REGINA v. WESLEY

(1975), 62 D.L.R. (3d) 305 (also reported: 9 O.R. (2d) 524, 25 C.C.C, (2d) 309)

Ontario District Court, Vannini D.C.J., 29 April 1975

Indians - Aboriginal rights - Hunting on unoccupied Crown land -Accused Ojibway Indian hunting on territory covered by Robinson Treaty - Accused a James Bay Treaty Indian - Both treaties entered into by Ojibway Indians preserving right to hunt on unoccupied Crown land within area covered by treaty - Whether accused may be convicted of unlawful hunting contrary to provincial statute - Game and Fish Act (Ont.), as. 41, 42 - Indian Act (Can.), a. 88 - British North America Act, 1867, s.91(24).

Criminal law - Defences - Double jeopardy - Interpretation Act providing that where act constitutes offence under two or more Acts, accused "not liable to be punished twice for the same act or omission" -Whether section applicable where act constitutes two offences under same Act - Interpretation Act (Ont.), s.25 - Game and Fish Act (Ont.), ss.41, 42.

The accused was charged with unlawfully hunting deer and possession of game contrary to ss. 42(1) and s. 41 of the *Game and Fish Act,* R.S.O. 1970, c.186. The accused, an Indian within the meaning of s. 2 of the *Indian Act,* R.S.C. 1970, c.I-6, was hunting on unoccupied Crown land in the territory covered by the Robinson Treaty of 1850. The accused, however, was a James Bay Treaty, Treaty No. 9 Indian. Both treaties were signed by the Ojibway Tribe of which he was a member, although the Robinson Treaty was not signed by the particular "band" of Ojibway to which the accused belonged. The accused led evidence that historically the Ojibway Tribe hunted throughout the area embracing, *inter alia,* the territory covered by both treaties. On appeal by the accused by way of trial *de novo* from two convictions for unlawful hunting of deer and possession of game, *held,* the appeal should be allowed in part and the conviction for possession of the game and one of the counts of unlawful hunting quashed.

Section 88 of the *Indian Act* provides that the application of provincial laws to Indians is subject to the terms of any treaty. The aboriginal right of Indians to hunt on unoccupied Crown land, which right was preserved by the Royal Proclamation of 1763 and s. 91(24) of the *British North America Act, 1867,* was surrendered by them when they entered into the treaties with the Crown. However, the treaties did preserve their right to hunt on unoccupied Crown land within the territory covered by the treaty. Accordingly, s. 88 of the *Indian Act* will prevent prosecution of a treaty Indian for violation of provincial game legislation when the accused is hunting on unoccupied Crown land within the territory covered by a treaty under which he has rights.

Although the accused was an Ojibway Indian and both treaties were entered into by Ojibway Indians, the rights of both treaties did not enure to his benefit considering the historical evidence that the Ojibway "tribe" was in fact a large group of individual "bands" each occupying and protecting their own hunting grounds, and, further, that the treaties were intended to be mutually exclusive with respect to the Indians covered thereby. The accused could claim a treaty right to hunt only under his own band's treaty, covering his own band's traditional hunting territory, and not the Robinson Treaty. Therefore, the accused was rightly convicted of hunting deer out of season on the territory covered by the Robinson Treaty of 1850. However, s.84 of the *Game and Fish Act* provides that only one conviction for the same kind of offence on the same day shall be imposed and s. 25 of the *Interpretation Act,* R.S.O. 1970, c.225, provides that where an act constitutes an offence under two or more Acts the accused is "not liable to be punished twice for the same act or omission" and therefore only the one conviction contrary to s. 42(1) of the *Game and Fish Act* should be entered.

[*R. v. Moses,* [1970] 3 O.R. 314, [1970] 5 C.C.C. 356, 13 D.L.R. (3d) 50; *R. v. Dennis and Dennis* (1974), 22 C.C.C. (2d) 152, 56 D.L.R. (3d) 379, 28 C.R.N.S. 268, [1975] 2 W.W.R. 630, distd; R. v. Syliboy (1928), 50 C.C.C. 389, [1929] 1 D.L.R. 307; *R. v. Simon* (1958), 124 C.C.C. 110, 43 M.P.R. 101, consd; *Calder et at. v. A.-G. B.C.,* [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1; affg 13 D.L.R. (3d) 64, 74 W.W.R. 481; *R. v. Kruger and Manuel* (1974), 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435, (1974] 6 W.W.R. 206 [revd on other grounds 24 C.C.C. (2d) 120, (1975] 5 W.W.R. 167]; *Isaac et at. v. Davey et at.* (1974), 5 O.R. 610, 51 D.L.R. (3d) 170; *R. v. Sikyea,* [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, 43 C.R. 83, 46 W.W.R. 65; affd [1964] S.C.R. 642, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, 44 C.R. 266, 49 W.W.R. 306; *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd [1965] S.C.R. vi, 52 D.L.R. 481n; *R. v. George,* [1966] S.C.R. 267, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485; *R. v. Francis,* [1970] 3 C.C.C. 165, 10 D.L.R. (3d) 189, 9 C.R.N.S. 249, 2 N.B.R. (2d) 14; *R. v. Derriksan* (1974), 20 C.C.C. (2d) 157, 52 D.L.R. (3d) 744, [1975] 1 W.W.R. 56 [affd 24 C.C.C. (2d) 101, [1975] 4 W.W.R. 761]; *The Pas Merchants Ltd. v. The Queen* (1975), 50 D.L.R. (3d) 154, [1974] 2 F.C. 376; *R. v. Smith* (1935), 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 433; *R. v. Mirasty,* [1942] 1 W.W.R. 343, refd to]

Indians - Exemption from seizure - Rifle and motor vehicle seized from accused on reserve in respect of violation of provincial game legislation outside reserve - Indian Act providing that Indian property situated on reserve not subject to seizure - Provincial legislation providing for seizure inconsistent with Indian Act provision - Provincial legislation ineffective to permit seizure - Goods returned - Game and Fish Act (Ont.), ss. 16, 42(1) - Indian Act (Can.), ss. 88, 89.

