the duck was a female mallard.

Sissons J. then dealt at length with the contention that the appellant as a Treaty Indian was lawfully entitled to shoot ducks for food at any time of the year. He concluded his judgment by saying:

I find that the Migratory Birds Convention Act has no application to Indians hunting for food, and does not curtail their hunting rights.

He had, however, preceded that finding with this statment:

It is clear that the evidence does not establish beyond a reasonable doubt that the female Mallard which was shot was a wild duck. In spite of the argument of the Crown, I cannot draw from the circumstantial evidence the inference that it was a wild duck. The Rule in Hodge's case is in the way. The accused therefore cannot be found Guilty of the offence with which he is charged.

but having said that, he immediately added:

The real defence and the important issue in this case is that the Migratory Birds Convention Act has no application to Indians engaged in the

574

1964

SIKYEA
v.
THE QUEEN

Hall J.

pursuit of their ancient right to hunt, trap and fish game and fish for food at all seasons of the year, on all unoccupied Crown lands.

The substantial question argued on the hearing of this appeal was whether the provisions of the *Migratory Birds Convention Act, supra,* and the Regulations made thereunder apply to Treaty Indians in the Northwest Territories hunting and killing ducks for food at any time of the year.

But the point is validly made that an appeal to this Court in a case of this kind can be on a question of law alone and that if the statement of Sissons J. above quoted is a finding of mixed fact and law, no appeal lay to the Court of Appeal or lies to this Court. What the learned judge was deciding in the passage above quoted was that there was some doubt on the evidence as to whether the duck in question was a "wild duck" within the meaning of the *Migratory Birds Convention Act*. The validity of his conclusion is dependent upon the true meaning to be attached to the words "wild duck" as used in the statute and regulations, and this is, in my view, "a question of law alone". See *Vail v. The Queen*[1]. A mallard duck is defined in the Shorter Oxford Dictionary as a "wild duck". It is also referred to in Canadian Water Birds, Game Birds: Birds of Prey, by P. A. Taverner as "perhaps the choice duck of the wild-fowler" and in the Catalogue of Canadian Birds by J. Macoun and J. M. Macoun, published by the Geological Survey of Canada as "the most abundant duck in the Northwest Territories and British Columbia, breeding near ponds and lakes from lat. 49° to the borders of the Barren Lands." Mallards are also referred to as wild birds in the publication Canadian Bird Names, published by the Canadian Wild Life Service, 1962.

The facts are not in dispute; the duck in question was a mallard which was shot on a pond some six miles from Yellowknife in the Northwest Territories in the month of May at which time such a bird found in this region would be in the nesting grounds area and would probably be starting to nest.

There is evidence that if such a bird were tamed it would be very difficult to distinguish it from one which was wild, and in fact an expert called on behalf of the Crown was unable to say whether the dead duck, which was an exhibit

[1] [1960] S.C.R. 913 at 920, 129 C.C.C. 145, 33 W.W.R. 325.

1964

SIKYEA v. THE QUEEN

Hall J.

in this case, had been tamed during its lifetime, and it is this evidence which seems to have caused Sissons J. the doubts he expressed.

There appears to me to be no room for doubt that a mallard is a species of wild duck within the meaning of the *Migratory Birds Convention Act* and under the circumstances the doubts expressed by Sissons J. are only consistent with his having erroneously formed the opinion that a wild duck which has once been tamed or confined and is later found at large in the nesting area at a time when it would be likely to nest is not then a "wild duck" within the meaning of the statute. The contrary is the case. A wild duck which has once been tamed or confined reverts, on escaping, to being a wild duck in the eyes of the law. See *Hamps v. Darby*[1]. Accordingly, the Court of Appeal had jurisdiction and this Court has jurisdiction to entertain the appeal.

On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal[2]. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

The appeal must, therefore, be dismissed. There will be no order as to costs, counsel having stated that costs were not being asked for by either party, regardless of the result.

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitor for the respondent: D. H. Christie, Ottawa.

[1] [1948] 2 K.B. 311 at 321, 2 All E.R. 474.
[2] [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65.

REGINA v. SIKYEA

Northwest Territories Court of Appeal, Smith, C.J.A., Johnson, J.A., Parker, J., Kane and McDermid, JJ.A. January 24, 1964.

Constitutional law — Treaty and implementing legislation under B.N.A. Act, s. 132 — Whether validity of legislation affected by post-Statute of Westminster amendments where treaty still on foot — Migratory Birds Convention, 1916 — Migratory Birds Convention Act, 1917.

Statutes validly enacted by the Parliament of Canada before the *Statute of Westminster*, 1931, to implement a treaty properly made under s. 132 of the *B.N.A. Act*, may be amended subsequent thereto as may be necessary to carry out the terms of the treaty so long as the treaty has not been denounced, and consequently the fact that the treaty concerns matters which fall within provincial legislative jurisdiction does not preclude such Federal legislation. *Held*, in any event, an extension of all Federal Acts to the enlarged territorial jurisdiction of Canada (as by the *Extra-territorial Act*, 1933 (Can.), c. 39 and by the Act of 1949, c. 1 approving the agreement by which Newfoundland became a Province) is not a re-ratification or re-implementation of treaties made under s. 132 and when it was fully effective. *Held*, further, the *Migratory Birds Convention Act*, 1917 (Can.), c. 18, and Regulations thereunder remain valid Federal legislation in implementation of the Migratory Birds Convention of 1916 with the United States made pursuant to s. 132. It may well be that the preservation of migratory birds comes within Federal competence (apart from s. 132) as being the concern of the Dominion as a whole, and it would appear that there is room for provincial as well as Federal legislation in this field.

[*A.-G. Ont. et al. v. Canada Temperance Federation*, [1946] 2 D.L.R. 1, 85 C.C.C. 225, [1946] A.C. 193, 1 C.R. 229, [1946] 2 W.W.R. 1, consd; *R. v. Paling*, [1946] 3 D.L.R. 54, 85 C.C.C. 289, 54 Man. R. 43, 1 C.R. 461, [1946] 2 W.W.R. 49; *A.-G. Can. v. A.-G. Ont.*, [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299; *Johannesson et al. v. Rural Municipality of West St. Paul*, [1951] 4 D.L.R. 609, 69 C.R.T.C. 105, [1952] 1 S.C.R. 292, refd to]

Constitutional law — Indian treaty — Derogating legislation — Breach of promise — Validity of legislation not affected if otherwise valid — Migratory Birds Convention Act (Can.).

