REGINA v. MOSES

(1969), 13 D.L.R. (3d) 50 (also reported [1970] 3 O.R. 314, [1970] 5 C.C.C. 356)

Ontario District Court, Little D.C.J., 16 December 1969

Indians - Hunting rights - Charge under Game and Fish Act 1961 - 62 (Ont.), of hunting moose during closed season - Accused hunting on unoccupied Crown land - Descendant band signing Robinson Treaty of 1850 - Members of band entitled to hunt moose at any time on unoccupied Crown land - Onus on accused to prove game lawfully taken pursuant to s. 81(a) of the Game and Fish Act, 1961-62 (Ont.) - No derogating legislation to restrict rights of Indians entitled to benefit under treaty - Accused satisfying onus - Game and Fish Act, 1961-62 (Ont.), ss. 38(1), 81(a) - Indian Act (Can.), ss. 5, 6, 7, 87 - B.N.A. Act, 1867, ss. 109, 91(24), 92(13).

[*St. Catherines Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd [1965] S.C.R. vi, 52 D.L.R. (2d) 481*n*; *R. v. Sikyea,* 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65; affd [1964] S.C.R. 642, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, 44 C.R. 266, 49 W.W.R. 306, refd to]

APPEAL by the accused by way of trial *de novo* from his conviction by Powell, Prov..Ct.J., on a charge of unlawfully hunting moose during the closed season for moose contrary to s. 38 (1) of the *Game and Fish Act,* 1961-62 (Ont.), c. 48.

Wm. H. Green, Q.C., for accused, appellant.
J. S. Stewart, for the Crown, respondent.

LITTLE, D.C.J.: - This is an appeal in the form of a trial *de novo* from the conviction of the appellant on February 24, 1969, by Provincial Court Judge F. C. Powell, with respect to a charge that the appellant did on or about January 19, 1968, at the Township of Mowat, in the District of Parry Sound, unlawfully hunt moose during the closed season for moose, contrary to s. 38 (1) of the *Game and Fish Act,* 1961-62 (Ont), c. 48.

Said s. 38(1) reads:

> 38(1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed by the regulations, no person shall hunt black bear, polar bear, caribou, deer, or moose.

At the commencement of the appeal counsel agreed on the following facts as contained in the judgment of the Court below:

> The facts as proven or admitted are that the accused is a resident member of an Indian reserve known as the Lower French River Reserve or Pickerel Reserve, situate on the south shore of the Pickerel River, south of the French River, in the Township of Mowat, District of Parry Sound. He tracked three moose on the reserve, thence west off the reserve, which is skirted along its west boundary by Kings Highway 69, to a location on Lot 33 Concession 19, of the said township, which is west of the highway where he killed all three moose and slaughtered them. This wag on January 19, 1968, during a period when there was closed season for moose. The following day Conservation Officer William Watts of the Department of Lands and Forests, found three piles of meat admitted to be moose meat on the said lot or in the vicinity of and later stationed himself at the scene when a car approached. The occupants included the accused, who admitted that he had killed the three moose and he was going to give other Indians with him parts of the meat for food and that the reason for killing was to supply food to residents of the reserve including himself.

Crown counsel further admitted (1) that the hunting took place on unoccupied Crown lands, and (2) that the appellant was paid treaty money by the federal Government in 1968 and according to the records of the Indian agent at Parry Sound said payment arose out of the Robinson Treaty made in the year 1850 with the Ojibewa Indians of Lake Huron, conveying certain lands to the Crown.

Relevant provisions of the *Indian Act,* R.S.C. 1952, c. 149, as to the definition and registration of Indians read as follows:

> 5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.
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> 6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.
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> 7(1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with the provisions of this Act, is entitled or not entitled, as the case may be, to have his name included in that List.
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> (2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.
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> 8. Upon the coming into force of this Act, the band lists then in existence in the Department shall constitute the Indian Register and the applicable lists shall be posted in a conspicious place in the superintendent's office that serves the band or persons to whom the list relates and in all other places where band notices are ordinarily displayed.

The Registrar designated under the *Indian Act,* Mr. H. H. Chapman, testified that the accused Moses was registered under List 190 - Henvey Inlet Band which was posted in accordance with the provisions of said s. 8 in 1951. The same witness then proceeded to establish that the members of the Henvey Inlet Band were descendants of a band whose chief had signed the Robinson Treaty and that the accused was therefore one of those entitled to any of the rights or benefits flowing from the said treaty.

