Arthur Andrew Dick *Appellant*; and Her Majesty The Queen *Respondent*; and The Attorney General of Canada and the Attorney General of Nova Scotia *Interveners*.

1984: October 29; 1985: October 31.

Present: Dickson C.J. and Beetz, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Indians -- Hunting -- Non-treaty Indian convicted of killing a deer out of season contrary to Wildlife Act -- Applicability of provincial game laws to Indians -- Wildlife Act, R.S.B.C. 1979, c. 433, ss. 3(1), 8(1) -- Indian Act, R.S.C. 1970, c. I-6, s. 88 -- Constitution Act, 1867, s. 91(24).

Constitutional law -- Indians -- Game laws -- Non-treaty Indian convicted of killing a deer out of season contrary to Wildlife Act -- Whether Wildlife Act impairing Indian status -- Whether Wildlife Act constitutionally applicable to appellant -- Constitution Act, 1867, s. 91(24) -- Wildlife Act, R.S.B.C. 1979, c. 433, ss. 3(1), 8(1) -- Indian Act, R.S.C. 1970, c. I-6, s. 88.

Criminal law -- Appeals -- Summary convictions -- Non-treaty Indian convicted of killing a deer out of season -- Whether this appeal raises a question of law alone for the purpose of s. 114 of the Offence Act -- Offence Act, R.S.B.C. 1979, c. 305, s. 114.

Appellant, a non-treaty Indian member of the Alkali Lake Band, was charged with the killing of a deer out of season without being the holder of a permit, contrary to s. 3(1) of the British Columbia *Wildlife Act*. Appellant killed the deer for food on the traditional hunting grounds of the Alkali Lake Band outside the reserve. Appellant was convicted and his appeals to the County Court and the Court of Appeal were dismissed. This appeal raises several issues: (1) whether the *Wildlife Act* impairs the status and capacity of Indians, an invasion of the federal field under s. 91(24) of the *Constitution Act, 1867*; (2) if so, whether the *Wildlife Act* is a law of general application referentially incorporated into federal law by s. 88 of the *Indian Act*; and (3) whether this appeal raises a question of law alone for the purpose of s. 114 of the *Offence Act* of British Columbia.

Held: The appeal should be dismissed.

The *Wildlife Act* of British Columbia is a law of general application and it applies to the appellant either by its own force or, assuming that the *Wildlife Act* has the effect of regulating him *qua* Indian, by referential incorporation under s. 88 of the *Indian Act*.

(*a*) *Laws of general application*: To determine whether a provincial enactment is not a law of general application, it must be shown that the intent, purpose or policy of the legislation was to impair the status or capacities of a particular group. While it is assumed in this case that the *Wildlife Act* impairs the status or capacity of Indians, it has not been demonstrated that the provincial legislator intended this particular impact nor has it been established that the legislative policy of the *Wildlife Act* singles out Indians for special treatment or that it discriminates against them in any way.

(*b*) *Referential incorporation:* Section 88 of the *Indian Act* does not incorporate, as part of federal legislation in respect to Indians, all provincial laws of general application. On one hand, s. 88 refers to the provincial laws which cannot apply to Indians without regulating them *qua* Indians, *i.e.*, provincial legislation which, *per se*, would not apply to Indians under the *Indian Act* unless given force by federal reference. On the other hand, provincial laws of general application which can apply to Indians without touching their Indianness apply to them *ex proprio vigore*.

Finally, this Court entertains grave doubts as to whether the first two issues on which an appeal was taken to the Court of Appeal were founded "on any ground that involves a question of law alone". Indeed, it does not appear possible to resolve these issues without weighing the evidence adduced by the parties. However, since the appeal should be dismissed, there is no need to decide that question.

Cases Cited

Kruger v. The Queen, [1978] 1 S.C.R. 104, considered; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *R. v. Haines* (1981), 34 B.C.L.R. 148; *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695; *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248;

Commission du Salaire minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767; *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178; *R. v. White and Bob* (1965), 52 W.W.R. 193; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91; *Attorney-General for Manitoba v. Attorney-General for Canada*, [1929] A.C. 260; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *R. v. Hill* (1908), 15 O.L.R. 406; *R. v. Martin* (1917), 41 O.L.R. 79; *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31; *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137; *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569; *R. v. Jack and Charlie* (1982), 139 D.L.R. (3d) 25; *Poitras v. The Queen*, [1974] S.C.R. 649; *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, referred to.