Indians — Treaty embodying Government promise to permit usual vocation of hunting, trapping and fishing — Derogating legislation in breach of promise — Validity not affected.

A treaty with an Indian Band, as for example Treaty 11 of 1921 respecting Indian rights in the Yellowknife area, by which the Government covenants that the Indians shall have the right to pursue their usual vocations of hunting, trapping and fishing (but subject to such Regulations as may from time to time be made by the Government) cannot stand against derogating legislation which goes beyond contemplated Regulations that would assure that a supply of game for the needs of the Indians would be maintained. Although legislation which, in imposing game restrictions, goes beyond the permission of

the treaty to make Regulations, may be a breach of promise to the Indians, Parliament is not thereby prevented from legislating competently on the subject thereof, as it did in enacting the *Migratory Birds Convention Act*, and Regulations to implement a Convention entered into by Great Britain on behalf of Canada with the United States as authorized by s. 132 of the *B.N.A. Act*. *Held*, although the Convention and implementing legislation preceded the Treaty of 1921, the prohibition in the legislation and Regulations thereunder against shooting mallard ducks out of season is binding as against an Indian who shot such a duck for food in reliance on the terms of the treaty.

[*R. v. Wesley*, [1932] 4 D.L.R. 774, 58 C.C.C. 269, 26 A.L.R. 433, [1932] 2 W.W.R. 337; *A.-G. Can. v. A.-G. Ont., A.-G. Que. v. A.-G. Ont.* [1897] A.C. 199, apld]

APPEAL from a judgment of Sissons, J.T.C., 40 W.W.R. 494, setting aside a conviction against an Indian, on appeal by way of a trial *de novo*, for shooting a migratory bird out of season in violation of the *Migratory Birds Convention Act* and Regulations.

M. M. de Weerdt, for appellant.

W. G. Morrow, Q.C., and *Mrs. E. R. Hagel*, for respondent.

The judgment of the Court was delivered by

JOHNSON, J.A.:—The respondent in this case was convicted by a Magistrate at Yellowknife upon a charge of unlawfully killing a migratory bird in an area described in Schedule A, Part XI, of the *Migratory Bird Regulations* P.C. 1958-1070, SOR/58-308, at a time not during an open season for that bird in the area, in violation of s. 5(1)(*a*) of the *Migratory Bird Regulations*. He was fined $10 and costs, and apparently (although the original conviction is not before us), both the bird and the respondent's gun were seized. The respondent appealed to Sissons, J.T.C. [40 W.W.R. 494] and, after a trial *de novo*, that Judge set aside the conviction, acquitted the respondent and ordered the return of the gun and the duck to the respondent. From that decision the Crown appeals.

On May 7, 1962, not far from Yellowknife airport in the Northwest Territories, the respondent was arrested by a constable of the Royal Canadian Mounted Police shortly after he had shot a female mallard duck. The respondent admitted shooting the duck but stated that he did not know that he was not to shoot ducks out of season.

The respondent is an Indian and a member of Band Number 84 under Treaty 11. He had contracted tuberculosis in 1959 and had been sent out to Edmonton for treatment. Since his return he had been unable to work and he and his family had been receiving welfare assistance. On this day he was

on his way out to the bush to see if he was able to do his customary work. He had taken his tent, gun and muskrat traps and was planning to trap muskrats. He expected to be away two or three weeks. He had taken no food, expecting to shoot game. He shot this duck for food.

The right of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada — in the early days as an incident of their "ownership" of the land, and later by the treaties by which the Indians gave up their ownership right in these lands. McGillivray, J.A., in *R. v. Wesley*, [1932] 4 D.L.R. 774, 58 C.C.C. 269, 26 A.L.R. 433, [1932] 2 W.W.R. 337, discussed quite fully the origin, history and nature of the right of the Indians both in the lands and under the treaties by which these were surrendered and it is unnecessary to repeat what he has said. It is sufficient to say that these rights had their origin in the *Royal Proclamation*, R.S.C. 1952, vol. 6, App. III, p. 6127, that followed the *Treaty of Paris* in 1763. By that Proclamation it was declared that the Indians "should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds". The Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the Proclamation, and it is doubtful, to say the least, if the Indians of at least the western part of the Northwest Territories could claim any rights under the Proclamation, for these lands at the time were *terra incognita* and lay to the north and not "to the westward of the Sources of the Rivers which fall into the Sea from the West and North West" (from the 1763 Proclamation describing the area to which the Proclamation applied). That fact is not important because the Government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson Bay Company, as having an interest in the lands that required a treaty to effect its surrender.

Two of the earliest treaties (called the "Robinson Treaties" in the book, "The Treaties of Canada with the Indians of Manitoba, the North-West Territories, and Knee-Wa-Tin" by The Honourable Alexander Morris, P.C.), entered into in 1850 contained the following [p. 302]:

> And the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees . . . to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions

> of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the Provincial Government.

In The North-West Angle Treaty of 1873, a clause that became the model for all subsequent treaties appears. By 1877, seven treaties had been signed by which the Indians surrendered most of the arable and grazing lands from the Great Lakes to the mountains. In 1899 by Treaty 8, the Indians surrendered the Peace River and Northern Alberta area. It was not until 1921 that the Indian rights in that part of the Northwest Territories that includes Yellowknife were surrendered by Treaty 11. As part of the consideration for surrendering their interest in the lands covered by the treaty, the Indians received the following covenant:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the Country acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

This is substantially the same covenant as appears in all of the other treaties that I have been able to examine.

From these treaties and from the negotiations preceding the signing of these treaties as reported in Mr. Morris' book, it is, I think, obvious that while the Government hoped that the Indians would ultimately take up the white man's way of life, until they did, they were expected to continue their previous mode of life with only such regulations and restrictions as would assure that a supply of game for their own needs would be maintained. The regulations that "the Government of the Country" were entitled to make under the clause of the treaty which I have quoted, were, I think, limited to this kind of regulation. Certainly the Commissioners who represented the Government at the signing of the treaties so understood it. For example, in the report of the Commissioners who negotiated Treaty 8, this appears:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made,

> and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

These Indians, as well as all others, would have been surprised indeed if in the face of such assurances, the clause in their treaty which purported to continue their rights to hunt and fish could be used to restrict their right to shoot game birds to one and a half months each year. I agree with the view of McGillivray, J.A., in the *Wesley* case where he says [p. 789 D.L.R., p. 284 C.C.C., p. 45 A.L.R.]:

> It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land.