[*Campbell v. Sandy,* [1956] O.W.N. 441, 4 D.L.R. (2d) 754; *Diabo v. Rice,* [1942] Que. S.C. 418; *Beaulieu v. Petitpas,* [1959] Que. P.R. 86; *Geoffries v. Williams (alias Well)* (1958), 16 D.L.R. (2d) 157, 26 W.W.R. 323; *R. v. Jim* (1915), 26 C.C.C. 236, 22 B.C.R. 106; *R. v. Rodgers* (1923), 40 C.C.C. 51, [1923] 3 D.L.R. 414, [19231 2 W.W.R. 353, *Man. L.R.* 139; *R. v. Morley* (1931), 58 C.C.C. 166, [1932] 4 D.L.R. 483, [1932] W.W.R. 193, 46 B.C.R. 28, refd to]

Criminal law - Sentence - Mitigation - Mistake of law - Belief by accused Indian that entitled to hunt on certain lands - Action by accused apparently to test application of provincial law - Accused intending to give

meat to needy Indian family - $750 fine varied on appeal to suspended sentence - Game and Fish Act (Ont.), ss. 42(1), 90 - Summary Convictions Act, R.S.O. 1970, c. 450, s. 11(1).

Indians - Aboriginal rights - Charge of unlawful hunting contrary to provincial game legislation - Claim by accused Indian that exempt from legislation based on aboriginal right - Burden of proof on accused to prove exemption on balance of probabilities - Aboriginal right once proved presumed to continue until contrary proved - Crown relying on treaty as extinguishing right - Burden on Crown as author of treaty to prove that treaty extinguished Indian title to land - Treaty provisions to 'be construed against Sovereign as draughtsman in event of ambiguity - Game and Fish Act (Ont.), ss. 41, 42, 89(a) - Indian Act (Can.), ss. 33, 89(1) - Summary Convictions Act, R.S.O. 1970, c. 450, s. 3 -Cr. Code, s. 730(2).

[*R. v. Park Hotel (Sudbury) Ltd.,* [1966] 2 O.R. 316, [1966] 4 C.C.C. 158; *Calder* et *at. v. A.-G. B.C.,* [1973] 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1; affg 13 D.L.R. (3d) 64, 74 W.W.R. 481; *Isaac et al. v. Davey et al.* (1974), 5 O.R. 610, 51 D.L.R. (3d) 170, apld; *R. v. Moses,* [1970] 3 O.R. 314, [1970] 5 C.C.C. 356, 13 D.L.R. (3d) 50; *R. v. Appleby,* [1972] S.C.R. 303, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, 16 C.R.N.S. 35, (1971] 4 W.W.R. 601; *R. v. St. Catharines Milling & Lumber Co.* (1885), 10 O.R. 196; affd 14 App. -Cas. 46, 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 Court may take judicial notice of treaties with Indians - Game and Fish Act (Ont.), as. 41, 42 - Indian Act (Can.), as. 88, 89(1).

[*Calder et al. v. A.-G. B.C.,* [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1, folld; *R. v. Kruger and Manuel* (1974), 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435, [1974] 6 W.W.R. 206 [revd on other grounds 24 C.C.C. (2d) 120, [1975] 5 W.W.R. 167], refd to]

APPEAL by the accused by way of *trial de novo* from convictions and sentences on two charges of unlawfully hunting deer contrary to s.42(1) of the *Game and Fish Act* and one charge of possessing such game contrary to s.41 of the *Game and Fish Act* (Ont.).

T. G. Watkinson, for accused, appellant.
D. R. Orazietti, for the Crown, respondent.

VANNINI, D.C.J.:- This is an appeal by the defendant by way of a trial *de novo* from two convictions for unlawfully hunting deer contrary to s.42(1) and from a conviction of knowingly possessing such game contrary to s.41 of the *Game and Fish Act,* R.S.O. 1970, c.186, and from the sentences imposed as well as the seizures made in respect thereof.

With the consent of counsel the appeal was heard upon the following agreed and admitted statement of facts, namely:

(1) The accused Henry Wesley, on March 29, 1974, in the Township of Sheddon in the District of Algoma, hunted deer.
(2) That March 29, 1974, was during the closed season for deer hunting in the Township of Sheddon pursuant to the *Game and Fish Act.*
(3) That the hunting took place on private property, not used "for settlement, mining, lumbering, trading or other purposes" and, secondly, hunting took place on a public highway, Highway 17 East and adjacent to Crown land.
(4) That Henry Wesley is an Indian as defined by the *Indian Act,* R.S.C. 1970, c.I-6, and in particular that Henry Wesley is a member of the Ojibway Indian Tribe and is a registered James Bay Treaty No. 9 Indian, from the Lake Constance Band.
(5) That seizure of the vehicle and rifle of Henry Wesley was made on an Indian reserve as defined in the *Indian Act.*
(6) That copies of both the Robinson Treaty (1850) and James Bay Treaty be filed.

Counsel for the defendant further admitted each of the following as facts in evidence against the defendant:

(1) That the Lake Constance Band Reserve is situated within that portion or tract of land in the Province of Ontario described in, and to which the James Bay Treaty -Treaty No. 9, in part, relates and said therein to contain 90,000 square miles, more or less.
(2) That the said Township of Sheddon is situate within the lands described in and to which the Robinson Treaty of 1850 relates.

The Lake Constance Band Reserve is situated some 20 miles east of Hearst, Ontario, and Hearst is said to be some 200 to 300 miles "as the crow flies" north of the Township of Sheddon.

At the conclusion of the oral submissions of counsel on the initial hearing of the appeal counsel requested that they be permitted to file supplementary submissions in writing and that I postpone the determination of the appeals until they were received and considered by me as submissions on the hearing of the appeals.

The Court acceded to this request and directed that such submissions be filed with the Court by April 1st. These were received within the time prescribed and have been fully considered by me.

The defendant claims to be exempt or immune from the provisions of ss. 41 and 42 of the Game *and Fish Act* pursuant to s.88 of the *Indian Act* on the ground that the aboriginal rights from time immemorial of the Indians of the Ojibway Tribe to hunt and to fish in the area in question was and

still is reserved to him under the Robinson Treaty of 1850 and/or the James Bay Treaty - Treaty No.9, of 1905, except as otherwise therein provided.