The said Robinson Treaty was executed at Sault Ste. Marie, in the Province of Canada on September 9, 1850, and was between the Honourable William Benjamin Robinson, on behalf of Her Majesty the Queen, and the Chiefs and Principal Men representing Indian tribes or bands referred to therein “inhabiting and claiming the Eastern and Northern Shores of Lake Huron, from Penetanguishine to Sault Ste. Marie, and thence to Batchewanaung Bay, on the Northern Shore of Lake Superior; together with the Islands in the said Lakes, opposite to the Shores thereof, and inland to the Height of land which separates the Territory covered by the charter of the Honourable Hudson Bay Company from Canada; as well as all unconceded lands within the limits of Canada West to which they have any just claim . . .”. It provided that the said Chiefs and Principal Men did "voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors for ever, all their right, title, and interest to, and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed; which reservations shall be held and occupied by the said Chiefs and their Tribes in common for their own use and benefit".

The said treaty, after providing for the making of certain payments stated as follows: "and further to allow the said Chiefs and their Tribes the full and free privilege to hunt over the Territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing; saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government".

The said Schedule of Reservations made by the said subscribing Chiefs and Principal Men included the following:

> Second - Wagemake and his Band, a tract of land to commence at a place called NEKICKSHEGESHING, six miles from east to west, by three miles in depth.

The Registrar stated that the original pay list of the Henvey Inlet Band from 1850 names the head of the band as Chief Waikemancai and refers to those listed as the Indians of Nigikishingishing entitled under the said treaty to share in the annuities provided for therein and to occupy the reserve.

All the Indian signatories to the said treaty signed by making their marks. The witness also stated that the spelling of both Indian names and places varied according to the way in which those writing them heard them pronounced. He further said that the "Waikemahcai" and "Nigikishingishing" sounded phonetically like "Wagemake" and "Nekickshegeshing", respectively, so he was satisfied that Chief Wagemake who signed the treaty was the Chief Waikemancai referred to in the original pay list; and the place called "Nekickshegeshing" mentioned in the treaty was the place called "Nigikishingishing" also referred to in the said original pay list.

This witness also produced a surveyor's "Plan of the Henvey Inlet Indian Reserve at NEKICKSHEGESHING North Shore of Lake Huron being No. 2 under the Treaty of Sept. 9th, 1850 Signed John Stoughton Dennis P.L.S. Weston 12th May 1852" (ex. 6) and said this plan was now designated as the reserve of the Henvey Indian Band and is called "Henvey Inlet Reserve".

Finally, Mr. Chapman stated that annuities under the said treaty had been regularly paid to those on the said original pay list and thereafter to their descendants up to, and including, those on the list of the Henvey Inlet Reserve today which includes the accused. Furthermore, it matters not that Moses lives on another reserve. A member of one band may live on the reserve of another band provided he has permission from those governing the reserve on which he lives. The word "occupied" in the first paragraph of the treaty has been treated as meaning "set aside for their use and benefit" and not necessarily physically occupied.

It is therefore clear from this evidence, and I so find, that Moses is a member of the Henvey Inlet Band; that he is one of the successors of the band headed by Chief Wagemake who signed the treaty; that the lands comprising the Henvey Inlet Reserve are those shown on ex. 6; that these are the lands "occupied" by this band as referred to in the treaty; and even though he does not live on the said reserve, Moses is one of those entitled to "occupy" it and he not only annually receives money under the provisions of the said treaty, but is also entitled to any other rights or benefits conferred on the members of his band by it.

Before deciding what those rights are I have considered the provisions of two other treaties, one dated October 31, 1923, between His Majesty King George V and the Chippewa Indians of Christian Island, Georgina Island and Rama, and the other dated November 15, 1923, between His Majesty King George V and the Mississauga Indians of Rice Lake, Mud Lake, Scugog Lake and Alderville. By these treaties both the tribes and the Indians comprising them, did "cede, release, surrender and yield up to the Government of the Dominion of Canada for His Majesty the King and His Successors forever, all their right, title, interest, claim, demand, and privileges whatsoever, in, to, upon or in respect of lands and premises therein described". The said lands would appear to include the lands considered to be the Henvey Inlet Reserve, but it should be observed that at the conclusion of the metes and bounds description there appears the following exception: "Excepting thereout and therefrom those lands which have already been set aside as Indian reserves. "

In the first recital in each of these treaties it is stated that the interests claimed in the said lands are "such interests being the Indian title of the said tribe to fishing, hunting and trapping rights over the said lands". It further states that His Majesty "is desirous of obtaining a surrender" of such rights and had appointed Commissioners to determine the validity of the claims and had agreed if they were found to be valid to negotiate treaties for their surrender on the payment of certain compensation.

It then recites that the inquiry by the Commissioners had been determined in favour of the validity of such rights and therefore the treaties were being entered into.

