REGINA EX REL. CLINTON v. STRONGQUILL

[1953] 2 D.L.R. 264 (also reported: 8 W.W.R. (N.S.) 247, 16 C.R. 194, 105 C.C.C. 262)

Saskatchewan Court of Appeal, Martin C.J.S., Gordon, Procter, McNiven and Culliton JJ.A., 13 March 1953

Indians--Game Laws--Constitutional Law I--Treaty Indian hunting for food in provincial forest reserve--Hunting except for moose permitted--Moose killed--Rights under Natural Resources Agreement, para. 12--Right to hunt for food on unoccupied Crown land or on land to which right of access—

The Natural Resources Agreement, 1930, between Canada and Saskatchewan ratified by each by 1930 (Can.), c. 41 and 1930 (Sask.), c. 87 respectively, and confirmed by 1930 (Imp.), c. 26, provides in para. 12 that "in order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access".

A treaty Indian who lived on an Indian reserve was hunting for food and killed a moose in a provincial forest reserve during a time when hunting for game other than moose was permitted under a provincial hunting licence. On appeal from a conviction under the *Game Act*, 1950 (Sask.), c. 76, *held*, by a majority, the conviction should be quashed. The Province could not unilaterally limit the rights given to Indians by s. 12 of the Natural Resources Agreement, and in so far as s. 13(2) of the *Game Act* purported to do so (by defining "unoccupied Crown land") it was *ultra vires*. The forest reserve where the moose was shot was not a place to which access was absolutely prohibited since not only could the public go there but game hunting was permitted. Accused thus had a right of access to such land, and consequently, he was entitled to hunt game there for food.

Per McNiven J.A.: The forest reserve in question was also unoccupied Crown land.

Per Martin C.J.S. and Culliton J.A., dissenting: Accused had no right of access as an Indian to the forest reserve nor was such reserve unoccupied Crown land; rather it was land set aside for a special purpose under the *Forest Act*, R.S.S. 1940, c. 39, and the *Fur Act*, 1950 (Sask.), c. 77.

Cases Judicially Noted: *R. v. Smith*, [1935], 3 D.L.R. 703, 2 W.W.R. 433, 64 Can. C.C. 131, consd & distd; *R. v. Wesley*, [1932], 4 D.L.R. 774, 2 W.W.R. 337, 58 Can. C.C. 269, 26 A.L.R. 433, refd to.

Statutes Considered: *Natural Resources Agreement*, para. 12, as ratified by 1930 (Sask.), c. 87, and confirmed by the *B.N.A. Act*, 1930 (Imp.), c. 26; *Game Act*, 1950 (Sask.), c. 76; *Forest Act*, R.S.S. 1940, c. 39; *Fur Act*, 1950 (Sask.), c. 77.

A**PPEAL** from a conviction of a game offence. Reversed.

L. McK. Robinson, Q.C., for appellant.

R. M. Barr, Q.C., for respondent.

M**ARTIN** C.J.S. (dissenting):--The accused was charged before C. P. B. Dundas, a Justice of the Peace, on December 17, 1952, that he "a treaty Indian on or about the 8th day of November, 1952, at or upon the Porcupine Provincial Forest Reserve, being Fur Conservation Area Number 103 . . . . did hunt, take and kill a moose, being big game as defined by the Game Act 1950 of the Province of Saskatchewan, contrary to the provisions of the said Game Act and the regulations thereunder".

Evidence was adduced on behalf of the prosecution and defence. The Justice of the Peace found the accused guilty and imposed a fine of $150 and $30 the costs of prosecution and directed that in default of payment he serve 3 months in jail. On December 23, 1952, the Justice was requested to state a case for the opinion of the Court of Appeal setting forth the facts and the grounds upon which the proceeding is questioned. Pursuant to the request the Justice has stated the case as follows:

"1. The accused, T**HOMAS** S**TRONGQUILL**, is a Treaty Indian, of the Keeseekoose Indian Reserve, in the Province of Saskatchewan, which Reserve is situated near Kamsack, in the Province of Saskatchewan.

"2. The hunting and killing of moose in and for the Province of Saskatchewan for the year 1952 was prohibited.

"3. The season for the hunting of other big game in the Province of Saskatchewan, opened

on the 8th day of November, A.D. 1952.

"4. On the 8th day of November, 1952, the accused Thomas Strongquill, was hunting with one Arthur Barton for big game in the Porcupine Provincial Forest Reserve, which was also known as Fur Conservation Area #103, in the Province of Saskatchewan, which area is situated on the east side of the Province of Saskatchewan, containing township 38, range 30, in the said Province, the point in question being designated as near Camp 5 as shown on the map which was produced to me by an Officer of the Natural Resources Department, and which map, I am advised, can again be produced to the Court to show the exact location.

"5. On the 8th day of November, A.D. 1952, the accused while hunting as I have stated herein shot and killed a moose in the said Reservation above described at or near the said point indicated as Camp 5, in township 38, range 30, West of the First Meridian, in the Province of Saskatchewan.

"6. The area where the moose was shot was not inhabited; there was no one living near the point and for seven miles south of Camp 5 there is but one family and they do not farm or work the land; the country is new and there are patches of timber, some burned over, but no clearing or any agriculture or farming area; the area known as Porcupine Provincial Forest Reserve and also as Fur Conservation Area #103 was open to any visiting hunters who have a licence and they are permitted to hunt over that area which is Crown lands.

"7. The accused T**HOMAS** S**TRONGQUILL** is a member of the Keeseekoose Indian Reserve. He still follows the Indian way of life and does not speak English and makes his living by hunting, fishing and woodcraft and rough labour. He has a family of six adults and a number of grandchildren. When he went to the Porcupine Forest Reserve to hunt on the 8th day of November, 1952, he was trying to obtain food for his family.

"8. The lands in the area herein referred to where the moose was killed was a Provincial Park or Fur Conservation Area according to the evidence given and the map produced which is referred to in The Game Act as was pointed out to me, the reference being to section 13 of the said Game Act, and the lands referred to I found not to be unoccupied Crown lands as referred to in that section.