With regard to such claim of exemption or immunity, s. 730(2) of the *Criminal Code,* which is made applicable to provincial statutory offences by s. 3 of the *Summary Convictions Act,* R.S.O. 1970, c. 450, provides that:

> **730(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.**

In *R. v. Park Hotel (Sudbury) Ltd.,* [1966] 2 O.R. 316, [1966] 4 C.C.C. 158, it was held that s. 730(2) of the *Criminal Code is* applicable to provincial statutory offences and that the burden of proving that an exception operates in favour of the defendant is on defendant and that the prosecutor is not required, except by way of rebuttal, to negative the exception. See, also, s.89(a) of the *Game and Fish Act,* which places upon the person charged thereunder in respect of taking, killing, procuring or possessing game or fish, the "onus" of "proving" that it was lawfully taken, killed, procured or possessed by him.

Of this section His Honour Judge Little in *R. v. Moses,* [1970] 3 O.R. 314 at pp. 319-20, [1970] 5 C.C.C. 356 at P. 362, 13 D.L.R. (3d) 50 at pp. 55-6 (Ont.), said:

> **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 the Robinson Treaty are still operative, and if so, he has not contravened the provisions of said s.38(1) as charged.**

Accordingly I hold that the onus of proving that the defendant is exempt from the relevant provisions of the *Game and Fish Act is* upon the defendant and that the prosecutor is not required, except by way of rebuttal, to negative the exemption.

Where the law imposes an onus upon an accused to establish or to prove an essential fact or to establish or prove a lawful excuse or exemption, that burden of proof is fulfilled by a preponderance of evidence or by a balance of probabilities the allegation of which proof is required by the party so asserting: *R. v. Appleby,* [1972] S.C.R. 303, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325 (S.C.C.).

This defendant must therefore prove by a preponderance of evidence or upon a balance of probabilities each of the following:

(1) That he is an Indian within the meaning of s.2(1) of the *Indian Act;*
(2) that pursuant to s.88 of the *Indian Act* he has the right to hunt on the lands in question, and
(3) that by virtue of s.89(1) of the *Indian Act* he is exempt from the seizure and forfeiture provisions of s.16 of the *Game and Fish Act.*

In determining whether any particular Indian tribe or band had an aboriginal right to hunt and fish in any particular part of Canada reference may be had to the Royal Proclamation of 1763 and to any treaty touching upon such rights. In addition the Court may take judicial notice of the facts of history, whether past or contemporaneous, and is also entitled to rely on its historical knowledge and researches: *per* Hall, J., in *Calder et al. v. A.-G. B.C.,* [1973] S.C.R. 313 at p. 346, 34 D.L.R. (3d) 145 at p. 169, [1973] 4 W.W.R. 1 (S.C.C.); *R. v. Kruger and Manuel* (1974), 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435, [1974] 6 W.W.R. 206 (B.C. Co.Ct.) [reversed on other grounds 24 C.C.C. (2d) 120, [1975] 5 W.W.R. 167].

Of historical documents and enactments, Hall, J., *supra*, said at p. 346 S.C.R., p.169 D.L.R.:

> **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.**

Once this aboriginal hunt is established, it is presumed to continue until the contrary is proven: Hall, J., *supra,* at p. 401 S.C.R., p. 208 D.L.R.

Relying on the decisions in *R. v. St. Catharines Milling & Lumber Co.* (1885), 10 O.R. 196 (at pp. 203-6), as affirmed by 14 App. Cas. 46 (at pp. 54-5), the Ontario Court of Appeal *in Isaac et al. v. Davey et al.* (1974), 5 O.R. 610, 51 D.L.R. (3d) 170, summarized the Indian title in Ontario as follows at p. 620 O.R., p. 180 D.L.R.:

> **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.

It is also beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the prosecution and that intention must be clear and plain: *per* Hall, J.A., *supra*, at p. 404 S.C.R., p. 210 D.L.R.

It follows from this that the onus of proving that the Sovereign intended to limit or to restrict such title to certain Indians or to confine it to a certain territory or to terminate or to abrogate it on the happening of a certain event also lies on the prosecutor and such intention must also be clear and plain.

In any such treaty the provisions conferring a right or benefit upon the Indians are to be construed broadly in their favour and in the event of any ambiguity in any of the terms thereof any issue arising therefrom should be resolved against the Sovereign as the draughtsman of the document and in favour of the Indian.

Against this general background of the law I turn first to a consideration whether the Ojibway Indians ever enjoyed any aboriginal right to hunt and to fish and, if so, what the nature and the extent of that right was.

In addition to the facts admitted in evidence the defendant called one William E. Sault, a full-blooded Ojibway Indian from Nipigon, Ontario, to give evidence touching upon such rights and the nature and extent thereof.

Having researched the subject thoroughly and from information that has been passed down from one generation to another and from his personal knowledge Mr. Sault may aptly be described as a scholar of the history and the culture of his people and of the several treaties affecting them.

He touched upon the aboriginal rights from time immemorial of the members of the Ojibway Tribe to hunt and fish over all of the territories subsequently covered by the Robinson Treaty of 1850 with the Indians of Lake Huron, by the Robinson Treaty of 1850 with the Indians of Lake Superior, by the Northwest Angle Treaty (Treaty No. 3) with the Saulteau Indians and by the James Bay Treaty - Treaty No. 9, of 1905 with the Indians north of the Height of Land, north of Lake Superior and by other treaties with other bands of Ojibway Indians in other parts of Ontario.

Mr. Sault described the aboriginal culture of his ancestors as being one of sharing with each other the bounties placed upon the earth by the Great Spirit; that it was essentially nomadic in character; that they were known to travel far and wide by canoe and portage over all of these territories to hunt and fish for their sustenance and that it is a culture that is given to the preservation and not to the over-killing or senseless killing of the creatures that sustain life for them.

He expressed the view that the Robinson Treaties of 1850 had no relation to the social, economic and political structure of the Indians that inhabited those areas and honestly and firmly believed that it was still the right of every Indian to hunt and fish in any area of Canada regardless of the territorial limits of the particular treaty provided, however, that such right was not by them ceded or otherwise limited or restricted thereby.

Mr. Sault is a credit to his people and they in turn should be proud of him and appreciative of his efforts on their behalf.

I turn now to an historical research of the said issue.

Every phase of the life of the aboriginal Canadian Indian - political, social, cultural and economic, is covered by Diamond Jenness, the internationally known ethnologist, in *The Indians of Canada,* 6th ed.

He concluded that in Canada the Indian tribe was seldom a definite political unit or organization as with other primitive people in most other parts of the world.

