REGINA v. CARDINAL

(1971), 22 D.L.R. (3d) 716 (also reported: [1972] 1 W.W.R. 536, 5 C.C.C. (2d) 193, 17 C.R.N.S. 110)

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

(Appealed to Supreme Court of Canada, **reported sub nom. Cardinal v. Attorney-General of Alberta, infra** p. 307)

Indians -- Application to Indian on a reserve of provincial game laws prohibiting trafficking in big game -- Provision 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 *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.
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> 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 assured 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.
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> 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 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 effect 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 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 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 had 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.
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> . . . . .
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> 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 dies 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 statements 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 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] 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 wither 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 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 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.
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> 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 regulation
> (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 (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.