"9. I found that the accused actually killed a moose at the point in question and that it was big game within the meaning of The Game Act, section 11 thereof, and that he took the meat after the animal was dressed, a portion of it at least, to his home.

"10. On behalf of the accused there was produced from the custody of an Indian Chief a copy of the Treaty between Her Most Gracious Majesty Queen Victoria through her Commissioners and the Indian Chiefs of Western Canada, dated the 15th day of August, A.D. 1874, which was entered as an exhibit and it was contended on behalf of the accused that this Treaty gave the Indians and the accused himself, since he was an Indian, the right to hunt, trap and fish throughout the tract of land surrendered to Her Majesty under the said Treaty, which tract would apparently take in the area in question in this case and I am advised the said exhibit will be made available for the purpose of this appeal.

"11. I found the accused guilty and fined him the sum of $150.00 and in default of payment that he serve three months in gaol and that he pay the costs in the sum of $30.00.

"At the conclusion of the trial counsel for the accused questioned the conviction of the accused on the grounds that since he was a Treaty Indian he was entitled under the Treaty herein referred to, to hunt any place in the territory referred to in the said Treaty which apparently would cover the land referred to in this case.

"The grounds upon which I found the accused guilty were as follows:

"That the accused on the 8th day of November, A.D. 1952, at or upon the Porcupine Provincial Forest Reserve, known also as Fur Conservation Area #103, did hunt, kill and take a moose, which was big game as defined by The Game Act 1950 of the Province of Saskatchewan and that the hunting of such big game, that is moose, was prohibited in the Province of Saskatchewan for the year 1952 and that The Game Act applied and I did not consider that I should endeavour to interpret the effect of the Treaty that was referred to me and I thought it was my duty to follow the provisions of The Game Act and found the accused guilty and fined him accordingly. As to the point with reference to the Treaty this, I felt, was a matter for a higher court."

Counsel for the accused referred to the treaty which was made between the Crown in right of Canada and certain Tribes of Indians on September 15, 1874, under which the Indians agreed to surrender their title whatever it was, in an area of land of which the Porcupine forest now forms a part, and the Crown undertook certain obligations and assured the Indians certain rights and privileges. The treaty was made between the Hon. Alexander Morris, Lieutenant-Governor of Manitoba, and the North-west Territories and the Hon. David Laird, Minister of the Interior and the Cree, Salteaux and other Indian inhabitants of the territory described, represented by their chiefs and headsmen. The treaty contained the following provision:

"And further Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the

authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government."

It will be observed that the right to hunt and fish on the tract surrendered is subject to "such regulations as may from time to time be made by Her Government of Her Dominion of Canada". There is also the saving clause which excepts "such tracts as may from time to time be required or taken up for settlement, mining or other purposes."

In *R. v. Smith*, [1935] 3 D.L.R. 703, 64 Can. C.C. 131, a decision of this Court, the provisions of a treaty made on August 23, 1876, were considered. One of the paragraphs of the treaty was as follows: "Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government."

It was held by the Court that the words "or other purposes" were not *ejusdem generis* as the words "settlement, mining and lumbering" could not be grouped in any genus to which the *ejusdem generis* rule could be applied. The Court was therefore of the opinion that the words "or other purposes" were broad enough to include a game preserve on which the accused in the case was charged with carrying arms contrary to the provisions of s. 69 of the *Game Act*, R.S.S. 1930, c. 208. In his judgment Turgeon J.A. referred to s. 69 of the *Indian Act*, R.S.C. 1927, c. 98, which provided that the Superintendent General of Indian Affairs might by public notices declare that the laws respecting game in the Province of Manitoba, Saskatchewan or Alberta specified in the notice shall apply in the Province or to Indians in such part thereof as to him seems expedient. The Court was of the opinion that nothing in the treaty of August, 1876, could assist the accused because under its terms Parliament might have set up game preserves in the area surrendered without violating any promises made to the Indians.

Applying the decision in *R. v. Smith, supra*, to the treaty of September 15, 1874, the words "or other purposes" following the words "for settlement, mining" are not *ejusdem generis* because the words "settlement, mining" cannot be grouped in any genus to which the *ejusdem generis* rule can be applied. Moreover the right of the Indians to hunt and fish is subject to "such regulations as may from time to time be made by the Government of the Country under the authority of her Majesty". Nothing therefore in the treaty of 1874 can assist the accused because under its terms Parliament might have set up game preserves in the area surrendered, and in my opinion provincial forests and fur conservation areas, without violating any promises made to the Indians in the treaty.

The extent to which Indians are exempted from the game laws of Saskatchewan must be determined by an interpretation of the provisions of para. 12 of the Natural Resources Agreement of 1929 made between the Province and Canada. The agreement was ratified by the Legislature by chapter 87 of the Statutes of 1930 and by the Parliament of Canada by chapter 41 of the Statutes of Canada 1930. It was confirmed by Imperial statute chapter 26 of 1930. The agreement therefore has the force of law and the law in respect of any subject dealt with therein must be determined by an interpretation of the relevant provisions. The right of the Indians to hunt, trap and fish is dealt with in para. 12 of the agreement which is as follows: "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Under this paragraph the intention is to assure the Indians a supply of game in the future for their subsistence by requiring them to comply with the game laws of the Province, subject, however, to the express provision that they have the right to hunt, trap and fish for food at all seasons of the year on all "unoccupied Crown lands" and on any other lands to which they may have the right of access. Indians have a right of access to certain Crown lands, for example the reservations on which they live, and which are vested in the Crown, but it does not appear that they have any similar right of access to the lands in the Porcupine Forest. In *R. v Wesley*, [1932] 4 D.L.R. 774, 58 Can. C.C. 269, 26 A.L.R. 433, it was admitted that the alleged offences took place on unoccupied Crown lands and the Appellate Division of the Supreme Court of Alberta considered the effect of para. 12 of the Alberta Natural Resources Agreement, which is in the same language as para. 12 of the Saskatchewan agreement. The Court held that regardless of the provisions of the provincial *Game Act* the Indians may when hunting for food kill all kinds of wild animals at all seasons of the year wherever they may be found on unoccupied Crown lands or other lands to which they have a right of access, and that they need no licence beyond the provisions of para. 12 to enable them to do so: *per* Lunney J.A. at pp. 775-6 D.L.R., pp. 270-1

Can. C.C. *per* McGillivray J.A. at p. 781 D.L.R., pp. 275-6 Can. C.C.