Discussing the nature of the rights which the Indians obtained under the treaties, Lord Watson, speaking for the Judicial Committee in *A.-G. Can. v. A.-G. Ont., A.-G. Que. v. A.-G. Ont.*, [1897] A.C. 199 at p. 213, said:

> Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due . . .

While this refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing. It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement", like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the *B.N.A. Act*, from doing so.

The Government in dealing with the Indians, has, on the whole, treated its obligations under these treaties seriously. This was probably not always the case if we may judge from the remarks of John Beverley Robinson, Attorney-General for Upper Canada, in 1824, as quoted in *Sero v. Gault* (1921), 64 D.L.R. 327 at p. 330, 50 O.L.R. 27 at pp. 31-2:

> "To talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada, upon lands purchased for them and given to them by the British Government, is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke street or with the French emigrants who have settled in England:" Canadian Archives, Q. 337, pt. II., pp. 367, 368.

In refreshing contrast is a speech of Lieutenant-Governor Morris to the Indians during the negotiation of the Qu'Appelle Treaty as reported in his book (p. 96):

> Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.

It is interesting to note that when the Government of Canada transferred the natural resources within the Province of Alberta to that Province in 1930 [*Alberta Natural Resources Act*, 1930 (Alta.), c. 21], the agreement contained the following paragraph:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Because of the Government's concern with the Indians' right to pursue "their usual vocations of hunting, trapping and fishing", and that its obligations under the treaties should be performed, it is difficult to understand why these treaties were not kept in mind when the Migratory Birds Convention was negotiated and when its terms were implemented by the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179, and the Regulations made under that Act.

That Convention was entered into by Great Britain (on behalf of Canada), with the United States in August, 1916 and ratified by both Governments in December of that year. Part of the preamble and some of the terms of that Convention should be considered.

In the preamble these paragraphs appear:

> Whereas many species of birds in the course of their annual migrations traverse certain parts of the Dominion of Canada and the United States; and
>
> Whereas many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both Canada and the United States, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds;
>
> His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas, Emperor of India, and the United States of America, being desirous of saving from indiscriminate slaughter and of insuring the preservation of

582

such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects, and to the end of concluding a convention for this purpose have appointed as their respective plenipotentiaries . . .

Article I defines the birds covered by the Convention and among the migratory birds are "wild ducks". Article II reads:

> The High Contracting Powers agree that, as an effective means of preserving migratory birds, there shall be established the following close seasons during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities.
>
> 1. The close season on migratory game birds shall be between 10th March and 1st September, except that the close of the season on the Limicolae or shorebirds in the Maritime Provinces of Canada and in those States of the United States bordering on the Atlantic Ocean which are situated wholly or in part north of Chesapeake Bay shall be between 1st February and 15th August, and that Indians may take at any time scoters for food but not for sale. The season for hunting shall be further restricted to such period not exceeding three and one-half months as the High Contracting Powers may severally deem appropriate and define by law or regulation.
>
> 2. The close season on migratory insectivorous birds shall continue throughout the year.
>
> 3. The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres and puffins, and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

It will be seen from the preamble that the purpose of the Convention was to save migratory birds "from indiscriminate slaughter" and to assure their preservation. This, it seems to me, would have allowed for exceptions or reservations in favour of the Indians, for there can be no doubt that the amount of game birds taken by the Indians for food during the close season would not have resulted in "indiscriminate slaughter" of birds nor would the preservation of those birds have been threatened. We are told that the treaty between the United States and Mexico negotiated in 1936 permits indigent persons in Mexico to take these types of birds for food.

The *Migratory Birds Convention Act*, 1917 (Can.), c. 18, "sanctioned, ratified and confirmed" the Convention. By s. 4 it provides:

> 4(1) The Governor in Council may make such regulations as are deemed expedient to protect the migratory game, migratory insectivorous and migratory nongame birds which inhabit Canada during the whole or any part of the year.
>
> (2) Subject to the provisions of the said Convention, such regulations may provide,—

(*a*) the periods in each year or the number of years during which any such migratory game, migratory insectivorous or migratory nongame birds shall not be killed, captured, injured, taken, molested or sold, or their nests or eggs injured, destroyed, taken or molested;

(*b*) for the granting of permits to kill or take migratory game, migratory insectivorous and migratory nongame birds, or their nests or eggs;

(*c*) for the prohibition of the shipment or export of migratory game, migratory insectivorous or migratory nongame birds or their eggs from any province during the close season in such province, and the conditions upon which international traffic in such birds shall be carried on;

(*d*) for the prohibition of the killing, capturing, taking, injuring or molesting of migratory game, migratory insectivorous or migratory nongame birds, or the taking, injuring, destruction or molestation of their nests or eggs, within any prescribed area;

(*e*) for any other purpose which may be deemed expedient for carrying out the intentions of this Act and the said Convention, whether such other regulations are of the kind enumerated in this section or not.

(3) A regulation shall take effect from the date of the publication thereof in the *Canada Gazette*, or from the date specified for such purpose in any regulation, and such regulation shall have the same force and effect as if enacted herein, and shall be printed in the prefix in the next succeeding issue of the Dominion Statutes, and shall also be laid before both Houses of Parliament within fifteen days after the publication thereof if Parliament is then sitting, and if Parliament is not then sitting, within fifteen days after the opening of the next session thereof.

Section 5(1) and (2) of the present Regulations provides:

5(1) Unless otherwise permitted under these Regulations to do so, no person shall

(*a*) in any area described in Schedule A, kill, hunt, capture, injure, take or molest a migratory bird at any time except during an open season specified for that bird and that area in Schedule A, or

(*b*) from any area described in Schedule A, kill, hunt, capture, injure, take or molest a migratory bird at any time in another area described in Schedule A except during an open season specified for that bird and both those areas in Schedule A.