Statutes and Regulations Cited

Constitution Act, 1867, s. 91(24).
Indian Act, R.S.C. 1970, c. I-6, s. 88.
Offence Act, R.S.B.C. 1979, c. 305, s. 114.
Supreme Court Act, R.S.C. 1970, c. S-19, s. 41(1) [rep. & subs. 1974-75-76 (Can.), c. 18, s. 5], (3).
Wildlife Act, R.S.B.C. 1979, c. 433, ss. 3(1), 8(1).

Authors Cited

Lysyk, K. "The Unique Constitutional Position of the Canadian Indian" (1967), 45 *Can. Bar Rev*. 513.
Jordan A. "Government, Two -- Indians, One" (1978), 16 *Osgoode Hall L.J.* 709.

APPEAL from a judgment of the British Columbia Court of Appeal (1982), 3 C.C.C. (3d) 481, 41 B.C.L.R. 173, [1983] 2 C.N.L.R. 134, dismissing the accused's appeal from his conviction by Andrews Co. Ct. J., *sub nom*. *R. v. Tenale* (1982), 66 C.C.C. (2d) 180, 134 D.L.R. (3d) 654, [1982] 3 C.N.L.R. 167, of killing a deer out of season contrary to s. 3(1) of the British Columbia *Wildlife Act*. Appeal dismissed.

Arthur Pape, Edward John and *Richard Salter*, for the appellant.
Peter D. Messner, for the respondent.
John Rook and *Peter K. Doody*, for the intervener the Attorney General of Canada.
Robert E. Lutes, for the intervener the Attorney General of Nova Scotia.

The judgment of the Court was delivered by

1.BEETZ J.--

I The facts

2 The facts are not in dispute. They are summarized by Lambert J.A., dissenting in the British Columbia Court of Appeal whose reasons for judgment are reported: *R v. Dick* (1982), 3 C.C.C. (3d) 481. At pages 484-85, Lambert J.A. related the facts:

> Arthur Dick is a member of the Alkali Lake Band of the Shuswap people. He lives on the Alkali Lake Reserve in the Chilcotin District of the County of Cariboo. He is a non-treaty Indian.
>
> The Alkali Lake Band is comprised of about 10 families, or approximately 350 people, all told. They subsist in large measure by foraging. They catch fish for food and they kill deer and moose for food and other uses.
>
> The Shuswap word for May is "Pellcwewlemten". It means "time to go fishing". In response to this imperative Arthur Dick and two other band members, with two members of the Canoe Creek Band, set off on May 4, 1980, for Gustafsen Creek, where they intended to catch fish. On the way they passed Holdon Lake. There Arthur Dick killed a deer with a rifle. His purpose was to provide food for the members of the foraging party and for other band members. The carcass, cut up in pieces, was taken on to Gustafsen Creek where a provincial conservation officer and four R.C.M.P. constables found the five Indians in possession of dip nets, a number of rainbow trout, and the deer meat.

3 One precision should perhaps be added. The killing of the deer occurred in the traditional hunting grounds of the Alkali Lake Band but outside a reserve. I now return to the recital of the facts by Lambert J.A.:

> *The Wildlife Act*, R.S.B.C. 1979, c. 433, said it was a closed season for hunting for deer. So Arthur Dick was charged under the Act with two counts; first, with killing wildlife, to wit; one deer, at a time not within the open season, contrary to s. 3(1); and, secondly, with possession of wildlife that was dead, to wit: parts of one deer, during a closed season, contrary to s. 8. It was also a closed season for fishing in Gustafsen Creek. All five Indians were charged with respect to the fishing, and those charges are the subject-matter of a separate appeal by the Crown, raising quite different issues from those raised in this appeal.
>
> The trial took place before His Honour Judge Gilmour, a judge of the provincial court. The evidence was extensive. The accused was convicted on the first count and sentenced to a fine of $50. No conviction was entered on the second count. The accused appealed. His appeal was heard by His Honour Judge Andrews, sitting as a judge of the County Court of the County of Cariboo. The appeal was dismissed. Both Judge Gilmour and Judge Andrews reserved judgment and each of them prepared full and carefully considered written reasons.
>
> An application has now been made to this court, under s. 114 of the *Offence Act*, R.S.B.C. 1979, c. 305, for leave to appeal on a ground or grounds involving a question or questions of law alone.