The sole question for determination here is whether or not the Porcupine Forest is unoccupied Crown land. The accused was hunting for food and if he shot the moose when on land where under para. 12 of the agreement, he had a right to hunt for food, he cannot be convicted.

The accused is here charged with hunting and killing a moose in the Porcupine Provincial Forest which is also a Fur Conservation Area No. 103. Under the *Forest Act*, R.S.S. 1940, c. 39, the Lieutenant-Governor in Council may constitute any portion of the Province a forest district and by s. 43 it is provided that the provincial lands within the boundaries of the provincial forests mentioned in the Schedule to the Act "are hereby withdrawn from disposition, sale, settlement or occupancy under this or any other Act of the Legislature". Section 44 provides that the provincial forests are for the "maintenance, protection and reproduction of the timber thereon, for the conservation of the minerals and the protection of the animals, birds and fish therein". Among the areas thus set aside is the Porcupine Provincial Forest in which the moose was shot by the accused.

Under s. 5 of the *Fur Act*, 1950 (Sask.), c. 77, the Lieutenant- Governor in Council may constitute any area of Crown land a registered trapline or a fur conservation block and every such order must be published in the Saskatchewan Gazette. According to the stated case the Porcupine Provincial Forest has been constituted a Fur Conservation Area No. 103.

In *R. v. Smith, supra*, the word "unoccupied" was interpreted as meaning "idle", "not put to use", "not appropriated" and it was held that when the Crown in right of the Province appropriates or sets aside certain areas for special purposes, as for game preserves, such areas can no longer be deemed to be "unoccupied Crown lands" within the meaning of para. 12 of the agreement. Following the decision in *R. v. Smith* a provincial forest created under the provisions of the *Forest Act* and a fur conservation area created under the *Fur Act* cannot be deemed to be "unoccupied Crown lands" within para. 12 of the agreement.

The area on which the accused shot the moose was set aside by the Crown in right of the Province both as a forest reserve and as a fur conservation area and the accused had no right to hunt thereon.

Counsel for the accused argued that s. 13 (2) of the *Game Act*, 1950 (Sask.), c. 76, is *ultra vires* of the provincial Legislature. Notice was served upon the Attorney-General pursuant to the *Constitutional Questions Act*, R.S.S. 1940, c. 72. Section 13 of the *Game Act* is as follows:

"13 (1) Notwithstanding the provisions of this Act, and in so far only as is necessary in order to implement the provisions of the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the statutes of 1930, it shall be lawful for the Indians within the province to hunt for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

"(2) For the purpose of subsection (1) the lands designated by or pursuant to *The Provincial Lands Act* as school lands and the lands within game preserves, provincial forests, provincial parks, registered traplines or fur conservation areas established pursuant to the regulations under *The Fur Act*, shall be deemed not to be unoccupied Crown lands or lands to which Indians have a right of access."

It will be observed that s-s (1) states that in so far only as is necessary to implement the provisions of the agreement between the Government of Canada and the Government of Saskatchewan "it shall be lawful for the Indians . . . to hunt for food at all seasons of the year on all unoccupied Crown Lands and on any other lands to which the said Indians may have a right of access". The words quoted are a repetition of the language contained in the last lines of para. 12 of the Natural Resources Agreement. Subsection (2) of s. 13 follows with a declaration that the lands within game preserves, provincial forests, registered traplines or fur conservation areas shall be deemed not to be "unoccupied Crown lands" or lands to which Indians have a right of access. I am of the opinion, following the decision in *R. v. Smith, supra*, that provincial forests and fur conservation areas having been set aside or appropriated by the Crown in right of the Province for special purposes cannot be deemed to be "unoccupied Crown lands" within para. 12 of the Natural Resources agreement. The Legislature therefore in enacting in s. 13 (2) of the *Game Act* that provincial forests and fur conservation areas "shall be deemed not to be unoccupied Crown lands" has enacted what is consistent with the interpretation of the words "unoccupied Crown lands" in s. 12 of the Natural Resources Agreement. No question therefore as to the constitutionality of s. 13(2) of the *Game Act* here arises.

The appeal is dismissed.

G**ORDON** J.A.:--In this appeal I have had the advantage of reading the judgment of my Lord the Chief Justice in which he has set out the material parts of the stated case so it is unnecessary for me to do so. As I have the misfortune to differ from him I need hardly say that I do so with great regret and respect.

When the matter first came before us Mr. Robinson, Q.C., appearing for the accused, stated that he wished to contend that s-s. (2) of s. 13 of the *Game Act* was *ultra vires*. The matter was accordingly adjourned to permit the necessary notice to be given to the Attorney-General of

the Province, which notice was duly given and the matter came before us with Mr. R. M. Barr, Q.C., appearing for the Attorney- General of the Province as well as Crown Prosecutor.

Paragraph 12 of the Schedule to chapter 87 of the Statutes of Saskatchewan for 1930 reads as follows:

"12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Section 13 of the *Game Act* reads as follows:

"13(1) Notwithstanding the provisions of this Act, and in so far only as is necessary in order to implement the provisions of the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the statutes of 1930, it shall be lawful for the Indians within the province to hunt for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

"(2) For the purpose of subsection (1) the lands designated by or pursuant to *The Provincial Lands Act* as school lands and the lands within game preserves, provincial forests, provincial parks, registered traplines, or fur conservation areas established pursuant to the regulations under *The Fur Act*, shall be deemed not to be unoccupied Crown lands or lands to which Indians have a right of access."

So far as I can find this is the first effort on the part of the Legislature of the Province of Saskatchewan to define "unoccupied Crown lands".