I have considered the provisions of the said treaties dated October 31 and November 15, 1923, in conjunction with the evidence of Hugh R. Conn who was, prior to this retirement, special adviser on treaties to the Department of Indian Affairs, and is presently consultant on treaties to the National Indian Brotherhood. He produced a map (ex. 5) on which is superimposed the boundaries of lands referred to in Indian treaties including the Robinson Treaty. The lands affected by the latter treaty are shown thereon as Robinson-Superior and Robinson-Huron. This map was prepared by draftsmen in the Department of Indian Affairs specifically for the use of a joint Senate-House of Commons Committee which was considering the *Indian Act* in 1961. It is clear from this map that lands reserved for the Henvey Indian Reserve are included in the area Robinson-Huron. It is well south of the northerly boundary and considerably north of the southerly boundary of Robinson-Huron.

It should also be observed that the Ojibewa, Mississauga and Chippewa Indians all belonged to the same language group, the Algonquins.

The lower Court, which did not have the benefit of the evidence of Chapman and Conn, came to the conclusion that Moses was more likely to be a Mississauga Indian that an Ojibewa, and concluded that he was therefore likely affected by the 1923 treaty under the terms of which the Mississauga Indians had given up the right to fish and hunt in the area where the offence took place. It thus decided that the accused became subject to the provisions of the *Game and Fish Act,* 1961-62.

I have already found that Moses was an Ojibewa. He, therefore could not have been affected by the 1923 treaties for two reasons. He was neither a Mississaugan nor a Chippewan. In addition, although the Mississaugas and the Chippewas had apparently a concurrent right with the Ojibewas to hunt and fish in the lands and waters reserved for the Henvey Inlet Band, such reserve was deluded from the provisions of the 1923 treaties, and in any event, the Mississaugas and the Chippewas could only cede to the Government of Canada the rights and privileges of their own bands, which excluded the Ojibewas.

Having satisfied myself that the accused is an Ojibewa and a member of the Henvey Inlet Band and entitled to any rights which the present members of the band may have under the provisions of the Robinson Treaty, I must now decide if any legislation has been passed abrogating those rights.

Section 87 of the *Indian Act* reads:

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

Section 81 *(a)* of the *Game and Fish Act,* 1961-62, reads as follows:

> 81. In prosecutions under this Act in respect of,
> (a) taking, killing, procuring or possessing game or fish, or any part thereof, the onus is upon the person charged to prove that the game or fish or part thereof was lawfully taken, killed, procured or possessed by him;

The onus is therefore on the accused under said s. 81 *(a)* and he seeks to meet that onus by claiming that the terms of the Robinson Treaty are still operative, and if so, he has not contravened the provisions of said s. 38(1) as charged.

The lands referred to in the Robinson Treaty belong to the Province of Ontario by virtue of s. 109 of the *B.N.A. Act, 1867*, which reads:

> 109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate

or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Said s. 109 was considered by the Privy Council in *St. Catherines Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. In that case, a similar treaty to the Robinson Treaty had been entered into by the Government of the Dominion of Canada on behalf of the Queen with the "Salteaux tribe of Ojibbeway Indians" in Ontario. Possession of the lands therein referred to had been granted to the Indians by the Royal Proclamation in 1763 [see R.S.C. 1952, vol. VI, p. 6127]. The treaty of 1873 provided that the lands which had been under occupation by the Indians since the proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of Canada for the Crown, subject to a certain qualified privilege of hunting and fishing. It was decided by the Court, and I quote from the judgment delivered by Lord Watson at p. 54:

> The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them.
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> That inference is, however, at variance with the terms of the instrument, which shew that a tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.

At p. 55:

> It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

At pp. 58-9:

> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.
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> In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of sect. 91(24) which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91(24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any tern or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure

uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

The sole right to legislate on behalf of Indians, and lands reserved for Indians, is conferred on the Parliament of Canada by s. 91 (24) of the said *B.N.A. Act, 1867.* The Robinson Treaty was between the Province of Canada (Ontario and Quebec) and counsel for the Crown on this appeal raised the question, but without pressing it, as to whether in this cue "property and civil rights" rather than "Indians, and lands reserved for Indians" were involved. If it were only the former, the provincial Legislature under the powers conferred by s. 92(13) of the said *B.N.A. Act, 1867* had effectively abrogated the rights of the Indians to fish and hunt freely by passing the said *Game and Fish Act, 1961-62* and prior legislation relating thereto. Counsel conceded that this argument did not appear to have been raised in any previous cases where Indians were alleged to have hunted illegally.

I must reject this contention as I am satisfied from the authorities that it is only the Parliament of Canada which has power to abrogate the privilege to hunt which the Indians retained under the Robinson Treaty.