(2) Indians and Eskimos may take auks, auklets, guillemots, murres, puffins and scoters and their eggs at any time for human food or clothing, but they shall not sell or trade or offer to sell or trade birds or eggs so taken and they shall not take such birds or eggs within a bird sanctuary.

The "scoter" mentioned in this section and in the Convention is defined in Murray's New English Dictionary:

Scoter. [Of obscure origin.] A duck of the genus *Oedemia*, esp. *Oedemia nigra*, a native of the Arctic regions and common in the seas of Northern Europe and America. Also *scoter-duck*.

584 There is no evidence that there are any of these ducks in the Yellowknife area which is several hundred miles from the sea.

The open season under these Regulations for mallard ducks in the Yellowknife area is from September 1st to October 15th.

Sissons, J.T.C., in his reasons for judgment [(1962), 40 W.W.R. at p. 504] says:

> There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging, or infringing upon the hunting rights of the Indians.

I have quoted s. 5(1) of the Regulations which says that "no person shall . . . kill . . . a migratory bird at any time except during an open season . . .". It is difficult to see how this language admits of any exceptions. When, however, we find that reference in both the Convention and in the Regulations to what kind of birds an Indian and Eskimo may "take" at any time for food, it is impossible for me to say that the hunting rights of the Indians as to these migratory birds, have not been abrogated, abridged or infringed upon.

It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked — a case of the left hand having forgotten what the right hand had done. The subsequent history of the Government's dealing with the Indians would seem to bear this out. When the treaty we are concerned with here was signed in 1921, only five years after the enactment of the *Migratory Birds Convention Act*, we find the Commissioners who negotiated the treaty reporting:

> The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case, and the Government will expect them to support themselves in their own way, and, in fact, that more twine for nets and more ammunition were given under the terms of this treaty than under any of the preceding ones; this

> went a long way to calm their fears. I also pointed out that any game laws made were to their advantage, and, whether they took treaty or not, they were subject to the laws of the Dominion.

and there is nothing in this report which would indicate that the Indians were told that their right to shoot migratory birds had already been taken away from them. I have referred to Art. 12 of the agreement between the Government of Canada and the Province of Alberta signed in 1930 by which that Province was required to assure to the Indians the right of "hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands". (The amendment to the *B.N.A. Act* (1930 (U.K.), c. 26) that confirmed this agreement, declared that it should "have the force of law notwithstanding anything in the British North America Act . . . or any Act of the Parliament of Canada. . . .") It is of some importance that while the Indians in the Northwest Territories continued to shoot ducks at all seasons for food, it is only recently that any attempt has been made to enforce the Act.

I can come to no other conclusion than that the Indians, notwithstanding the rights given to them by their treaties, are prohibited by this Act and its Regulations from shooting migratory birds out of season. Unless one or other of the matters mentioned in the learned trial Judge's reasons for judgment or raised by the respondent's counsel at the hearing of the appeal is a defence to the charge, the appeal must be allowed and the conviction sustained.

The learned trial Judge in his reasons for judgment discusses the definition of the word "scoter" as used in the Convention and Regulations, and he finds that there is "a reasonable doubt as to what ducks are included in the word 'scoter,' and whether the word as used here is synonymous with 'ducks'." [p. 499] From the definition I have quoted, as well as the ones referred to by the learned trial Judge, I am satisfied that the female mallard duck which was shot by the respondent is one which, by the Regulations, could not be shot except in the open season.

The learned Judge also, because there was evidence that mallard ducks had been domesticated and kept by Constable Robin of the Royal Canadian Mounted Police at Fort Rae, Northwest Territories, felt he could not draw the inference that this was in fact a wild duck. By the common law as stated in Blackstone's Commentaries, this would be a wild duck even though it had once been domesticated. Speaking of property in wild animals, Blackstone says in Book II, p. 391:

586

> A qualified property may subsist in animals *ferae naturae per industriam hominis*: by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty.

And at p. 392:

> These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*, which is only to be known by their usual custom of returning.

It would, I think, follow, that once such ducks escape they are wild ducks. There can be no doubt that mallard ducks are *ferae naturae* even though they are sometimes domesticated.

It was argued before us, as it was before the learned Judge appealed from, that the *Migratory Birds Convention Act* is now *ultra vires*. It is, of course, conceded that when it was passed in 1917 it was validly passed under s. 132 of the *B.N.A. Act*. It is suggested that its validity can now be questioned because of the *Statute of Westminster* and two Acts of the Parliament of Canada which have been passed since that statute became effective and which had the effect, to use counsel's words, "of reaffirming the Migratory Birds Convention Act". There are two cases decided since the *Statute of Westminster* which discusses the effect of that statute upon s. 132 and the treaty making powers under the *B.N.A. Act*. The first of these cases (*A.-G. Can. v. A.-G. Ont.*, [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299), dealt with Acts whereby the Parliament of Canada sought to implement certain treaties adopted by the International Labour Organization of the League of Nations in accordance with the labour part of the Treaty of Versailles, 1919, and the Judicial Committee of the Privy Council held that, the legislation being matters of "property and civil rights within the Province", Parliament lacked the power to pass them. In the second case (*Johannesson et al. v. Rural Municipality of West St. Paul*, [1951] 4 D.L.R. 609, 69 C.R.T.C. 105, [1952] 1 S.C.R. 292), the Supreme Court of Canada held that the Province of Manitoba had no power to legislate with respect to aeronautics, that field belonging exclusively to the Parliament of Canada. Both of these cases dealt with treaties entered into after the *Statute of Westminster* had been passed and Canada had acquired full treaty making powers. There would seem to be no doubt that statutes which implement treaties made before the *Statute of Westminster*, remain valid legislation even though the subject-matter of that treaty is one which falls exclusively under s. 92, so long, of course,

as those treaties have not been denounced. Mr. Morrow for the respondent does not dispute this but he argues that Parliament cannot further legislate upon these matters contained in the treaty in a manner to indicate an intention to re-ratify the treaty, and if it does so, the whole Act can then be reviewed and if it is found that its subject-matter properly belongs to the Province, it then becomes *ultra vires*. He says that Parliament passed two such Acts which extend the operation of the *Migratory Birds Convention Act* beyond its original scope and, as the Court of Appeal in Manitoba in *R. v. Paling*, [1946] 3 D.L.R. 54, 85 C.C.C. 289, 54 Man. R. 43, 1 C.R. 461, [1946] 2 W.W.R. 49, has held that the preservation of game is a matter of provincial jurisdiction, the Act is now *ultra vires*. The two Acts referred to are, (1) the *Extra-territorial Act, 1933*, 1932-33 (Can.), c. 39, which gives extra-territorial operation to every statute of the Parliament of Canada "which in terms or by necessary or reasonable implication was intended . . . to have extra-territorial operation", and (2) 1949 (Can.), c. 1, the Act which approves the agreement by which Newfoundland became a Province of Canada. Paragraph 18(2) of that agreement makes provision for the bringing into force in the Province of Newfoundland by proclamation the statutes of the Parliament of Canada.