The history of the dealings of the Crown with the native tribes is set forth in an admirable way by the late McGillivray J. A. in the case of *R. v. Wesley*, [1932], 4 D.L.R. 774, 58 Can. C.C. 269.

The contention of Mr. Robinson, appearing for the accused, is that the Province cannot by unilateral legislation take away any rights that were assured to the Indians under para. 12 of the Schedule to c. 87 of the Statutes of 1930.

The agreement entered into between the Province and the Dominion was confirmed by the Parliament of Great Britain by the *B.N.A. Act*, 1930, c. 26. The operative section of this Act being s. 1 is as follows: "The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act 1867, or any Act amending the same, or any Act of Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid."

Mr. Robinson contends that the Saskatchewan Legislature had no more right to define terms used in this agreement so confirmed and made a part of the *B.N.A. Act* than they could define terms used in the original Act.

For the Crown it was contended that the decision of this Court in *R. v. Smith*, [1935] 3 D.L.R. 703, 64 Can. C.C. 131, was conclusive against the accused. With every deference I think there is a very material difference. In the *Smith* case the accused Indian was hunting on a game preserve on which all hunting was absolutely prohibited. Turgeon J. A. writing the majority judgment of the Court stated in part as follows at p. 706 D.L.R., pp. 135-6 Can. C.C.: "Nevertheless it was within reason that the time might come in this, as in all populated countries, when the establishment of game preserves would be beneficial to all interested in hunting and fishing, including the Indians themselves. But a game preserve would be one in name only if the Indians, or any other class of people, were entitled to shoot in it. It is evident that the Parliament of Canada did not put any such narrow meaning on the words of the treaty, but had in mind that nothing in it prevented the due preservation of game."

Then again the opening words of the very paragraph of the agreement assuring to the Indians the right to hunt are: "In order to secure to the Indians of the Province the continuance of the suppy of game and fish for their support and subsistence."

By creating the game preserves the Province was endeavouring to secure to the Indians of the Province an adequate supply of game.

With every respect I do not think the enactment of s-s. (1) of s. 13 of the provincial *Game Act* added anything to the rights assured to the Indians of this Province, nor do I think that s-s. (2) of the same section in any way curtailed them.

If instead of defining the words "unoccupied lands" the provincial Legislature had defined the word "game" as it appears in said para. 12, as limited to jack rabbits no one would have had the temerity to suggest that such legislation was not *ultra vires* the Province. The same could be said if the area in question had been reserved for hunting by white men alone.

With every deference I agree with my Lord the Chief Justice when in the *Smith* case, *supra*, he stated at p. 708 D.L.R., pp. 137-8 Can. C.C., as follows: "The issue must be determined upon the construction of para. 12 of the Natural Resources Agreement, made between the Government of the Dominion of Canada, and the Government of the Province of Saskatchewan, and which provided the terms upon which the natural resources within the boundaries of the Province were

transferred by the Dominion to the Province. This agreement was affirmed by the Legislature of the Province by c. 87 of the Statutes of 1930, and by the Parliament of Canada by s. 41 of the Statutes of Canada, 1930. It was also affirmed by the Parliament of the United Kingdom of Great Britain and Northern Ireland, by the *B.N.A. Act*, 1930 (Imp.), c. 26. By the Act of the Imperial Parliament the agreement was declared to have the force of law notwithstanding anything in the *B.N.A. Act* of 1867, or any amending Act or any Act of Parliament of Canada or any Order in Council, or by any terms or conditions of union made or approved under any such Act. The Natural Resources Agreement, therefore, has been given the force of law by the Imperial statute and the law with respect to any subject dealt with therein must be determined by an interpretation of the terms of that agreement."

Other parts of the Act certainly apply to Indians because para. 12 of the agreement above set out provides that: "Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof."

There was however one important exemption reserved to the Indians, namely: "Provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

It was admitted by the counsel for the Crown that the accused would have the right to shoot even a moose on his own reserve or upon any unoccupied Crown lands provided that his definition of "unoccupied" were accepted. It therefore seems clear that the absolute prohibition against killing moose at any time or anywhere in the Province did not apply to Indians.

It is also clear from the stated case and from statements by counsel that the Porcupine Forest Reserve is not in the same class as a game preserve where hunting is absolutely prohibited because on November 8, 1952, the day in question in this appeal, the accused and one Barton were on the reserve to shoot big game and people other than Indians could lawfully hunt on this reserve for big game during the proper hunting season which opened on November 8, 1952. The stated case says: "The area known as Porcupine Provincial Forest Reserve and also as Fur Conservation Area No. 103 was open to any visiting hunters who have a licence and they are permitted to hunt over that area which is Crown Lands."

There are therefore two different areas on which the Indians may hunt for game when required for food at all times of the year. They are first, "unoccupied Crown lands" and second, "any other lands to which the Indians may have a right of access". This was stated by Turgeon J. A. in the *Smith* case at pp. 705-6 D.L.R., pp. 134-5 Can. C.C.

The second class would include "occupied" Crown lands in which class Indian reservations would fall. Even accepting the rule laid down in the case of *R. v. Smith* as to the meaning of "unoccupied" I cannot see how it could be said that the Indians had no right of access to the Porcupine Provincial Forest Reserve. The word "access" is very simple and according to the New Oxford dictionary its main meaning is "action of going or coming to or into". I cannot see how any Indian could have been excluded from this reserve. The public at large was permitted not only to go into the reserve but to hunt big game there. The accused entered the reserve to hunt for food. If he had shot a deer, there could not have been a single objection raised, in my opinion he undoubtedly had a right of access to this Crown land and having that right he could kill moose for food, within its boundaries.

In the *Smith* case Turgeon J. A. held that although the accused in that case had the right of access to the game preserve, his rights were no greater than the right of any other member of the public and that therefore he could not hunt even for food within its area. However this statement cannot be divorced from his previous statement that the game preserves were set apart for the benefit of the Indians as well as the sporting public. The accused having the right of access to the forest reserve in question to hunt for big game I think he had the right to shoot moose providing it was needed for food. As my brother Procter stated on the argument the Indians should be preserved before moose.