4 Leave to appeal was granted by the Court of Appeal but the appeal was dismissed, Lambert J.A. dissenting.

5 Appellant further appealed to this Court by leave of this Court.

II <u>The issues</u>

6 Appellant and respondent appear to agree in substance as to the issues raised by this appeal, save one. But they express them differently and I find it preferable to rephrase them as follows:

> 1 Is the practice of year-round foraging for food so central to the Indian way of life of the Alkali Lake Shuswap that it cannot be restricted by ss. 3(1) and 8(1) of the *Wildlife Act*, R.S.B.C. 1979, c. 433, without impairment of their status and capacity as Indians, and invasion of the federal field under s. 91 (24) of the Constitution Act, 1867?
>
> 2 If the answer to the first question is in the affirmative and, consequently, the *Wildlife Act* cannot apply *ex proprio vigore* to the appellant, then is this Act a law of general application referentially incorporated into federal law by s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, which 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.
>
> 3 Does this appeal raise a question of law alone for the purpose of s. 114 of the *Offence Act*, R.S.B.C. 1979, c. 305?

7 The third issue was raised only by respondent.

8 In addition, a constitutional question was stated by the Chief Justice:

> Are ss. 3(1)(*c*) and 8(1) of the *Wildlife Act*, R.S.B.C. 1979, c. 433, constitutionally inapplicable in the circumstances of this case on the ground that the restriction imposed by such sections affects the appellant *qua* Indian and therefore may only be enacted by the Parliament of Canada pursuant to s. 91(24) of the *Constitution Act, 1867*?

9 The Attorney General of Canada and the Attorney General of Nova Scotia intervened in support of respondent.

10 Another issue had been raised by appellant in the Court of Appeal, namely whether the County Court Judge had erred in holding that the manner of administration of the *Wildlife Act* by provincial officials--somewhat misleadingly referred to as the policy of the Act--had not significantly changed since the judgment of this Court in *Kruger v. The Queen*, [1978] 1 S.C.R. 104. But the Court of Appeal, following *R. v. Haines* (1981), 34 B.C.L.R. 148, unanimously held that this issue was not a "ground that involves a question of law alone". While appellant referred in his factum to the policy of the provincial government not to issue sustenance permits for out of season hunting by Indians who regularly depend on hunting for their food, I did not understand him to press this matter in this Court as a distinct issue.

11 One issue that does not arise is that of Aboriginal Title or Rights. In its factum, the appellant expressly states that he has "not sought to prove or rely on the Aboriginal Title or Rights in the case at bar". As in the *Kruger* case, the issue will accordingly not be dealt with any more than the related or included question whether the Indians' right to hunt is a personal right or, as has been suggested by some learned authors, is a right in the nature of a *profit à prendre* or some other interest in land covered by the expression "Lands reserved for the Indians", rather than the word "Indians" in s. 91(24) of the *Constitution Act, 1867*. (See Kenneth Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 *Can. Bar Rev*. 513, at pp. 518-19; Anthony Jordan, "Government, Two--Indians, One" (1978), 16 *Osgoode Hall L.J*. 709, at p. 719.)

No submission was made on this last point and in this Court, as well apparently as in the courts below, the case has been argued as if the Indians' right to hunt were a personal one.

III The first issue

12 Appellant's main submission which was apparently presented in the Court of Appeal as an alternative argument, is that the *Wildlife Act* strikes at the core of Indianness, that the question stated in the first issue should accordingly be answered in the affirmative and that the *Wildlife Act*, while valid legislation, should be read down so as not to apply to appellant in the circumstances of the case at bar.

13 As was noted by Andrews Co. Ct. J., whose reasons for judgment are reported sub nom. *R. v. Tenale* (1982), 66 C.C.C. (2d) 180, at pp. 182-83:

> A considerable volume of evidence was called at trial as to Indian culture, habits, history, the significance of hunting and fishing as part of that culture, and specifically as to provincial conservation objectives and methods, sustenance permits, food requirements, traditional claims and so on. This testimony was supported by various maps as to alleged historic hunting areas, policy statements and lengthy opinion evidence of a Dr. M. Asch, an anthropologist who is the author of numerous papers dealing with, *inter alia*, aboriginal rights.

14 Provincial Court Judge Gilmour stated, in his reasons for judgment:

> I have reviewed the evidence in the case at bar and I am not convinced that the policy of either the Fishing or Game legislation as presently expounded by the Provincial and Federal Governments and under review in this case, is such that it was intended to, or does in fact, "impair the status or capacities of Indians".