It would appear to me that statutes made to implement treaties properly made under s. 132 of the *B.N.A. Act* can still be amended if that be necessary to properly carry out the terms of the treaty. In any case, an extension of all Acts of the Parliament of Canada to the enlarged territorial jurisdiction of Canada which came about immediately before these Acts were passed, cannot be said to be a re-ratification or re-implementation of those treaties made when s. 132 was fully effective.

Viscount Simon, L.C., in *A.-G. Ont. et al. v. Canada Temperance Federation*, [1946] 2 D.L.R. 1 at pp. 5-6, 85 C.C.C. 225 at pp. 230-1, [1946] A.C. 193 at pp. 205-6, 1 C.R. 229, [1946] 2 W.W.R. 1, said this:

> In their Lordships' opinion, the true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the *Aeronautics Case* [*Re Aerial Navigation, A.-G. Can.* v. *A.-G. Ont.*], [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108 and the *Radio Case* [*Re Regulation & Control of Radio Communication, A.-G. Que.* v. *A.-G. Can.*], [1932], 2 D.L.R. 81, A.C. 304, 39 C.R.C. 49) then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters

588

> specially reserved to the Provincial Legislatures. War and pestilence, no doubt, are instances; so too may be the drink or drug traffic, or the carrying of arms. In *Russell* v. *The Queen*, 7 App. Cas. 829, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a Provincial Legislature dealing with an aspect of the same subject in so far as it specially affects that Province.

It may well be that the preservation of migratory birds which are (to quote the preamble to the Convention), "of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain", comes within the class of subjects that Viscount Simon, L.C., mentions as being within the competence of Parliament. It would appear that there would be room for a Provincial Legislature as well as the Parliament of Canada to legislate in this field.

We were invited by counsel for the respondent to apply to the Migratory Birds Convention those rules which have been laid down for the interpretation of treaties in international law and we have been referred to many authorities on how these treaties should be interpreted. We are not, however, concerned with interpreting the Convention but only the legislation by which it is implemented. To that statute the ordinary rules of interpretation are applicable and the authorities referred to have no application.

The appeal must be allowed and the conviction imposed by the Magistrate affirmed. In coming to this conclusion, I regret that I cannot share the satisfaction that was expressed by McGillivray, J.A., in *R. v. Wesley*, [1932] 4 D.L.R. at p. 790, 58 C.C.C. at p. 285, 26 A.L.R. at p. 451, when he was writing his judgment dismissing the appeal in that case:

> It is satisfactory to be able to come to this conclusion and not to have to decide that "the Queen's promises" have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be "convinced of our justice and determined resolution to remove all reasonable cause of discontent."

Appeal allowed.

I cite below a list of the more important cases to which counsel made reference, as well as others I have examined. No case is perfectly in point, but each refers to some aspect of the instant case or to notice generally. The American cases should be read bearing in mind that, in several states, interpretation statutes have important provisions relating to the service of notices: *Williamson v. Michael* [1946] 2 WWR 495 (Sask.); *St. John (City) v. Christie* (1892) 21 SCR 1; *Craig v. Cromwell* (1900) 27 OAR 585, affirming 32 OR 27; *Merrick v. Campbell* (1914) 6 WWR 722, 27 WLR 836, 24 Man R 446; *Magrath v. Collins* [1917] 3 WWR 677, 12 Alta LR 240; *Tanham v. Nicholson* (1872) LR 5 HL 561; *North v. Kinney* (1942) 2 NW (2nd) 407; *Brown v. Ortesa* (1956) 80 NW (2nd) 92; *Espin v. Pemberton* (1859) 3 DE G & J 547, 28 LJ Ch 311, 44 ER 1380, at 1383; *In re Child Welfare Act; In re Gorenstein* (1951) 1 WWR (NS) 16, at 19, 59 Man R 1; *Wood v. Kenley and C.P.R. (Garnishee)* [1940] 1 WWR 23 (Sask.).

MONNIN, J.A. concurs with Miller, C.J.M.

NORTHWEST TERRITORIES

TERRITORIAL COURT — SISSONS, J.T.C.

Regina v. Sikyea

Game Laws — Indians and Eskimos — Hunting Rights in Northwest Territories — Effect of Northwest Territories Act, S. 14 (3) — Non-Applicability of Migratory Birds Convention Act to Indians — Meaning of "Scoter."

Sec. 14 (3) of the *Northwest Territories Act*, RSC, 1952, ch. 331, as amended 1960, ch. 20, sec. 1 (3), recognizes and preserves the hunting rights of Indians and Eskimos unrestricted except as to game in danger of becoming extinct, which has the effect of nullifying any application of the *Migratory Birds Convention Act*, RSC, 1952, ch. 179, to Indians and Eskimos.

There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act, supra*, which abrogate, abridge or infringe upon the hunting rights of Indians; the various references in the Migratory Birds Convention and in said Act and the regulations thereunder to Indians and Eskimos and their hunting rights indicate recognition of said rights; the fact that they are particularly entitled thereunder to take certain migratory game and non-game birds does not indicate an intention to abrogate, abridge or infringe said hunting rights.

Meaning of "scoter" in the Migratory Birds Convention considered.

[Note up with 10 CED (2nd ed.) *Eskimos*, sec. 3; 12 CED (2nd ed.) *Game Laws*, sec. 2; 13 CED (2nd ed.) *Indians*, sec. 1; 3 CED (CS) *Words and Phrases* (1946-1961 Supps.).]