I would allow the appeal with costs here and in the Court below, set aside the conviction and discharge the accused.

P**ROCTER** J. A:--The accused Strongquill, a treaty Indian, appeals to this Court by way of stated case from his conviction before C.P.B. Dundas, a Justice of the Peace in and for the Province of Saskatchewan after a plea of "not guilty" on an information and complaint charging him, "that T**HOMAS** S**TRONGQUILL**, of Keeseekoose Indian Reserve, in the Province of Saskatchewan, Treaty Indian, on or about the 8th day of November, A.D. 1952, at or upon the Porcupine Provincial Forest Reserve, being Fur Conservation Area No. 103, in the said Province, did hunt, take and kill a moose, being big game, as defined by The Game Act, 1950, of the Province of Saskatchewan, contrary to the provisions of the said The Game Act, 1950, and regulations thereunder".

The stated case has been set out in full in the judgment of the Hon. the Chief Justice of this Court and I repeat only such of the facts as found by the Justice of the Peace as are necessary to establish the grounds on which I base my opinion.

The right of a treaty Indian such as Strongquill to shoot, hunt, trap and carry fire arms within

certain areas of Crown Lands in the Province which have been declared to be Game Preserves was dealt with by this Court in *R. v. Smith*, [1935], 3 D.L.R. 703, 64 Can. C.C. 131, and in disposing of that case it was held unnecessary to examine minutely the state of the law prior to the passing of the Imperial statute cited as the *B.N.A. Act*, 1930, c. 26. That statute validated and confirmed the agreement entered into between the Dominion of Canada and the Province of Saskatchewan, which had already been validated and confirmed by legislation passed in the Parliament of the Dominion of Canada and the Legislature of the Province.

Paragraph 12 of that agreement reads as follows: "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

In *R. v. Smith* this Court held that para. 12 now governs the relations of treaty Indians under the game laws of Saskatchewan rather than the old Indian treaties which have a bearing on the question only as they assist in an interpretation of para. 12.

In view of the fact that the agreement in part recited above required legislation not only on the part of the Dominion of Canada and the Province of Saskatchewan but also of the Imperial Parliament of the United Kingdom to render it operative it is clear that any amendment to the rights and powers set forth in the agreement can only be effective if made under the authority so granted by the validating legislation of the three Governments. It is also I think clear that any attempt to limit the rights conferred on Indians to hunt, shoot etc. by para. 12 cannot be altered or amended by the Province of Saskatchewan alone under the guise of legislation in respect to game laws unless the provisions of such game laws fairly come within the authority provided for by para. 12.

In *R. v. Smith* Turgeon J. A., who delivered the majority judgment of this Court, said [p. 705 D.L.R., p. 134 Can. C.C.]:

"It follows therefore that, whatever the situation may have been in earlier years, the extent to which Indians are now exempted from the operation of the game laws of Saskatchewan is to be determined by an interpretation of para. 12, given force of law by this Imperial statute. This paragraph says that the Indians are to have the right to hunt, trap and fish for food in all seasons 'on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access'.

"For the purposes of the present inquiry we can confine ourselves to Crown lands (excluding lands owned by individuals as to which some other question might arise) because this game preserve is Crown land. The question then is (1) is it unoccupied Crown lands or (2) is it occupied Crown lands to which the Indians have a right of access? If it is either of these no offence was committed by the accused."

Thereafter Turgeon J.A. held in effect that it was originally contemplated in the old Indian treaties and carried forward into para. 12 that various areas might be established as game preserves in the Province to conserve and propagate game, and that upon the establishment of such a game preserve the area became "occupied Crown Land" within the meaning of para. 12 and the Indian for whose benefit the area had been occupied had no longer the right to hunt and shoot thereon.

Dealing, in the *Smith* case, with the second question which Turgeon J.A. had posed--"Is it occupied Crown lands to which the Indians have a right of access?"--he disposed very shortly of this question in one paragraph holding that any right of access the Indians enjoyed was merely the privilege of all persons to enter the preserve *without carrying fire-arms* italicizing the last four words. The charge in the *Smith* case was one of "carrying fire-arms" on the game preserve. No one, Indian or otherwise, was entitled to *access to the game preserve* whilst carrying fire-arms and it was therefore held that Smith was properly convicted of the offence charged.

Turning now to the provisions of the *Game Act*, 1950, c. 76, s. 13 reads as follows:

"13(1) Notwithstanding the provisions of this Act, and in so far only as is necessary in order to implement the provisions of the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the statutes of 1930, it shall be lawful for the Indians within the province to hunt for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

"(2) For the purpose of subsection (1) the lands designated by or pursuant to *The Provincial Lands Act* as school lands and the lands within game preserves, provincial forests, provincial parks, registered traplines or fur conservation areas established pursuant to the regulations under *The Fur Act*, shall be deemed not to be unoccupied Crown lands or lands to which Indians have a right of access."

It will be seen that by s-s. (2) it has been enacted that amongst other Crown lands, provincial forests and fur conservation areas shall be deemed not to be unoccupied Crown lands or lands to which Indians have a right of access.

Before us counsel for the accused Strongquill argued that s. 13 (2) was *ultra vires* of the

Provincial Legislature in view of the provisions of s. 12 of the agreement with the Dominion validated as it was by the legislation of the Imperial and Dominion Parliaments and the provincial Legislature. There is a very full discussion of the rights granted to the Indians under the various treaties in *R. v. Wesley*, [1932] 4 D.L.R. 774, 58 Can. C.C. 269, and it is there pointed out that there is a difference in the rights of an Indian hunting for sport and one hunting for food necessary for his maintenance. In addition to what was pointed out in the *Wesley* case I would call attention to the fact that since the validation of para. 12 of the agreement, by the legislation enacted, neither the Government of the Province, the Government of the Dominion or the Imperial Parliament itself can by legislation of one Government alone alter or amend the rights conferred by the three Governments jointly under para. 12 of the agreement on treaty Indians except as the right to do so is contained in that agreement and the validating legislation.