Of the Canadian Indian, he says, at p. 8:

> **Head chiefs were rare, for as a rule bands or villages were politically independent of their neighbours, to whom they were bound only by ties of kinship and common interest. The remoter bands often diverged considerably in dialect, and so readily assimilated the customs of alien peoples around them that they lost all feeling of political unity with their distant relatives and sometimes became openly hostile. Furthermore, in the widespread migrations that occurred shortly before Europeans penetrated into the interior, many bands became entirely separated from their kinsmen and established themselves in new and remote hunting grounds. It thus becomes impossible in many cases to determine the limits of tribal units, or indeed of any political unit larger than the band; and the bands were too small, and too numerous, to provide a satisfactory basis of classification.**

After considering a further classification of the Canadian Indian by languages and cultural areas, Jenness concludes, at p. 12:

> **This is the classification we shall adopt in this book, a classification based primarily on culture areas, which were themselves largely determined by the physiography of the country. But in discussing each culture area in turn, we shall find it most convenient to subdivide according to cleavages of tribe and language, so that in the end we shall be adopting all three bases of classification.**

i.e., political, linguistic and cultural.

Jenness then determined that there were four such cultural areas or groups, one of which he describes as the Migratory Tribes of the Eastern Woodlands which comprised, *inter alia,* the Algonkins between the Ottawa River and the St. Maurice and the Ojibwa of Northern Ontario.

Of what he writes of the Ojibwa at pp. 277-83 that may be relevant to the determination of the said issue on this appeal may be summarized as follows:

(1) They were the strongest nation in. Canada and controlled all the northern shores of Lakes Huron and Superior from Georgian Bay to the edge of the prairies and at the Height of Land north of Lake Superior where the rivers begin to flow towards Hudson Bay they united with their near kinsmen, the Cree;
(2) so numerous were they and so large a territory did they cover that they could be separated into four distinct groups or tribes, namely, the Ojibwa of the Lake Superior region, the Mississauga of Manitoulin Island and of the mainland around the Mississagi River, the Ottawa of the Georgian Bay region, and the Potawatomi on the west side of Lake Huron within the State of Michigan, some of whom moved across into Ontario in the 18th and 19th centuries;
(3) each tribe was subdivided into numerous bands that possessed their own hunting territories and were politically independent of one another, though closely connected by intermarriage;
(4) the band was the real political unit with its own leader;
(5) there was no chief for a whole tribe;
(6) while they were not so completely dependent on game and fish as other Canadian tribes they were, nevertheless, as keen hunters and as keen fishermen as other Indians, thereby causing them to be migratory, and,
(7) by the beginning of the 18th century the main body of the Ojibwa suddenly entered on a career of expansion provoked by the diminution of the beaver within their domains as a result of which many Mississauga moved into the old territory of the Hurons between Lakes Huron and Erie; some of the Lake Superior Ojibwa occupied parts of Manitoba and some spread eastward along the north shore of Lake Huron into Georgian Bay where they still remain on the numerous reserves that the Government has set aside for their use.

Of the term "tribe" Jenness states, at p. 121:

> **We may admit at the outset that the term tribe, strictly speaking, is hardly applicable to the eastern arid northern peoples of Canada; for the word implies a body of people who occupy a continuous territory, who possess the same customs, speak the same language, and act as a unit in matters of offence and defence. It implies, further, a clear political separation from neighbouring peoples, usually associated in turn with differences in customs and in language.**

and at p. 122:

> **It is true that neighbouring bands differed little except in the possession of different hunting-grounds, and that they frequently joined together for mutual support, but the compositions of these united groups varied continually as a band coalesced with its kindred, now in one direction, now in another.**

Of "ownership" of the land they occupied and over which they hunted and fished, Jenness writes' at p. 124:

> **"Real" property he had none, for the hunting territory and the fishing places belonged to the entire band, and were as much the right of every member as the surrounding atmosphere. Members of other bands might use them temporarily, with the consent of the owner band, or they might seize them by force; but land could not be sold or alienated in any way.**

and at p. 125:

> **Natives living outside the tribe were enemies, real or potential, to be carefully avoided unless they encroached on the hunting territories. Then it was the local band only that opposed the invasion, unless the menace became so serious that other bands voluntarily rallied to its aid.**

Having regard to the reputation of Diamond Jenness as an internationally known ethnologist and consequently as an authority on the Indians of Canada, I accept the statements he makes in his text, as above quoted and summarized, as facts of history.

These findings do not differ materially from the evidence of Mr. Sault as it relates thereto except as follows:

(a) While Mr. Sault could not definitely state what the westerly limits were of the lands occupied by the Ojibwa, Jenness states that they extended to the edge of the prairies;
(b) while Mr. Sault stated that the Ojibwa were known to travel and to hunt and fish over all of the territories occupied by them, Jenness concluded that each band had its own hunting and

fishing grounds and that members of other Ojibwa bands might use them temporarily with the consent of the owner band, and

(c) while Mr. Sault appeared to state that it was the aboriginal right of any Indian to fish anywhere in Canada, Jenness concludes that a local band opposed the invasion upon their hunting and fishing grounds by natives living outside the tribe.

Because of the significance of these differences as they relate to the theory of the prosecutor and of the defendant, I reiterate my acceptance of Jenness' statements.

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: *per* Johnson, J.A., in *R. v. Sikyea,* [1964] 2 C.C.C. 325 at pp. 327-8, 43 D.L.R. (2d) 150 at p. 152, 43 C.R. 83, and affirmed by the Supreme Court of Canada in [1964] S.C.R. 642 at p. 646, [1965] 2 C.C.C. 129 at p. 132, 50 D.L.R. (2d) 80 at p. 84, and by Hall, J., in *Calder et al. v. A.-G. B.C., supra,* at pp. 397-8 S.C.R., pp. 2056 D.L.R.