590

M. M. deWeerdt, for crown, respondent.
Elizabeth R. Hagel, for accused, appellant.

November 8, 1962.

SISSONS, J.T.C. — This is an appeal against a certain conviction bearing date May 7, 1962, and made by W. V. England, J.P., in and for the Northwest Territories, at Yellowknife in the Northwest Territories, whereby Michael Sikyea was convicted and fined $10 plus costs of $4 and in default three days' imprisonment, on the charge that he, the said Michael Sikyea, of Yellowknife in the Northwest Territories

> "on the 7th day of May, A.D. 1962 at or near the Municipal District of Yellowknife in the Northwest Territories did unlawfully kill a migratory bird in an area described in Schedule A of the Migratory Bird Regulations at a time not during the open season for that bird in the area in the aforementioned schedule, in violation of Section 5 (1) (*a*) of the Migratory Bird Regulations, thereby committing an offence contrary to Section 12 (1) of the *Migratory Birds Convention Act,* Chapter 179, R.S.C., 1952."

The area referred to in the charge is described in Sched. A of the migratory bird regulations as follows:

"Part XI

"Open Seasons in the Northwest Territories

	Ducks, Geese, (other than Ross's Goose) Rails, Coots.
Throughout the Northwest Territories	September 1 to October 15."

Sec. 5 (1) (*a*) of the migratory bird regulations reads as follows:

> "5 (1) Unless otherwise permitted under these Regulations to do so, no person shall
>
> "(*a*) in any area described in Schedule A, kill, hunt, capture, injure, take or molest a migratory bird at any time except during an open season specified for that bird and that area in Schedule A."

Sec. 12 (1) of the *Migratory Birds Convention Act,* RSC, 1952, ch. 179, reads as follows:

"12. (1) Every person who violates any provision of this Act or any regulation is, for each offence, liable upon summary conviction to a fine of not more than three hundred dollars and not less than ten dollars, or to imprisonment for a term not exceeding six months, or to both fine and imprisonment."

This case brings before the court an issue which has disturbed and aggrieved the Indians for some years. From time immemorial the Indians and Eskimos of the north and their wives and children have in the spring taken migratory birds for food and will continue to do so and this has been and is necessary for their survival and well-being. The effect on the bird population is negligible, particularly compared to the loss to predators, but it would not matter if it were otherwise.

It is notorious that a few years ago a government official spoke to one of the local Indian chiefs and pointed out that shooting ducks in the spring was contrary to the Migratory Birds Convention. The chief asked what was this convention and was told it was a treaty between Canada and the United States. He then queried, "Did the Indians sign the treaty?" The reply was, "No." "Then" the chief declared, "We shoot the ducks."

The Indians have their constitutional rights and their own treaty preserving their ancient hunting rights.

The old chief was on sound ground. There is or should be as much or more sanctity to a treaty between Canada and its Indians as to a treaty between Canada and the United States.

Several witnesses gave evidence for the prosecution at the trial *de novo*.

Miss Marion Bjornson, a radiographer, gave evidence that X-ray plates she took showed two small metal objects in the duck in this case.

Constable Paul Robin, of the R.C.M.P. stated that on May 7, 1962, he was driving along the highway some six miles from Yellowknife and saw the accused who was carrying a 16-gauge Stevens shotgun. The accused told him he had just shot a duck. He saw a duck in a small lake by the highway, wounded, and being driven by the wind toward the shore. He asked the accused if he was not aware he could not shoot ducks out of season. The accused told him he did not know this and that a game warden had told him it was all right for him to shoot ducks at any time of the year. He said this was about two years ago.

592

The constable seized the duck and the shotgun. The duck was a female Mallard. The accused told him he always thought treaty Indians could shoot ducks at any time in any part of the Northwest Territories. He had been informed that the accused was a treaty Indian and he knew he was listed in the band list.

Ronald Hugh MacKay, an official of the dominion wild life service, was called as an expert witness. He identified the bird as a female Mallard. He said it was hard to tell a wild duck from a domestic duck and he could not say whether the duck produced was a wild duck or not.

Constable Robin, recalled, testified that he knew of no one in the area keeping domestic ducks except himself. He had some at Rae.

Kenneth Kerr, superintendent of the Indian agency at Yellowknife, was called by the defence. He said the accused was registered as a treaty Indian. He contracted T.B. in 1959 and was sent to Camsell Hospital at Edmonton. He was returned in February, 1961, as cured. While he was in hospital his wife and children were on relief. On his return, the accused was unable to work and was put on relief. Before going to hospital the accused was a good hunter and trapper. Mr. Kerr said it was the policy to encourage Indians to hunt and trap. The relief given covered basic needs, he believed. The accused had been issued welfare meat.

The accused, Michael Sikyea, gave evidence on his own behalf. He had not worked since he had T.B. and hadn't earned a cent. He tried to look after his family by fishing and hunting. On the day in question he was going to Mile 17 for rats, taking traps and a gun. He took no food with him, intending to live off the land from what he shot. He had left all the relief food and fish at home for the family. He needed food badly. This was the first time he had gone after rats since coming out of hospital. He shot a duck. The constable confiscated the duck and his gun. He couldn't go then and went home. He couldn't do anything without his gun. He said he was at Fort Resolution and was an interpreter when treaty No. 11 was signed and the Indians were promised they would keep their hunting rights.

Art. I of the convention declares and enumerates the migratory birds included under the headings: (1) Migratory game birds; (2) Migratory insectivorous birds; (3) Other migratory non-game birds.

593

Art. II provides for close seasons.

Art. II, par. 1, relating to migratory game birds, contains the following:

> "Indians may take at any time scoters for food but not for sale."

It is puzzling that the hunting rights of the Indians be preserved as to "scoters" particularly. It is not conceding the Indians very much, as "scoters" are not a very edible bird and are hard to take.

Par. 3 relates to migratory non-game birds and provides that Eskimos and Indians may take them at any time and their eggs for food and their skins for clothing but the birds and eggs shall not be sold.

The word "scoters" does not appear in the list of migratory game birds in Art. I and there is nothing to indicate what is meant by the word. The word used is "scoters" not "scoter duck." Does it mean genus, family or subfamily?