Section 13 of the *Game Act* purports to affect Indians only. Doubtless within the ambit of provincial legislation under the civil rights sections of the *B.N.A. Act*, 1867, the Province has the right to pass game laws but it must be held not to have the right to alone vary or affect the rights of treaty Indians granted to them under para. 12 of the agreement nor can any legislation of the Dominion Government alone now affect those rights in so far as treaty Indians in this Province are concerned even though jurisdiction in respect to Indians was reversed to them by the *B.N.A. Act*. Game laws of the Province passed to secure a continuance of game and fish in the Province are within the purview of para. 12 and for that purpose reasonable and *bona fide* areas may be set aside for game preserves in which hunting by treaty Indians may be prohibited under the reasoning applied in *R. v. Smith*, [1935] 3 D.L.R. 703, 64 Can. C.C. 131. Attempts however to limit, exclude or prohibit the rights granted to treaty Indians to hunt, trap and fish for food on all unoccupied Crown lands and on any other lands to which the Indians may have a right of access must be viewed in the light of the true intent of the words used in para. 12 by the parties.

See *Mullins v. Treasurer of Surrey* (1880), 5 Q.B.D. 170 at p. 173; Craies' Hardcastle's Statute Law, 3rd ed., pp. 194-5, cited in *R. v. Wesley*, [1932] 4 D.L.R. at p. 782, 58 Can. C.C. at p. 276.

I can add little to the very able judgment of McGillivray J.A. in the *Wesley* case with which I wholly agree.

A careful study of the *Smith* case, *supra*, convinces me that the question of the right of a treaty Indian to shoot game for food on unoccupied Crown lands or Crown lands to which he has access is still open. There this Court dealt only with the prohibition of carrying fire-arms on a game preserve which was held to be occupied Crown land.

The Justice of the Peace has found the accused to be a treaty Indian belonging to an Indian Reserve in this Province and that he was hunting for food when he killed the moose in question during a time when the hunting and killing of moose was prohibited, but the season for hunting of other big game was open. The moose was killed in the Porcupine Forest Reserve also known as Fur Conservation Area No. 103.

Paragraphs 6, 7 and 8 of the stated case read as follows:

"6. The area where the moose was shot was not inhabited; there was no one living near the point and for seven miles south of Camp 5 there is but one family and they do not farm or work the land; the country is new and there are patches of timber, some burned over, but no clearing or any agriculture or farming area; the area known as Porcupine Provincial Forest Reserve and also as Fur Conservation Area #103 was open to any visiting hunters who have a licence and they are permitted to hunt over that area which is Crown lands.

"7. The accused T**HOMAS** S**TRONGQUILL** is a member of the Keeseekoose Indian Reserve. He still follows the Indian way of life and does not speak English and makes his living by hunting, fishing and woodcraft and rough labour. He has a family of six adults and a number of grandchildren. When he went to the Porcupine Forest Reserve to hunt on the 8th day of November, 1952, he was trying to obtain food for his family.

"8. The lands in the area herein referred to where the moose was killed was a Provincial Park or Fur Conservation area according to the evidence given and the map produced which is referred to in The Game Act as was pointed out to me, the reference being to section 13 of the said Game Act, and the lands referred to I found not to be unoccupied Crown lands as referred to in that section."

The grounds on which the Justice of the Peace held the accused guilty were that provisions of the *Game Act* applied and that his killing of the moose under the circumstances was prohibited thereby.

The licence referred to in para. 6 above is a licence to hunt game under the *Game Act* and does not confer any special right of access to the forest reserve or fur conservation area.

On the date in question, November 8, 1952, the killing of moose generally in the Province was prohibited but the area where this moose was killed was at the time of killing an area open to visiting hunters who had a licence and such hunters were permitted to hunt over the area in question which are Crown lands. Such being the case it appears to me that hunters had access to these Crown lands for the purpose of killing game and unless the provision of s-s. (2) of s. 13 of the *Game Act* denying Indians access to this area is valid this Indian had a right of access to the

Crown land in this area and having such a right of access he could lawfully kill the moose in question since he required it for food for his family. His right to kill the moose should have been determined by the Justice of the Peace not under the *Game Act* but under para. 12 of the agreement referred to before. Section 13 of the *Game Act* is not a binding enactment as against Indians and is *ultra vires* of the provincial Legislature.

By s. 91 (24) of the *B.N.A. Act* exclusive legislative authority to deal with Indians and lands reserved for Indians was reserved to the Parliament of Canada. The Parliament of Canada dealt with the rights and liabilities of Indians by the *Indian Act*. 1951 (Can.), c. 29. Section 87 of that Act reads as follows: "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 13 (2) of the *Game Act* purports to declare that lands designated by or pursuant to the *Provincial Lands Act* as school land, lands within game preserves, provincial forests, provincial parks registered traplines or fur conservation areas established by the Regulations under the *Fur Act* shall be deemed not to be unoccupied Crown Lands or lands to which Indians have a right of access. That provision is clearly intended to apply only to Indians and it does not apply to the general public. It is not a "law of general application" within the meaning of s. 87 of the *Indian Act* and is therefore not binding on Indians within the meaning of that section. Provision for the right of Indians to hunt for food on Crown lands had already been made by "other Acts" referred to in s. 87, these being the Acts validating the agreement of which para. 12 was a part.

A further reason for holding s. 13 to be ineffective for the purpose of excluding only Indians from access to forest reserves exists in the provisions of the *Saskatchewan Bill of Rights Act*, 1947 (Sask), c. 35. The latter Act is an Act of "general application" within the meaning of s. 87 of the *Indian Act* and by its express provisions binds the Crown in Saskatchewan. It has been the consensus of judicial opinion in Canada as expressed in many decisions of the Courts that an Indian is a Canadian citizen and that subject to the special privileges and restrictions provided in legislation such as the *Indian Act* and the Acts validating the agreement of which para. 12 is a part, he has the same rights, duties and obligations as any other Canadian citizen.