This right was affirmed and reserved unto them by the Royal Proclamation of 1763 which has been carried forward into s. 91(24) of the *British North America Act, 1867,* and later affirmed, assured and regulated by s. 88 of the *Indian* Act. See, generally, *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.), and more particularly the judgment of Norris, J.A., starting at p. 625 *et seq.*

Section 88 of the *Indian Act* provides:

> **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.**

Of this section Martland, J., speaking for the majority of the Court in *R. v. George,* [1966] S.C.R. 267 at p. 280, [1966] 3 C.C.C. 137 at p. 150, 55 D.L.R. (2d) 386 at pp. 397-8 (S.C.C.), 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 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.**

In considering the right of an Indian as defined in s.2(1) of the *Indian Act* to exercise his aboriginal right to hunt and to fish in any particular part of Canada, regard must be had to the particular tribe or band and to the particular territory over which such right was reserved, affirmed, allowed or granted and to any conditions or restrictions that may have been imposed by the treaty in question: *R. v. Syliboy* (1928), 50 C.C.C. 389, [1929] 1 D.L.R. 307; *R. v. Simon* (1958), 124 C.C.C. 110, 43 M.P.R. 101 (N.B.C.A.); *R. v. White and Bob, supra,* affirmed by the Supreme Court of Canada, [1965] S.C.R. vi, 52 D.L.R. 481n; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485 (B.C.C.A.); *R. v. Moses, supra; R. v. Francis,* [1970] 3 C.C.C. 165, 10 D.L.R. (3d) 189, 9 C.R.N.S. 249 (N.B.C.A.); *Calder v. A.-G. B.C., supra; R. v. Kruger and Manuel, supra* (B.C. Co.Ct.); *R. v. Derriksan* (1974), 20 C.C.C. (2d) 157, 52 D.L.R. (3d) 744, [1975] 1 W.W.R. 56 (B.C.S.C.) [affirmed 24 C.C.C. (2d) 101, [1975] 4 W.W.R. 761]; *R. v. Dennis and Dennis* (1974), 22 C.C.C. (2d) 152, 56 D.L.R. (3d) 379, 28 C.R.N.S. 268 (B.C. Prov.Ct.); *The Pas Merchants Ltd. v. The Queen* (1975), 50 D.L.R. (3d) 154, [1974] 2 F.C. 376 (Fed.Ct.).

In *R. v. Syliboy,* the defendant, who was the Grand Chief of the Mick Macks of Nova Scotia and an inhabitant of Cape Breton Island, was convicted under the *Lands and Forests Act* of Nova Scotia of a hunting offence committed on Cape Breton Island. He claimed that as an Indian he was not bound by the provisions of that Act as he had by treaty the right to hunt and trap at all times.

The treaty in question was made with the Chief "of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said 'Province" *(i.e.,* Nova Scotia proper) and thereafter reference was made to "the said Tribe of Indians" *(i.e.,* the tribe inhabiting the eastern coast of Nova Scotia) who "shall not be hindered from but have free liberty to hunt and fish as usual" and it was made not only with the signatories thereto but "with their heirs, and the heirs of their heirs forever".

For the defendant it was submitted that the Mick Mack Tribe throughout Nova Scotia, including Cape Breton Island, was one and indivisible; that the treaty was made with the tribe and that it was of general and not of local application.

Of this submission Patterson, Acting Co.Ct.J., in upholding the conviction, said at p. 391 C.C.C., p. 309 D.L.R.:

In the face of this evidence there can he no doubt, I think, that the Treaty relied upon was not made with the Mick Mack Tribe as a whole but with a small body of that tribe living in the eastern part of Nova Scotia proper, with headquarters in and about Shubenacadie, and that any benefits under it accrued only to that body and their heirs. The defendant being unable to show any connection, by descent or otherwise, with that body cannot claim any protection from it or any rights under it.

The Court there held that the treaty did not extend to Cape Breton Indians and that by reason thereof they did not acquire any rights to hunt under the treaty contrary to the game laws of Nova Scotia.

This decision was referred to, approved and followed in *R. v. Simon* in relation to another treaty. Of it the Court said, at pp. 114-5:

There is nothing before us to indicate to what Nations the Indians concerned in the 1725 Treaty belonged nor to show that the Micmacs, or. any particular tribe of them, were involved or that the band of Micmacs on the Big Cove Reservation, of which the appellant is a member, are natural descendants of any of the Eastern Indians with whom the Treaty was made. Likewise the record is completely devoid of evidence to show any connection, by blood or otherwise, between the appellant and his band and any of the Indian Tribes who, according to art. 1 of the 1752 Treaty, had lately at Halifax and the St. Johns River ratified the earlier Treaty.

On the evidence the appellant has failed to show vested in himself any right to any immunity that may have been contemplated by the Parliament of Canada when enacting s.87 of the *Indian Act.* In consequence, it is unnecessary for us to attempt any definition of the privileges to which legislative countenance has been so given. The proviso found in the section invites elucidation. The task of determining its scope and effect is one which, in our respectful opinion, could fittingly be undertaken by the Executive Authority.

In *R. v. White and Bob* the Court held that the Royal Proclamation of 1763 was a treaty within the meaning of s. 88 of the *Indian Act;* that it applied to Vancouver Island thereby confirming the aboriginal rights of the Indian to hunt and to fish on the Island and that such right could only be extinguished before Confederation by surrender to the British Crown and after Confederation by sui-render to the Dominion Government, which the Indians in question had not done and that by reason thereof the Indians on Vancouver Island could exercise their aboriginal rights.

In *Calder v. A.-G. B.C.,* the Supreme Court of Canada, because of a split decision, affirmed the decision of the British Columbia Court of Appeal in 13 D.L.R. (2d) 64, 74 W.W.R. 481, which held that the Royal Proclamation of 1763 did not apply to the lands historically occupied by the tribe in question in the absence of any subsequent treaty or federal legislation extending the benefits of the Proclamation to such tribe.

R. v. Discon and Baker involved two members of the Band of the Squamish Indian Reserve situated in North Vancouver, B.C., who were found hunting on unoccupied, reforested bush land outside of an Indian reservation.

It was there held that the Royal Proclamation of 1763 preserved the hunting rights of "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection" and because the Squamish Indians did not come within this category at the date of the Proclamation and there was no reservation of aboriginal hunting rights in favour of the Squamish Indians in either a written treaty or a statute the two Indian hunters were bound by the gaming laws of the Province by virtue of s. 88 of the *Indian* Act.

In concluding his judgment Schultz, Co.Ct.J., said at p. 629 D.L.R., p. 496 W.W.R.:

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.

In *R. v. Moses* the Court held that in the absence of federal legislation abrogating the hunting rights granted thereby, a registered member of a band covered by the Robinson Treaty of 1850 with the Lake Huron Ojibwa who was entitled to occupy the reserve established thereby for his band had the right to hunt on unoccupied Crown lands in territory covered by the treaty notwithstanding that he lived on another reserve established by the treaty.