The *American College Dictionary* gives the following definition of "scoter:"

> "Scoter—any of the large diving ducks constituting the genera Melanitta and Oedemia, found in northern parts of the Northern Hemisphere."

The *Shorter Oxford English Dictionary* gives:

> "Scoter. 1674 (Origin obsc.) A duck of the genus *Oedemia,* cap. oe, *nigra,* a native of the Arctic regions and common in the seas of northern Europe and America. Also s. duck."

Funk & Wagnall's Standard Dictionary (Britannica World Language ed.) gives:

> "Scoter. A sea duck (general Oedemia and Melanitta) of Northern regions, having the bill gibbous or swollen at the base, especially the American scoter also called coot, or scoter duck."

The *American College Dictionary* gives the following definition of "coot:"

> "Coot 1. Any of the aquatic birds constituting the genus Fulica, characterized by lobate toes and short wings and tail, as the common coot of Europe.

"2. Any of the various other swimming or diving birds, as the Scoter."

The *Shorter Oxford:*

"Coot 1. A name originally given vaguely to various swimming or diving birds, often to the Guillemot."

F. A. Taverner, the noted Canadian authority, in his *Birds of Western Canada,* groups eiders and scoters with the subfamily—fuligulinae, bay, sea or diving ducks; the family — anatidae, ducks, geese and swans; the order—anseres. He says as to "eider:"

"Though not forming a recognized subdivision of the Ducks, the Eiders are sufficiently similar to warrant special reference as a group in a popular work of this kind."

He says as to "scoters:"

"The Scoters, comprising the genus Oedemia, are large, heavily-built birds, and with the Eiders the largest of our Ducks. Scoters are expert divers and feed largely on shells and crustaceans."

It is possible that the word "scoters" as used in the Convention means not only the genus but the subfamily or the family or the order. This would make sense and at least raises a reasonable doubt as to what ducks are included in the word "scoter," and whether the word as used here is synonymous with "ducks."

Sec. 5 (2) of the migratory bird regulations reads as follows:

"5 (2) Indians and Eskimos may take auks, auklets, guillemots, murres, puffins and scoters and their eggs at any time for human food or clothing, but they shall not sell or trade or offer to sell or trade birds or eggs so taken and they shall not take such birds or eggs within a bird sanctuary."

It is noted that, unlike the Convention, the regulations group scoters with migratory non-game birds, and that the migratory non-game birds which Indians and Eskimos may take are not all those mentioned in the Convention and in the *Migratory Birds Convention Act.*

The regulations do not contain any other reference to "scoters." The words "scoter ducks" do appear in sched. A in the open season tables for Newfoundland, Nova Scotia, New Brunswick and Quebec.

595

Sched. B of the regulations refers to "daily bag and possession limits." It provides:

> "The words 'Ducks' and 'Geese' in this schedule include all species of ducks and geese respectively for which open seasons are provided, unless otherwise specified in footnotes."

There is a footnote reading as follows:

> "(k) Except Indians, Eskimos, Metis and other persons living by trapping and hunting may take 25 daily with no possession limit."

Strangely "(k)" appears only in the column, "Rails, Coots and Gallinules."

Assurances were given to the Indians when treaty No. 11 was entered into. Henry Anthony Conroy, commissioner of His Majesty the King, reported:

> "The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were advised by me that this would not be the case, and the Government will expect them to support themselves in their own way."

Treaty No. 11 itself provides:

> "And His Majesty the King hereby agrees with the said Indians that they shall have the right to preserve their usual vocations of hunting, trapping, and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the Country under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up, from time to time for settlement, mining, lumbering, trading or other purposes."

McGillivray, J.A. pointed out in *Rex v. Wesley* [1932] 2 WWR 337, at 352, 26 Alta LR 433, 58 CCC 269:

> "It is true that government regulations in respect of hunting are contemplated in the treaty but considering that treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land."

There was in the *Game Ordinance,* R.O., N.W.T., 1956, ch. 42, the following provision:

596

"3. (1) This Ordinance

"(a) does not apply in Wood Buffalo National Park, and

"(b) is subject to the provisions of the *Migratory Birds Convention Act* and the regulations thercunder.

"(2) Nothing in this Ordinance shall be deemed to prohibit an Indian, Eskimo, or the holder of a general hunting licence

"(a) from hunting non-migratory birds and big game other than musk-ox for food for himself and dependents at any time of the year on

"(1) all unoccupied Crown lands; or

"(2) all occupied Crown lands with the consent of the occupier thereof; or

"(b) from giving such food or part thereof to others."

There is nothing in treaty 11 as to these limitations on the hunting rights of the Indians, and they are of no effect.

This *Game Ordinance* was repealed by N.W.T., 1960, 2nd sess., ch. 2, which came into force July 1, 1961. The new *Game Ordinance* does not contain the above provisions.

By secs. 1 and 2 of 1960, ch. 20, assented to June 9, 1960, the *Northwest Territories Act* was amended to provide that ordinances made by the Commissioner in Council in relation to the preservation of game in the territories are applicable to and in respect of Indians and Eskimos; that this should not be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied crown lands, other than game declared by the Governor in Council to be game in danger of becoming extinct; that from the day on which this Act comes into force the provisions of the various game ordinances, including R.O., N.W.T., 1956, ch. 42, and N.W.T., 1960, 2nd sess., ch. 2, have the same force and effect in relation to Indians and Eskimos as if on that day they had been re-enacted in the same terms; that all laws of general application in force in the territories are, except where otherwise provided, applicable to and in respect of Eskimos in the territories.

Sec. 1 (3), ch. 20, reads as follows:

"1. (3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting

for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct."

The following order in council, P.C. 1960/1256, was passed on September 14, 1960:

"His Excellency the Governor General in Council, on the recommendation of the Minister of Northern Affairs and National Resources, pursuant to subsection (3) of Section 14 of the *Northwest Territories Act,* is pleased hereby to declare musk-ox, barren-ground caribou and polar bear as game in danger of becoming extinct."

It is only necessary for the Governor in Council to "declare" that game is in danger of becoming extinct. This may be fact or fiction, and may well be fiction.