In *R. v. Martin* (1917), 39 D.L.R., 635 at pp. 638-9, 29 Can. C.C. 189 at pp. 192-3, 41 O.L.R. 79 at pp. 83-4, Riddell J. said:

"I think the language used by the Judicial Committee in *Canadian Pacific R.W. Co. v. Corporation of the Parish of Nôtre Dame De Bonsecours*, [1899] A.C. 367, 372, 373, may well be applied here *mutatis mutandis*:--

" 'The British North America Act, whilst it gives the legislative control of the Indian defendant quâ Indian to the Parliament of the Dominion, does not declare that the defendant shall cease to be a denizen of the Province in which he may be, or that he shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. . . It therefore appears. . . that any attempt by the Legislature of Ontario to regulate by enactments his conduct quâ Indian would be in excess of its powers. If, on the other hand, the enactment had no reference to the conduct of the defendant quâ Indian, but provided generally that no one was to sell, etc., liquors, then the enactment would
. . . be a piece of legislation competent to the Legislature . . .' even though he--not in his status quâ Indian, but under the general words should come within the prohibition.

"In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them."

By ss. 9, 11 and 17 of the *Saskatchewan Bill of Rights Act* it is provided as follows:
"9 Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons.

"11. Every person and every class of persons shall enjoy the right to obtain the accommodation or facilities of any standard or other hotel, victualling house, theatre or other place to which the public is customarily admitted, regardless of the race, creed, religion, colour or ethnic or national origin of such persons or class of persons.

"17. The provisions of this Act shall bind the Crown and every servant and agent of the Crown, and application for relief may be made without complying with the provisions of *The Petition of Right Act*."

The Justice of the Peace in para. 6 of the stated case has found that "the area known as Porcupine Provincial Forest Reserve and also as Fur Conservation Area No. 103 was open to any visiting hunters who have a licence and they are permitted to hunt over that area which is Crown lands". Such being the case Strongquill apart from other legislation to which I have referred had the same "right of access" to the Crown land in the Porcupine Forest Reserve and Fur Conservation Area No. 103 as the other hunters referred to in para. 6 of the stated case. Having such access to that Crown land it was lawful for him to kill the moose for food under the special

right reserved to him by para. 12 of the agreement hereinbefore referred to notwithstanding that the killing of moose in the Province generally was prohibited.

The appeal therefore will be allowed, the conviction will be quashed and the appellant will have his costs here and in the Court below.

M**CN****IVEN** J.A.:--The accused Thomas Strongquill was charged before and convicted by C. P. B. Dundas, a Justice of the Peace for Saskatchewan of the following offence: "that T**HOMAS** S**TRONGQUILL**, of Keeseekoose Indian Reserve, in the Province of Saskatchewan, Treaty Indian, on or about the 8th day of November, A.D. 1952, at or upon the Porcupine Provincial Forest Reserve, being Fur Conservation Area No. 103, in the said Province, did hunt, take and kill a moose, being big game, as defined by the Game Act, 1950, of the Province of Saskatchewan, contrary to the provisions of the said The Game Act, 1950, and regulations thereunder"; and for the said offence was fined $150 and costs amounting to $30 and in default of payment to serve 3 months in gaol.

This conviction comes before us on appeal by way of stated case which is set out in full in the judgment of the learned Chief Justice. However, the pertinent facts may be summarized:

The accused was a treaty Indian living on an Indian reservation where he followed the Indian way of life. On the day in question in company with a white man the accused was hunting for food, and shot the said moose as food for his family of six adults and a number of grandchildren. The area where the moose was shot was Crown land, known as Porcupine Provincial Forest Reserve and also Fur Conservation Area No. 103 and was open to any visiting hunters in possession of a licence to hunt big game. The said area is uninhabited covered with patches of timber, some burned over, but no part thereof was cleared or used for farming or agricultural purposes. The season for hunting big game opened on November 8, 1952 (the day the said moose was shot) but by Regulation made pursuant to the *Game Act* the killing of moose in 1952 was prohibited throughout the Province.

In 1930 the natural resources of the Province generally were transferred from Canada to the Province by an agreement now known as the Natural Resources Agreement which was ratified and confirmed by the Saskatchewan Legislature and by Parliament and given the force and effect of law as an amendment to the *B.N.A. Act* by the Imperial Parliament. Paragraphs 10, 11 and 12 of the said agreement refer to Indians and with respect to the matters therein dealt with the rights heretofore enjoyed by the Indians whether by treaty or by statute were merged and consolidated. *Vide R. v. Smith*, [1935] 3 D.L.R. at p. 705, 64 Can. C.C. at p. 134, where Turgeon J.A. says: "It follows therefore that, whatever the situation may have been in earlier years, the extent to which Indians are now exempted from the operation of the game laws of Saskatchewan is to be determined by an interpretation of para. 12, given force of law by this Imperial statute." See also *R. v. Wesley*, [1932] 4 D.L.R. at pp. 779-80, 58 Can. C.C. at pp. 274-5.

Paragraph 12 of the said agreement is as follows: "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

It is a cardinal rule that in interpreting a statute the proviso or exception is to be carved out of its enacting terms. As I read this section its dominant purpose and real intent was to preserve to the Indians the right of hunting, trapping and fishing for food at all seasons of the year, irrespective of the game laws but limited to the lands therein mentioned. This right is embedded in and guaranteed by the Constitution of Canada coupled with the solemn assurance by the Province that this right would be made effective. One cannot help but wonder what added strength such an assurance gives to the Constitution unless it be that the ownership of all wild game is by law vested in the Crown in the right of the Province.

This right is limited to "all unoccupied Crown lands and to any other lands to which the Indians may have a right of access". As was succinctly stated by Turgeon J.A. in *R. v. Smith*, [1935] 3 D.L.R. at p. 705, 64 Can. C.C. at p. 134: "The question then is (1) is it unoccupied Crown lands or (2) is it occupied Crown lands to which the Indians have a right of access? If it is either of these no offence was committed by the accused."