15 At page 191 of his reasons, Andrews Co. Ct. J. wrote:

> I have reviewed this material and the substantial testimony of trial witnesses. It is apparent therefrom that hunting and fishing forms a significant part of the Indian culture. I do not conclude however, that the trial Judge was in error. I do not find in all of that evidence anything from which I might have reasonably concluded that the policy of the *Wildlife Act* was such as to impair, at least in any substantial way, the status and capacity of the appellants. I do not find in all that evidence anything from which I can reasonably conclude that status and capacity of the appellant was impaired to any greater degree than those Indians involved in the *Kruger and Manuel* and *Haines* cases, *supra*.
>
> As to the argument that the *Wildlife Act* affects this appellant *qua* Indian and thus cannot apply to him because the federal authorities have exclusive jurisdiction over Indians, I do not agree.

16 In the Court of Appeal, Seaton J.A. concluded as follows at p. 484:

The decisions under attack were primarily decisions of fact. To the extent that there were questions of law alone, I am not persuaded that error has been shown. I would grant leave, but dismiss the appeal.

17 Macdonald J.A. refrained from expressing any views on the merits of the three issues raised in the Court of Appeal. At page 496 he concluded:

My opinion is that none of the three issues involves a question of law alone. I would therefore dismiss the appeal.

18 The reasons of Lambert J.A., dissenting, are quite elaborate. For the greater part, they expound the similarities and differences between the case at bar and *Kruger* and his understanding of the tests adopted in the latter case to determine whether a law is one of general application, a matter to which I will return in dealing with the second issue. But he used the same tests to answer the question stated in the first issue, namely whether the application of the *Wildlife Act* to appellant would regulate him *qua* Indian. Here is what he wrote at p. 492:

... it seems to me that the same tests as are applied to determine whether the application of a provincial law to a particular group of Indians in a particular activity is the application of a law of general application, should also be applied to determine whether the application of a provincial law to a particular group of Indians in a particular activity is legislation in relation to Indians in their Indianness.

So, subject to the question of referential incorporation, which I will come to next, it is my opinion that the evidence and argument which I have set out in Part III of these reasons require the conclusion that the *Wildlife Act* should be "read down" in order to preserve its constitutionality. That "reading down" would prevent it from applying to Arthur Dick in his activity in this case.

19 It is well worth quoting substantial parts of the evidence and argument set out in Part III of the reasons of Lambert J.A., which, as I just said, were also relied upon by him to resolve the first issue. He wrote, at pages 487, and 489-91:

In *Kruger and Manuel v. The Queen, supra*, the two accused were members of the Penticton Indian Band. They shot four deer for food on unoccupied Crown land on the traditional hunting grounds of the Penticton Indian Band. It was the closed season under the *Wildlife Act* and Kruger and Manuel did not have a sustenance permit which would have allowed them to shoot a deer during the closed season. They were convicted. Their appeal to Judge Washington took the form of a trial *de novo*. It was allowed. The Crown appealed to this court. That appeal was aso allowed and the convictions were restored: 24 C.C.C. (2d) 120, 60 D.L.R. (3d) 144, [1975] 5 W.W.R. 167. Kruger and Manuel appealed to the Supreme Court of Canada. Their appeal was dismissed. Mr. Justice Dickson's reasons were the reasons of the full court of nine.

...

The evidence in this appeal goes much further than the agreed facts in *Kruger and Manuel v. The Queen*. Here there is evidence which indicates that the line demarking laws of general application from other enactments has been crossed. In *Kruger and Manuel v. The Queen* the only relevant evidence was the statement in the agreed facts that the accused had hunted deer during the closed season on land that was the traditional hunting grounds of the Penticton Indian Band. There was no evidence that the statutory restrictions on the right to hunt impaired the status and capacities of Kruger and Manuel as Indians. There was no evidence that the Penticton Indian Band depended on hunting for their supply of meat. There was no evidence that it would be impracticable to hunt sufficient meat during the open season. There was no evidence as to the amount of meat obtained through hunting, the amount of meat needed to feed an Indian family for a year, or the amount of meat allowed to Indians under the prevailing hunting quotas. Finally, there was no evidence to indicate that hunting was central to the way of life of the Penticton Indian Band. There was, in the words of Mr. Justice Dickson, an "absence of clear evidence" that the provisions in the *Wildlife Act* crossed the line demarking laws of general application from other enactments.

The situation is entirely different in the present appeal where, in my opinion, the evidence indicates that the line has been crossed.

Nine members of the Alkali Lake Band and three members of the Canoe Creek Band gave evidence. They described their lives and the significance of the rituals of food gathering. They

told of their dependence on moose and deer for food and for traditional and valued items of daily clothing and ceremonial clothing. Their evidence was placed in its cultural framework by Dr. Michael Asch, an anthropologist.