Little, D.C.J., said at p. 317 O.R., pp. 359-60 C.C.C., p. 53 D.L.R.:

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.

and at p. 322 O.R., p. 364 C.C.C., p. 58 D.L.R.:

> **. . . 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.**

and further, at pp. 323-4 O.R., pp. 365-6 C.C.C., pp. 59-60 D.L.R.:

> **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 satisfied 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.***

In *R. v. Kruger and Manuel* the defendants hunted food for sustenance on unoccupied Crown land which had been and still was the traditional hunting ground of the Penticton Indian Band in British Columbia, of which the defendants were members.

The Court there held that the Royal Proclamation of 1763 was applicable throughout British Columbia and because 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 and, of even more importance, no statutory extinguishment by federal enactment taking away the aboriginal right of Indians to hunt for sustenance on unoccupied Crown land, the right could not be affected by mere provincial legislation and that by virtue of s.88 of the *Indian Act* the Royal Proclamation of 1763 was still in full force and effect in so far as the particular band was concerned.

In *R. v. Derriksan* the Court found that the Royal Proclamation of 1763 has no application to the Indians therein involved or to the territory they occupy and that if they had aboriginal rights to hunt and fish for food in the territory occupied by them such rights had been wholly extinguished in the absence of any treaty affecting such Indians or their territory and by reason thereof they were subject to the *Fisheries Act* of British Columbia.

In *R. v. Dennis and Dennis* the Court had to first determine whether or not the treaty in question applied to the defendants who were Indians under the *Indian Act,* for if it did it afforded a complete defence to them "as it reserves hunting rights to the Indians within the treaty area": see p.155 C.C.C., p. 382 D.L.R., p. 271 C.R.N.S.

The Court found that the treaty in question legally only the signatories to the treaty and those whom they represented and that it did not inure to the benefit of the defendants who were members of a band that was not a party to the treaty although they hunted within the treaty area.

Of this, O'Connor, Prov.Ct.J., said at p. 155 C.C.C., p.382 D.L.R., pp. 271-2 C.R.N.S.:

> **A reading of the treaty makes it clear that only the signatories and those whom they represented are legally affected by its provisions. The treaty is similar to an agreement or contract. Neither the TahItan 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.**

The Court then proceeded to consider whether or not the defendants had an aboriginal or native interest or title to hunt for food on the lands in question and after having found that they did and that such rights had not been extinguished by a federal enactment, the Court held that the Province could not extinguish or restrict native hunting rights and that s.88 of the *Indian Act* did not operate to make provincial legislation in that regard applicable to the defendants.

Of this the Court said, at pp. 155-6 C.C.C., p. 382 D.L.R. p. 272 C.R.N.S:

> **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.**

See authorities and texts there referred to.

Of what such rights encompass, the Court said, at pp. 158-9 C.C.C., pp. 385-6 D.L.R., p. 275 C.R.N.S.:

> **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 of Indians to hunt for food for themselves and their dependants**

on unoccupied Crown lands. 1, 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.

This case appears to be an authority for the proposition that unless such aboriginal rights are extinguished or restricted by treaty or by federal enactment they may be enjoyed by any Indian as defined by s.2(1) of the *Indian Act* over the treaty area in which he resides notwithstanding that such Indian is not a member of the band that was a party to the treaty.

In *The Pas Merchants Ltd. v. the Queen,* Bastin, J., said, at p. 155 D.L.R., p. 378 F.C.:

With respect to Treaty No. 5, this was an agreement between the Canadian Government and the Indian tribes in question. On the principle of privity such an agreement confers no rights and imposes no obligations arising under it on any person not a party to it. It follows that its interpretation and performance concern only the parties to it and the plaintiff has no status to enforce its provisions.

The Robinson Treaty was made and entered in Sault Ste. Marie on September 9, 1850, with certain named Chiefs and certain named individuals who were described as

. . . principal men of the Ojibewa Indians, 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 ...

On their part

. . . they the said Chiefs and Principal men, on behalf of their respective Tribes or Bands, do hereby fully, freely, and 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.

In return for this concession, "the said Chiefs, and their Tribes" were allowed "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", *i.e.,* the then Province of Canada.

The following is to be particularly noted of the right that was allowed to such Indians to hunt and fish, namely:

(1) that it is confined to "the said Chiefs and their Tribes", and
(2) that it is restricted to the territory ceded by them and to the waters thereof "save and except such portions thereof as may be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government".

The James Bay Treaty - Treaty No. 9, of 1905 was made between His Majesty the King and the Province of Ontario, of the one part, and "the Ojibeway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their chiefs, and headmen hereunto subscribed" of the other part.

By it:

... the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada, for His Majesty the King and His successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say: That portion or tract of land lying and being in the province of Ontario, bounded on the south by the Height of Land and the northern boundaries of the territory ceded by the Robinson-Superior Treaty of 1850, and the Robinson-Huron Treaty of 1850, and bounded on the east and north by the boundaries of the said province of Ontario as defined by law, and on the west by a part of the eastern boundary of the territory ceded by the Northwest Angle Treaty No. 3; the said land containing an area of ninety thousand square miles, more or less.

And also, the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in Ontario, Quebec, Manitoba, the District of Keewatin, or in any other portion of the Dominion of Canada.

To have and to hold the same to His Majesty the King and His successors for ever.

In return for such surrender:

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. And His Majesty the King hereby agrees and undertakes to lay aside reserves for each band . . . the said reserves when confirmed shall be held and administered by His Majesty for the benefit of the Indians free of all claims, liens, or trusts by Ontario.**

The following is to be particularly noted of the right to hunt, trap and fish that was agreed to:

(1) that it was so agreed with "the said Indians", *i.e.,* with "the Ojibeway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described";
(2) that the right so granted to such Indians extended "throughout the tract surrendered as heretofore described", *i.e.,* over the whole of the territories surrendered thereby;
(3) that the tract surrendered thereby included an area of 90,000 square miles more or less, as well as all other lands of the said Indians wherever situated in Ontario, Quebec, Manitoba, the District of Keewatin, or in any other portion of the Dominion of Canada;
(4) that no reference is made therein to the Robinson-Superior Treaty of 1850 and the Robinson Huron Treaty of 1850 and the Northwest Angle Treaty of 1873 (Treaty No. 3) or to the lands surrendered thereby;
(5) that the right so granted did not extend to "such tracts" of the tract so surrendered thereby "as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

Did the James Bay Treaty - Treaty No. 9 cover any lands previously surrendered by the Robinson Treaties of 1850 or by the Northwest Angle Treaty of 1873 as Counsel for the defendant contends they did?