In R. *v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (decision of the B.C. Court of Appeal), and confirmed unanimously by the Supreme Court of Canada - see [1965] S.C.R. vi, 52 D.L.R. (2d) 481*n*, this power of Parliament was clearly upheld. I quote part of the (D.L.R.) headnote covering the Court of Appeal decision:

> The prohibitions of the *Game Act,* R.S.B.C. 1960, c. 160, against the hunting of game, e.g., deer, during the closed season (unless under permit) do not apply to native Indians, descendants of certain Nanaimo tribes, who hunt on unoccupied lands in an organized district, such lands not being within a reserve but being lands conveyed to the Hudson's Bay Co. by ancestors in the tribes. The conveyance of surrender of the lands in 1854 is a "Treaty" within the meaning of that term in the context of the *Indian Act,* R.S.C. 1952, c. 149; and s. 87 of this Act, in making applicable to Indians in a Province all provincial laws of general application subject, *inter alia,* to "the terms of any treaty and any other Act of the Parliament of Canada", qualifies the application of provincial legislation not only by Indian Treaties that create hunting rights but also any that confirm or except pre-existing rights already in being.
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> *Per* Davey, J.A., Sullivan, J.A., concurring: Legislation that abrogates or abridges hunting rights reserved to Indians under the Treaties and agreements by which they sold their ancient territories to the Crown and to the Hudson's Bay Co. for white settlement is legislation in relation to Indians because it deals with rights peculiar to them. Such rights cannot be abrogated or abridged by provincial legislation alone which is of such general application as to include Indians. Only Parliament can derogate from those rights, and it has, on the contrary, preserved them by s. 87.
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> *Per* Norris, J.A.: Aboriginal rights existed in favour of Indians from time immemorial and they became personal and usufructuary under the British Crown when it acquired a proprietary estate, by virtue of its sovereignty, over Vancouver Island. The right to hunt and fish on unoccupied lands was an aboriginal right confirmed by the *Royal Proclamation of 1763* which applied to territories claimed by the British with the exception mentioned therein, and it applied to Vancouver Island by virtue of the claim of Sir Francis Drake in 1579 and subsequent British claims thereto. Vancouver Island was not within the exceptions in the Proclamation since it was not Hudsons' Bay Co. land in 1763. This right to hunt and fish, recognized by British and colonial governments before Confederation, could only be extinguished before Confederation by surrender to the British Crown and after Confederation by surrender to the Dominion Government. Dominion and Provincial Governments had recognized this right after Confederation and it had never been surrendered or extinguished.

Finally, in *R. v. Sikyea,* 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325, 46 W.W.R. 65, 43 C.R. 83, a decision of the Northwest Territories Court of Appeal, later affirmed by the Supreme Court of Canada, [1964] S.C.R. 642, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, 44 C.R. 266, 49 W.W.R. 306, in which Hall, J., in delivering the judgment of the Court said at p. 646 S.C.R. p. 84 D.L.R., p. 132 C.C.C:

On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson, J.A., in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

The portion of the headnote summarizing the reasoning of Johnson, J.A., in dealing with the issue with which we are concerned here appears in 43 D.L.R. (2d) 150, [1964] 2 C.C.C 325, and reads:

A treaty with an Indian Band, as for example Treaty 11 of 1921 respecting Indian rights in the Yellowknife area, by which the Government covenants that the Indians shall have the right to pursue their usual vocations of hunting, trapping and fishing (but subject to such Regulations as may from time to time be made by the Government) cannot stand against derogating legislation which goes beyond contemplated Regulations that would assure that a supply of game for the needs of the Indians would be maintained. Although legislation which, in imposing game restrictions, goes beyond the permission of the treaty to make Regulations, may be a breach of promise to the Indians, Parliament is not thereby prevented from legislating competently on the subject thereof, as it did in enacting the *Migratory Birds Convention Act,* and Regulations to implement a Convention entered into by Great Britain on behalf of Canada with the United States as authorized by s. 132 of the *B.N.A. Act. Held,* although the Convention and implementing legislation preceded the Treaty of 1921, the prohibition in the legislation and Regulations thereunder against shooting mallard ducks out of season is binding as against an Indian who shot such a duck for food in reliance on the terms of the treaty.

R. v. Wesley, 58 C.C.C. 269, [1932] 4 D.L.R. 774, 26 A.L.R. 433, [1932] 2 W.W.R. 337; *A-G. Can. v. A-G. Ont., A-G. Que. v. A.-G Ont.,* [1897] A.C. 199, apld]

In the case at bar no derogating legislation has been enacted by the Parliament of Canada to restrict in any way the right of Indians entitled to the benefits under the Robinson Treaty from hunting moose at any time on unoccupied Crown lands. As a member of the Henvey Inlet Band, Moses still has his rights under the said treaty and has therefore 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*. The appeal is therefore allowed and I order the conviction quashed. An order will also go remitting the fine, if paid, to the accused, together with the deposit made at the time of launching the appeal.

Appeal allowed; conviction quashed.