In 1980, the year in which Arthur Dick shot the deer at Holdon Lake, there were 45 active hunters in the Alkali Lake Band. They took 117 deer and 48 moose in the year. That provided a yield of 65 to 70 pounds of meat for every man, woman and child in the Band. The meat was shared out among band members in accordance with the institutional practices of the Shuswap people.

The times of year for hunting animals and for fishing, the places to hunt, and the techniques of hunting are taught to young male members of the band by their fathers and grandfathers.

Some of the meat is smoked, some is salted, some is frozen, and some is eaten fresh. The preservation of the meat and the preparation of food is largely done by the women of the band. Women also tan and treat the hides and make the traditional clothing. The skills and techniques for preserving food and making clothing are handed down from one generation to the next.

When the meat supply runs out the hunters go out for more. They go when it is needed. That happens every spring when the supply of preserved meat, from animals killed in the fall, comes to an end.

The hunters in the Alkali Lake Band do not hunt for trophies; they do not hunt for recreation, nor do they look on hunting as recreation; they do not leave the carcasses of the animals they kill in the woods. If they work for wages it is not as an alternative to hunting but in order to acquire the means to hunt for food.

Ricky Dick, a member of the Alkali Lake Band, and one of the foraging party on May 4, 1980, gave evidence that his own family needs four or five deer each year for food. But the evidence of the conservation officer at 100 Mile House is that the limit for one hunter in one year from Region 5 is one deer. Of course, if you travel from one region to another, as recreational hunters do, then you can shoot deer in other regions to a total kill of three deer in one year. But, for the hunters of the Alkali Lake Band, the *Wildlife Act* and regulations, if they were to apply, would provide a limit of one deer for each hunter in each year within their hunting grounds.

Dr. Asch drew the relationship between the testimony of the Indian witnesses and the institutions and practices of the traditional way of life of the Alkali Lake Band of the Shuswap people.

In my opinion, it is impossible to read the evidence without realizing that killing fish and animals for food and other uses gives shape and meaning to the lives of the members of the Alkali Lake Band. It is at the centre of what they do and what they are.

In my opinion, this case is distinguishable from *Kruger and Manuel v. The Queen*, (1977), 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, [1978] 1 S.C.R. 104, because here the appellant has led evidence which, in my opinion, establishes that the *Wildlife Act* in its application to hunting for food impairs the status and capacities of the Alkali Lake Band members and crosses the line demarking laws of general application from other enactments.

20 And, before concluding at p. 495, Lambert J.A. wrote:

Indeed, I would add that if the facts in this case do not place the killing of the deer within the central core of Indianness, if there is one, or within the boundary that outlines the status and capacities of the Alkali Lake Band, then it is difficult to imagine other facts that would do so.

21 In *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695 at p. 706, it had already been held, apart from any evidence, that provincial game laws do not relate to Indians *qua* Indians. In the case at bar, there was considerable evidence capable of supporting the conclusions of Lambert J.A. to the effect that the *Wildlife Act* did impair the Indianness of the Alkali Lake Band, as well as the opposite conclusions of the courts below.

22 I am prepared to assume, without deciding, that Lambert J.A. was right on this point and that appellant's submission on the first issue is well taken.

23 I must confess at being strenghtened in this assumption by what Lambert J.A. said at p. 493:

The question of whether provincial legislation affects Indians as Indians, or Indians in their Indianness, to put it another way, is at the root of both arguments that I have considered in this appeal. I think it is worth adding that I have derived some sense of the nature of Indianness from the fact that the Indians in Alberta, Saskatchewan and Manitoba have the right to hunt and fish for food at all seasons of the year (see the Natural Resources Agreements and the *Constitution Act, 1930*, R.S.C. 1970, Appendix No. 25), and the treaty Indians in British Columbia also have that right: see *R. v. White and Bob* (1965), 52 D.L.R. (2d) 481 *n*., [1965] S.C.R. vi. I think that those rights are characteristic of Indianness, at least for those Indians, and if for those Indians, why not for the Alkali Lake Band of the Shuswap people?

24 On the basis of this assumption and subject to the question of referential incorporation which will be dealt with in the next chapter, it follows that the *Wildlife Act* could not apply to the appellant *ex proprio vigore*, and, in order to preserve its constitutionality, it would be necessary to read it down to prevent its applying to appellant in the circumstances of this case.