Whatever other lands in Ontario or elsewhere in Canada the Indians of the James Bay Treaty - Treaty No. 9 laid claim to, which were also by them surrendered thereby, could only relate to such lands, wherever situated in Canada, as such Indians had not hitherto surrendered and their inclusion in the treaty was obviously intended to embrace all of the lands to which such Indians lay claim as may have been excluded by previous treaties involving the Ojibwa, the Cree and other Indians who were parties to the James Bay Treaty - Treaty No. 9 with whom the Sovereign may have hitherto entered in a treaty of cessation.

That this is so is confirmed by the report of the Commissioners dated November 6, 1905, to the Superintendent General of Indian Affairs when transmitting the James Bay Treaty to him in which they set out the need for the treaty which they negotiated on behalf of the Government of Canada. This report forms part of ex. 2.

The reasons for the treaty are set out at the very beginning of the report, as follows:

> **Since the treaties known as the Robinson Treaties were signed in the autumn of the year 1850, no cession of the Indian title to lands lying within the defined limits of the province of Ontario had been obtained. By these treaties the Ojibeway Indians gave up their right and title to a large tract of country lying between the Height of Land and Lakes Huron and Superior. In 1873, by the Northwest Angle Treaty (Treaty No. 3), the Saulteaux Indians ceded a large tract east of Manitoba, part of which now falls within the boundaries of the province of Ontario. The first-mentioned treaty was made by the old province of Canada, the second by the Dominion. Increasing settlement, activity in mining and railway construction in that large section of the province of Ontario north of the Height of Land and south of the Albany River rendered it advisable to extinguish the Indian title. The undersigned were, therefore, appointed by Order of His Excellency in Council on June 29, 1905, as commissioners to negotiate a treaty with the Indians inhabiting the unceded tract. This comprised about 90,000 square miles of the provincial lands drained by the Albany and Moose river systems. When the question first came to be discussed, it was seen that it would be difficult to separate the Indians who came from their hunting grounds on both sides of the Albany river to trade at the posts of the Hudson's Bay Company, and to treat only with that portion which came from the southern or Ontario side. As the cession of the Indian title in that portion of the Northwest Territories which lies to the north of the Albany river would have to be consummated at no very distant date, it was thought advisable to make the negotiations with Indians whose hunting grounds were in Ontario serve as the occasion for dealing upon the same terms with all the Indians trading at Albany River posts, and to add to the community of interest which for trade purposes exists amongst these Indians a like responsibility for treaty obligations. We were, therefore, given power by Order of His Excellency in Council of July 6, 1905, to admit to treaty any Indian whose hunting grounds cover portions of the Northwest Territories lying between the Albany river, the district of Keewatin and Hudson bay, and to set aside reserves in that territory.**

It must be also remembered, as Jenness points out, that the Ojibway was the largest nation in Canada and so numerous were they that they could be separated into four groups or tribes and that they occupied all of that part of Ontario lying between the Height of Land and Lakes Huron and Superior which were ceded by the Robinson Treaties of 1850 and a large tract east of Manitoba, part of which now falls within the boundaries of Ontario, which was surrendered by the Saulteaux Indians in 1873 by the Northwest Angle Treaty (Treaty No. 3).

So general were the descriptions of the lands surrendered by these treaties as to make it inevitable that tracts or pockets of lands that were occupied by other Ojibway might easily have been excluded therefrom.

Then, too, at the Height of Land the Ojibway united with their near kinsmen, the Cree, who occupied all of Northern Ontario and Northern Quebec from the Height of Land to James Bay and Hudson Bay as well as large parts of Manitoba and Saskatchewan (see map of aboriginal population in Jenness, *supra*).

Even Mr. Sault expressed some doubt as to the exact territory that is covered by one or two of the earlier treaties with the Ojibway around Sault Ste. Marie and he was unable to say what were the westerly territorial limits in Canada of the Ojibway Nation.

And of the number of treaties entered into by the Ojibway he testified that, in addition to the four major ones, there were others with "countless number of bands and land surrenders which are overlapping".

Whatever land in Canada the Indians of the James Bay Treaty - Treaty No. 9 may have occupied at the time which had not previously been surrendered by them were by them by that treaty surrendered and in respect of such lands they still enjoy such hunting and fishing rights as by that treaty were granted to them.

Accordingly, I hold that as an Indian covered by the James Bay Treaty - Treaty No. 9, the defendant was not granted a right thereby to hunt in the Township of Sheddon in the District of Algoma, or elsewhere in the territory covered by the Robinson Treaty of 1850 for the reason that by each of the said treaties the Indians thereto surrendered their aboriginal right to hunt and to fish over the lands respectively covered thereby and agreed to accept in return the right to hunt and to fish as by such treaties respectively granted to them in respect of the lands respectively covered thereby.

The facts of this case and the law applicable thereto differ from the factual situation and the law applicable thereto in *R. v. Moses, supra,* and in *R. v. Dennis and Dennis, supra.*

The defendant before me has failed to prove a right to hunt or to be in possession of game in the Township of Sheddon in the District of Algoma either as an aboriginal right or under the rights reserved or conferred in this regard by the Robinson Treaty of 1850 or by the James Bay Treaty - Treaty No. 9 of 1905, or otherwise.

The defendant hunted and killed two deer in the Township of Sheddon and was later found in possession of their carcasses and was charged, convicted and fined $250 in respect of each.

In this regard s. 84 of the *Game and Fish Act* provides:

> **84. Where in a prosecution under this Act it appears in evidence that more than one offence of the same kind was committed at the same time or on the same day, the court shall in one conviction impose all the penalties at the same time.**

Further, it is by s. 25 of the *Interpretation Act,* R.S.O. 1970, c. 225, provided:

> **25. Where an act or omission constitutes an offence under two or more Acts, the offender, unless the contrary intention appears, is liable to be prosecuted and punished under either or any of those Acts, but is not liable to be punished twice for the same act or omission.**

Having regard to the facts of this case and to the provisions of s.84 of the *Game and Fish Act* and giving the defendant the benefit of the doubt as to whether in law the provisions of s.25 of the *Interpretation Act* apply to the facts herein, I do find the accused guilty only of one offence under s.42(1) of the *Game and Fish Act* and I dismiss the other information thereunder as well as the information under s.41 of that Act.