There is here a recognition and a preservation by parliament of the hunting rights of Indians and Eskimos, unrestricted except as to game in danger of becoming extinct. There is no mention of the *Migratory Birds Convention Act* or migratory birds.

This has the effect of nullifying any application of the *Migratory Birds Convention Act* to Indians and Eskimos.

Sec. 2 of ch. 20 reads:

"Section 17 of the said Act is amended by adding thereto the following subsection:

"'(2) All laws of general application in force in the Territories are, except where otherwise provided applicable to and in respect of Eskimos in the Territories.'"

It is "otherwise provided," so far as Indians are concerned, by sec. 87 of the *Indian Act,* RSC, 1952, ch. 149:

"87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province * * * ."

I dealt with these amendments to the *Northwest Territories Act* in *Re Noah Estate* (1961) 36 WWR 577, at p. 600:

"The remedy which these amendments to the *Northwest Territories Act* intended to apply was to make legislation of the Territorial Council of the Northwest Territories in relation to preservation of game into federal legislation relating to Indians and Eskimos and of general application.

"The obvious intent of these amendments to the *Northwest Territories Act* was to authorize the abrogation, abridgment or infringement of the hunting rights of the Eskimos and other rights of the Eskimos by the Territorial Government. The legislation is not effective. Eskimo rights could be extinguished by the Parliament of Canada. However, vested rights are not to be taken away without express words or necessary intendment or implication.

"The *Canadian Bill of Rights*, 1960, ch. 44, also stands in the way:

" 'Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.'

"If these amendments were to accomplish their purpose there should have been a provision that they would 'operate notwithstanding the *Canadian Bill of Rights*.'

"The argument submits that Parliament being the only body competent to legislate respecting Eskimos *qua* Eskimos has not legislated an exemption for them from laws of general application. That is not the point. The point is whether Parliament has legislated so as to abrogate, abridge or infringe the rights of the Eskimos. I find Parliament has not done so."

Mrs. Hagel raised the question as to the present federal powers to enact legislation implementing treaties which may conflict with any of the subjects over which the provinces have exclusive jurisdiction and that the *Migratory Birds Convention Act* could be held to infringe on the exclusive provincial jurisdiction as to property and civil rights and to require provincial ratification.

Mr. de Weerdt disputed this and cited a number of authorities as to the validity of the Act.

The point is interesting and intriguing and may have some merit but I do not think I need deal with it here. I can decide the case on other grounds.

It is clear that the evidence does not establish beyond a reasonable doubt that the female Mallard which was shot was a wild duck. In spite of the argument of the crown, I cannot

599

draw from the circumstantial evidence the inference that it was a wild duck. The rule in *Hodge's Case* is in the way. The accused therefore cannot be found guilty of the offence with which he is charged.

The real defence and the important issue in this case is that the *Migratory Birds Convention Act* has no application to Indians engaged in the pursuit of their ancient right to hunt, trap and fish game and fish for food at all seasons of the year, on all unoccupied crown lands.

Reference was made to the royal proclamation of October 7, 1763, cited in RSC, 1952, vol. VI, at p. 6127, as the first of Canada's constitutional Acts and documents, and commonly spoken of as the "Charter of Indian Rights;" and to treaty 11, made and concluded in 1921 between His Most Gracious Majesty George V, and the Slave, Dogrib, Loucheux, Hare and other Indians, inhabitants of the territory; and to *Rex v. Wesley, supra; Reg. v. Kogogolak* (1959) 28 WWR 376, 31 CR 12 (N.W.T.) and other cases.

Indians still have their ancient hunting rights unless, adopting the words used by Gywnne, J. of the Supreme Court of Canada, in *Ontario Mining Co. and Atty.-Gen. for Can. v. Seybold* (1902) 32 SCR 1, at 19, affirmed [1903] AC 73, 72 LJPC 5:

> " * * * unless the proclamation of 1763 and the pledge of the Crown therein * * * are to be considered now to be a dead letter having no force or effect whatever; and unless the grave and solemn proceedings which ever since the issue of the proclamation until the present time have been pursued in practice upon the Crown entering into treaties with the Indians for the cession or purchase of their lands are to be regarded now as a delusive mockery; * * * ."

The solemn proceedings surrounding treaty 11 and the pledge given by the crown and incorporated in the treaty would indeed be delusive mockeries and deceitful in the highest degree if the Migratory Bird Convention, made just five years previously, had curtailed the hunting rights of the Indians.

There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging, or infringing upon the hunting rights of the Indians.

The various references in the Convention and in the *Migratory Birds Convention Act* and in the regulations to Indians

and Eskimos and their hunting rights indicate recognition of these hunting rights.

The fact that Indians and Eskimos are particularly entitled to take certain migratory game birds and migratory non-game birds does not indicate an intention to abrogate, abridge or infringe the hunting rights of these Indians and Eskimos.

I find that the *Migratory Birds Convention Act* has no application to Indians hunting for food, and does not curtail their hunting rights.

I find the accused not guilty. The appeal is allowed. The fine and costs paid by the accused shall be returned to him. The duck and the shotgun of the accused shall be handed back to him.

BRITISH COLUMBIA

Supreme Court — Wootton, J.

Re Trustee Act

Re Dorigan's Will

Wills — Interpretaton — Punctuation as Aid When Clear and Unconfusing.

In the interpretation of a will punctuation may be taken into consideration if it is clear and not confusing. *Houston v. Burns* [1918] AC 337, 87 LJPC 99 (H.L. [Sc.]), agreed with.

[Note up with 3 CED (CS) *Wills*, sec. 16.]

Miss M. F. Southin, for executor.

T. R. Braidwood, for Santa and R. Duregon, beneficiaries.

D. Comparelli, for A. Duregon, beneficiary.

October 18, 1962.

Wootton, J. — This was an originating summons heard by me for the determination of the following questions arising out of the will of the above-named deceased:

> "1. Whether the bequest in the will of Giovanni Dorigan, otherwise known as Giovanni Dorigon, otherwise known as John Dorigon, deceased, to his brother, Giuseppe Duregon, who died in the lifetime of the Testator, lapsed?
>
> "2. Is the bequest to the said Giuseppe Duregon to be distributed in accordance with the laws of Intestate Succession of British Columbia or the laws of Intestate Succession of Italy?