IV The second issue

25 In holding that the tests adopted by this Court in *Kruger* to determine whether a law is one of general application are the same tests which should be applied to determine whether the application of the *Wildlife Act* to appellant would regulate him in his Indianness, Lambert J.A. fell into error, in my respectful opinion. And this error resulted from a misapprehension of what was decided in *Kruger* as to the nature of a law of general application.

26 The tests which Lambert J.A. applied in reviewing the evidence in his above quoted reasons are perfectly suitable to determine whether the application of the *Wildlife Act* to the appellant would have the effect of regulating him *qua* Indian, with the consequential necessity of a reading down if it did; but, apart from legislative intent and colourability, they have nothing to do with the question whether the *Wildlife Act* is a law of general application. On the contrary, it is precisely because the *Wildlife Act* is a law of general application that it would have to be read down were it not for s. 88 of the *Indian Act*. If the special impact of the *Wildlife Act* on Indians had been the very result contemplated by the Legislature and pursued by it as a matter of policy, the Act could not be read down because it would be in relation to Indians and clearly *ultra vires*.

27 The *Wildlife Act* does not differ in this respect from a great many provincial labour laws which are couched in general terms and which, taken literally, would apply to federal works and undertakings. So to apply them however would make them regulate such works and undertaking under some essentially federal aspects. They are accordingly read down so as not to apply to federal works and undertakings: *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248; *Commission du Salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767; *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178. But it has never been suggested, so far as I know, that, by the same token, those provincial labour laws cease to be laws of general application.

28 In his reasons for judgment, Lambert J.A. relied on two passages of *Kruger* which he quoted and commented. The first passage is to be found at p. 110 of the Supreme Court Reports:

> If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group.

29 The second passage of *Kruger* quoted by Lambert J.A. is at p. 112 of the Supreme Court Reports:

> Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former. If, of course, it can be shown in future litigation that the Province has acted

in such a way as to oppose conservation and Indian claims to the detriment of the latter--to "preserve moose before Indians" in the words of Gordon J.A. in *R. v. Strongquill* (1953), 8 W.W.R. (N.S.) 247--it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians. But that has not been done here and in the absence of clear evidence the Court cannot so presume.

30 Lambert J.A. then emphasized the importance of the effect of the legislation as opposed to its purpose. At page 489 of his reasons he wrote:

> ... evidence about the motives of individual members of the Legislature or even about the more abstract "intention of the legislature" or "legislative purpose of the enactment" is not relevant. What is relevant is evidence about the effect of the legislation. In fact, evidence about its "application".

31 With all due deference, it seems to me that the correct view is the reverse one and that what Dickson J., as he then was, referred to in *Kruger* when he mentioned laws which had crossed the line of general application were laws which, either overtly or colourably, single out Indians for special treatment and impair their status as Indians. Effect and intent are both relevant. Effect can evidence intent. But in order to determine whether a law is not one of general application, the intent, purpose or policy of the legislation can certainly not be ignored: they form an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application. This in my view is what Dickson J. meant when in the above quoted passage, he wrote:

> It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians.

32 I am reinforced in this view by the fact that at p. 113, Dickson J. quoted with approval the following passage of Davey J.A. in *R. v. White and Bob* (1965), 52 W.W.R. 193, at p. 198:

> Secs. 8 and 15 of the *Game Act* specifically exempt Indians from the operation of certain provisions of the Act, and from that I think it clear that the other provisions are intended to be of general application and to include Indians. If these general sections are sufficiently clear to show an intention to abrogate or qualify the contractual rights of hunting notoriously reserved to Indians by agreements such as Ex. 8, they would, in my opinion, fail in that purpose because that would be legislation in relation to Indians that falls within parliament's exclusive legislative authority under sec. 91(24) of the *B.N.A. Act, 1867*, 30 & 31 Vict., ch. 3, and also because that would conflict with sec. 87 of the *Indian Act* passed under that authority.

33 I am further confirmed in this view by one of the examples chosen by Dickson J. to illustrate, with an analogy, when a law is not one of general application. At page 110, he mentioned the case of *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91, where Ontario, Manitoba and Saskatchewan statutory provisions were held *ultra vires* so far as they paralysed the status and capacities of federal companies. Those provisions generally discriminated between provincially incorporated companies and extra-provincial companies including federal ones. They were clearly not laws of general application and on that ground they were *prima facie* suspicious from a constitutional point of view. I find it significant that Dickson J. abstained from referring to another "company case", that of *Attorney-General for Manitoba v. Attorney-General for Canada*, [1929] A.C. 260, where two Manitoba statutes prohibiting companies from selling their own shares within the province without the consent of a provincial commissioner or board were held not to apply to federal companies. Unlike the provisions considered in the *Great West Saddlery Co*. case, these two Manitoba statutes were clearly laws of general application and they were in fact "read down" although this is not what was explicitly said since the expression does not seem to have then been in use and the case was a reference stating a specific constitutional question.