Having found the defendant guilty on the grounds that I did there is no need to consider the issue raised on the appeal whether or not the hunting that took place on "private" property which was not used "for settlement, mining, lumbering, trading or other purposes" and the hunting that took place on the public highway adjacent to Crown lands constituted hunting within or in contravention of the rights to hunt granted by the James Bay Treaty - Treaty No. 9.

Suffice it only to make reference in this regard to *R. v. Smith* (1935), 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 433, in which it was held that the words "settlement", "mining" and "lumbering" could not be grouped into any genus to which the *ejusdem generis* rule applies; that the words are not of the same genus as they describe a different use for which Crown lands may be required or taken up and therefore the words "or other purposes" must be given their plain and ordinary meaning and, when given such meaning, may very reasonably be taken to include lands required for the establishing of game preserves. See, also, *R v. Mirasty,* [1942] 1 W.W.R. 343, to the same effect.

It only remains to determine the legality of the seizure effected pursuant to s. 16 of the *Game and Fish Act* on a reserve of the rifle and the motor vehicle used by the defendant in the commission of the offence contrary to s.2(1) of the Act.

The defendant claims exemption from such seizure by virtue of s.89(1) of the *Indian Act,* which provides:

> **89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.**

This section has to be read subject to the provisions of s.88 of the *Indian Act* which makes Indians subject to all provincial laws of general application except in so far as they are inconsistent with the Act.

By virtue of the combined effect of ss. 88 and 89 Of the *Indian Act* it was held that an Indian judgment debtor is exempt from execution under the law of Ontario if he has no property or interests outside the reserve: *Campbell v. Sandy,* [1956] O.W.N. 441, 4 D.L.R. (2d) 754 (Kinnear, Co.Ct.J.). Nor is his immovable property -on a reserve subject to seizure in satisfaction of a judgment: *Diabo v. Rice*, [1942] Que. S.C. 418, and a Court cannot order an Indian judgment debtor to pay a sizable part of the wages he earned on a reserve to satisfy the judgment: *Beaulieu v. Petitpas,* [1959] Que. P.R. 86, although the wages he earns outside the reserve are liable to attachment by garnishment: *Geoffries v. Williams (alias Well)* (1958), 16 D.L.R. (2d) 157, 26 W.W.R. 323 (B.C.).

The regulation of Indian reserves being under the exclusive jurisdiction of Dominion Parliament, a provincial game protection law is not effective, as regards such Indian reserve, to prohibit an Indian there resident from hunting, trapping and fishing on his own reserve: *R. v. Jim* (1915), 26 C.C.C. 236, 22 B.C.R. 106 (B.C.S.C.); *R. v. Rodgers* (1923), 40 C.C.C. 51, [1923] 3 D.L.R. 414, [1923] 2 W.W.R. 353 (Man. C.A.). See, also, *R. v. Morley* (1931), 58 C.C.C. 166, [1932] 4 D.L.R. 483, [1932] W.W.R. 193 (B.C.C.A.), where the Court upheld the conviction of a white man for killing a pheasant on a reserve during a closed season contrary to the *Game Act* of the Province.

Because s.16 of the *Game and Fish Act is* inconsistent with s.89(1) of the *Indian Act* it is inapplicable and unenforceable in respect of any personal property "of an Indian or a band situated on a reserve".

While in the circumstances of this case the rifle and the motor vehicle used by the defendant were liable to seizure pursuant to s.16 of the *Game and Fish Act* when situated outside of a reserve, they were immune from seizure while situated on a reserve by virtue of s.89(1) of the *Indian Act,* notwithstanding that they were used in the commission outside of a reserve of an offence under the provincial Act. The seizure in these circumstances was illegal.

In respect of the one conviction under s.42(1) of the Act the defendant is by s. 90 thereof liable to a fine of not more than $1,000 and in the determination thereof the Court is required by s.84 of the Act to impose a penalty for the commission by the defendant on the same day of the other offence under s.42(1) of the Act.

It is by s.11(1) of the *Summary Convictions Act,* R.S.O. 1970, c.450, provided that where a person is convicted of an offence for which a minimum punishment is not provided and he has not been previously convicted of any offence, the Court may, if it "thinks it expedient having regard to the age, character and antecedents of the offender and to the nature of the offence and to any extenuating circumstances, direct that he be released upon suspended sentence".

This defendant is 34 years of age and although married is living separate from his wife and it appears he is not contributing to her maintenance. He is presently employed by International Nickel in Sudbury where he lives and was living at the time of the commission of the offences in question.

He intends to leave his present employment to join the police force of the Indian band on Walpole Island. It will be part of his duty as a member of that police force to enforce the game laws.

The prosecutor not having made any reference to any previous conviction of any offence I can only conclude that this defendant has no previous conviction for any of fence either criminal or under any provincial enactment.

He hunted and killed two deer, one of which carried one fawn and the other carried two, who were also killed as a result.

The evidence given by this defendant at his trial before the summary conviction Court seems to indicate that he was aware of wrongdoing at the time of the hunting and shooting, but before this Court he maintains that he believed he had a right to hunt as a Treaty Indian notwithstanding the game laws of the Province.

I am going to give the defendant the benefit of the doubt in this regard and consider the sentence in the light of his belief that he had a right to hunt. I accept, also, his statement that he was not aware before shooting the deer that they were with fawn. If I could be satisfied that this was a deliberate infraction by this defendant of the game laws of the Province, deliberate in the sense that he knew that he did not have a right as a treaty Indian to hunt and that it was against

the game laws of the Province to do so, I would take a more serious view of the matter in so far as sentence is concerned than I propose to.

To his credit is his decision to join the police force in question and to become a law enforcement officer and it was his right to test what he believed to be his right to hunt in the area in question, albeit he was mistaken, and to test it as he did on his appeal to this Court.

In all of these circumstances the Court thinks it expedient, having regard to the age, character and antecedents of the defendant, to the nature of the offence and to the extenuating circumstances, namely, his mistaken belief as to his right to hunt and to his statement in the evidence read by the Crown from the evidence on the trial that he was killing to give the meat to a needy Indian family, I direct that the defendant be released upon suspended sentence for a period of two years as provided for by s. 11 (1) of the *Summary Convictions Act.*

Appeal allowed in part.