REX v. MIRASTY

[1942] 1 W.W.R. 343

Saskatchewan Police Court, Lussier P.M., 13 June 1939

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. 269, 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.
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."

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 Re- sources 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.

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 reserve, 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 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 Lands 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 Legislature 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 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 re- serves 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 pro- visions 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 preservation 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 disposition under *The Provincial Lands Act, 1931*, and that they do not include forest reserves, and having found that the Indians 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.