34 Reference should also be made to a later "company case", *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, where it was held, *inter alia* that ss. 113 and 114 of *The Securities Act* of Ontario, R.S.O. 1970, c. 426, applied to federally incorporated companies. Dickson J. as he then was, delivered the reasons of the majority. (But there was no division on this point.) At page 183 Dickson J. wrote:

> It is well established that the provinces have the power, as a matter of property and civil rights, to regulate the trade in corporate securities in the province, provided the statute does not single out federal companies for special treatment or discriminate against them in any way.

There must be no impairment of status or of the essential power to raise capital for corporate purpose. But federal incorporation does not render a company immune from securities regulation of general application in a province.

35 It has already been held in *Kruger* that on its face, and in form, the *Wildlife Act* is a law of general application. In the previous chapter, I have assumed that its application to appellant would have the effect of regulating the latter *qua* Indian. However, it has not been demonstrated, in my view, that this particular impact has been intended by the provincial legislator. While it is assumed that the *Wildlife Act* impairs the status or capacity of appellant, it has not been established that the legislative policy of the *Wildlife Act* singles out Indians for special treatment or discriminates against them in any way.

36 I accordingly conclude that the *Wildlife Act* is a law of general application within the meaning of s. 88 of the *Indian Act*.

37 It remains to decide whether the *Wildlife Act* has been referentially incorporated to federal laws by s. 88 of the *Indian Act*.

38 In *Kruger*, Dickson J. wrote at p. 115:

> There is in the legal literature a juridical controversy respecting whether s. 88 referentially incorporates provincial laws of general application or whether such laws apply to Indians *ex proprio vigore*. The issue was considered by this Court in *Natural Parents v. Superintendent of Child Welfare* (1975), 60 D.L.R. (3d) 148, [1976] 2 S.C.R. 751.
>
> This controversy has so far remained unresolved in this Court.

39 I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are on the other hand, provincial laws which cannot apply to Indians without regulating them *qua* Indians.

40 Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* as they always did before the enactment of s. 88 in 1951--then numbered s. 87 (1951 (Can.), c. 29)--and quite apart from s. 88. (*Vide R. v. Hill* (1908), 15 O.L.R. 406, where an Indian was convicted of unlawful practice of medecine contrary to a provincial medical act, and *R. v. Martin* (1917), 41 O.L.R. 79, where an Indian was convicted of unlawful possession of intoxicating liquor, contrary to a provincial temperance act.)

41 I have come to the view that it is to the laws of the second category that s. 88 refers. I agree with what Laskin C.J. wrote in *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, at p. 763:

> When s. 88 refers to "all laws of general application from time to time in force in any province" it cannot be assumed to have legislated a nullity but, rather, to have in mind provincial legislation which, *per se*, would not apply to Indians under the *Indian Act* unless given force by federal reference.
>
> I am fully aware of the contention that it is enough to give force to the several opening provisions of s. 88, which, respectively, make the "provincial" reference subject to the terms of any treaty and any other federal Act and subject also to inconsistency with the *Indian Act* and orders, rules, regulations or by-laws thereunder. That contention would have it that s. 88 is otherwise declaratory.
>
> On this view, however, it is wholly declaratory save perhaps in its reference to "the terms of any treaty", a strange reason, in my view, to explain all the other provisions of s. 88. I think too that the concluding words of s. 88, "except to the extent that such laws make provision for any matter for which provision is made by or under this Act" indicate clearly that Parliament is indeed effecting incorporation by reference.

42 I also adopt the suggestion expressed by Professor Lysyk, as he then was, *op. cit*., at p. 552:

> Provincial laws of general application will extend to Indians whether on or off reserves. It has been suggested that the constitution permits this result without the assistance of section 87 of the Indian Act, and that the only significant result of that section is, by expressly embracing *all* laws of general application (subject to the exceptions stated in the section), to contemplate

extension of particular laws which otherwise might have been held to be so intimately bound up with the essential capacities and rights inherent in Indian status as to have otherwise required a conclusion that the provincial legislation amounted to an inadmissible encroachment upon section 91(24) of the British North America Act.

43 The word "all" in s. 88 is telling but, as was noticed by the late Chief Justice, the concluding words of s. 88 are practically decisive: it would not be open to Parliament in my view to make the *Indian Act* paramount over provincial laws simply because the *Indian Act* occupied the field.

Operational conflict would be required to this end. But Parliament could validly provide for any type of paramountcy of the *Indian Act* over other provisions which it alone could enact, referentially or otherwise. (It is true that the paramountcy doctrine may not have been as precise in 1951 as it has become, at a later date, but it is desirable to adopt a construction of s. 88 which accords with established constitutional principles.)

44 In a supplementary factum, appellant argues that a prospective incorporation into the *Indian Act* of future provincial laws which would regulate the appellant *qua* Indian, involves interdelegation of powers of a type held unconstitutional in *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31. In my opinion *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137, and *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, provide a complete answer to this objection.

45 I accordingly conclude that, in view of s. 88 of the *Indian Act*, the *Wildlife Act* applies to appellant even if, as I have assumed, it has the effect of regulating him *qua* Indian.

V The third issue

46 I entertain grave doubts as to whether the first two issues on which an appeal was taken to the Court of Appeal were founded "on any ground that involves a question of law alone".

47 The first issue was whether the *Wildlife Act* affects appellant *qua* Indian. The same issue arose on an alternative basis in *R. v. Jack and Charlie* (1982), 139 D.L.R. (3d) 25 and, at p. 41, Craig J.A. like Macdonald J.A., and, semble, also like Seaton J.A. in the case at bar, held that it did not involve a question of law alone. It does not appear possible to resolve that issue without weighing the abundant evidence adduced by the parties. To quote Dickson J., as he then was, speaking for the majority in *Poitras v. The Queen*, [1974] S.C.R. 649 at p. 653, it does seem to be a question which

... can be asked, and answered, without reference to the detail of the particular case.

The first issue would appear to raise a question of mixed law and fact.

48 The second issue comprises two questions namely whether the *Wildlife Act* is a law of general application and whether s. 88 of the *Indian Act* referentially incorporates provincial laws of general application. The second question is probably one of law alone but it constitutes only one half of the problem. The other half cannot be resolved without a consideration of whether it has been established that, in enacting the *Wildlife Act*, the legislator intended to single out Indians for special treatment, again a matter of evidence, at least in part.

49 Even the constitutional question, referring as it does to "the circumstances of this case", sounds like a question of mixed law and fact, which is not unusual for constitutional questions: see for instance *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733.

50 The matter is further complicated by s. 41(3) of the *Supreme Court Act*, R.S.C. 1970, c. S-19 and amendments, which must be read in the context of s. 41(1):

41. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant

decision by it, and leave to appeal from such judgment is accordingly granted by the Supreme Court.

...

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

51 If the issues on which the appeal was taken to the Court of Appeal do not involve questions of law alone, it is arguable that the Court of Appeal exceeded its jurisdiction in entertaining the appeal, in which case we could have granted leave to appeal on this question of jurisdiction, while being precluded from reviewing the merits. But since the Court of Appeal and the County Court have reached the same result, it becomes unnecessary to decide whether the Court of Appeal has exceeded its jurisdiction.

52 It may seem anomalous that this Court and even a Court of Appeal be cut off from a constitutional question of some importance, but it is not unheard of: thus, *Reference re Minimum Wage Act of Saskatchewan*, *supra*, was a reference ordered because, in that case, no appeal lay to this Court from a decision of the Saskatchewan Court of Appeal.

53 These doubts, I would have to resolve if I thought that, on the merits, the appeal should succeed. But since I have reached the conclusion that the appeal should be dismissed in any event, I believe I can leave my doubts unresolved.

VI The constitutional question

54 I would answer the constitutional question as follows:

Sections 3(1) and 8(1) of the *Wildlife Act*, R.S.B.C. 1979, c. 433, being laws of general application in the Province of British Columbia, are applicable to the appellant either by referential incorporation under s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, or of their own force.

VII Conclusions

55 I would dismiss the appeal and make no order as to costs.

Appeal dismissed.

Solicitors for the appellant: Arthur Pape, Richard Salter and Edward John, Vancouver.
Solicitor for the respondent: Peter D. Messner, Mile House.
Solicitor for the intervener the Attorney General of Canada: R. Tassé, Ottawa.
Solicitor for the intervener the Attorney General of Nova Scotia: Robert E. Lutes, Halifax.