The Indians were the original settlers in the North-West Territories now known as Alberta, Saskatchewan and the northern part of Manitoba. Apart from some fur traders and the odd settler the Indians were the only inhabitants of this vast territory in 1874. In that year, by treaty the Indians ceded whatever rights they had to Her Majesty and in consideration thereof *inter alia* Her Majesty agreed that "Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be *required or taken up* . . . for settlement, mining or other purposes, under *grant* or other right *given* by Her Majesty's said Government".

The tract surrendered was practically "unoccupied" in the physical sense--it was idle land,

empty--vacant--not put to any use.

It is common knowledge that wild life (game) instinctively seeks "unoccupied" places remote from human habitation for food, for breeding and nurturing its young, for concealment and protection from predatory wild life including human beings.

I have already said that whatever rights with respect to hunting granted to the Indians by the said treaty were merged in para. 12 of the Natural Resources Agreement. I have only referred to the treaty for such assistance as its terms may give in interpreting the language used in para. 12 for we must attribute to Parliament an intention to fulfil its terms. It is also a cardinal rule of interpretation that words used in a statute are to be given their common, ordinary and generally accepted meaning. Statutes are to be given a liberal construction so that effect may be given to each Act and every part thereof according to its spirit, true intent and meaning: *vide* the *Interpreta tion Act,* R.S.S. 1940, c. 1, s. 3 [now s. 5(1) of 1943, c. 2]. Murray's Standard Dictionary defines "unoccupied" with relation to ground as: "Not occupied by inhabitants or indwellers; not put to use in this way; not frequented or filled up; empty."

This offence was committed on the Porcupine Forest Reserve which approximates 181 square miles and that part thereof where the moose was shot measures up to the foregoing definition of "unoccupied". In the schedule to the *Forest Act* reserves are described which in area exceed 8,000 sq. miles. Section 43(1) of the *Forest Act*, R.S.S. 1940, c. 39, as amended by 1951, c. 20, s. 4, is as follows:

"43(1) In order to reserve certain areas in the province for a perpetual growth of timber, and to preserve the forest cover thereon, which regulates stream flow, and to provide for a reasonable use of all the resources which the forests contain, all provincial lands within the respective boundaries of the provincial forests mentioned in the schedule to this Act are hereby withdrawn from disposition, sale, settlement *or occupancy* except under the authority of this Part or of regulations made thereunder."

Under the said Act there is power to withdraw from these forest reserves such land as may be required for historical sites or residential purposes and the granting of leases within provincial forests for agricultural, business, or residential purposes not exceeding 33 years. This vast area is, subject to these exceptions, withdrawn from sale, disposition, settlement or occupancy. It is a natural hunting ground. Whether Crown land is occupied or unoccupied is a question of fact to be determined by evidence and the facts as set out in the stated case compel the conclusion that the area where this moose was shot was unoccupied Crown land. The right of the Indians to hunt for food is "on all unoccupied Crown lands" and to effectuate the true intent and spirit of para. 12 the word "all" should be interpreted as any. The whole is the summation of its parts. If the Legislature by setting apart certain Crown lands as forest reserves (over 8,000 square miles) can convert them into occupied lands then it could set apart all Crown lands as a forest reserve and thus defeat the paramount object of para. 12. The Legislature has no power to do indirectly what it cannot do directly. I am equally certain the Legislature would not do anything to even qualify its solemn assurance as contained in para. 12.

The limitations on the Indians' right to hunt over the lands surrendered as set out in the Treaty of 1874 are upon "such tracts as may be required or taken up . . . . for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government".

The words "taken up" "grant" "given by" imply, connote alienation, transfer of the Crown 's interest therein. These forest reserves are still Crown lands--not required for settlement or mining and the word "unoccupied" in para. 12 should be so interpreted.

The offence charged in *R. v. Smith*, *supra*, was carrying firearms on a game preserve against which there was an absolute prohibition. Such prohibition was of general application and as such comes within the meaning of the *Indian Act*, 1950 (Can.), c. 29, s. 87. It can be readily distinguished upon the facts and the terms of the Treaty of 1874 are substantially different from the terms of the Treaty of 1876 before the Court in the *Smith* case.

However should I be wrong in this conclusion I am of the opinion that the Indians have a right of access to these forest reserves including the area where this moose was shot by the accused. Section 54 of the *Forest Act* is as follows: "Persons using, or travelling in, a provincial forest shall, upon request, give the local field officers of the department, or other authorized officers of the Crown, information as to their names, addresses, routes to be followed and the location of their camps and any other information pertaining to the protection of the forest from fire. Any person who refuses to give the required information shall be guilty of an offence, and for each such offence shall be liable on summary conviction to a fine of not less than $5 nor more than $50."

This section impliedly gives the right to use and travel in a provincial forest to "persons" and "any person" failing to give an authorized officer of the Crown the information therein required commits an offence. The Treaty of 1874 was made with "Her Majesty's Indian subjects" and as stated by my brother Procter in his judgment there is ample judicial authority for the statement that Indians born in Canada and/or living upon Indian reservations are British subjects and as such would be persons within the meaning of the foregoing section of the *Forest Act*. It is a right common to all persons and the "right of access" referred to in para. 12 is not a special or peculiar

right limited or confined to Indians to be enjoyed by them alone. In addition in the stated case there is the fact that the area in question "was open to any visiting hunters who have a licence and they are permitted to hunt over that area which is Crown lands". In my opinion the accused, a treaty Indian, had a right of access to the said land, a right to hunt thereon for and kill the said moose for food irrespective of the provincial *Game Act*.

However, counsel for the Crown relies upon s. 13 of the *Game Act*, 1950 (Sask.), c. 76, as follows:

"13(1) Notwithstanding the provisions of this Act, and in so far only as is necessary in order to implement the provisions of the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the statutes of 1930, it shall be lawful for the Indians within the province to hunt for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

"(2) For the purpose of subsection (1) the lands designated by or pursuant to *The Provincial Lands Act* as school lands and the lands within game preserves, provincial forests, provincial parks, registered traplines, or fur conservation areas established pursuant to the regulations under *The Fur Act*, shall be deemed not to be unoccupied Crown lands or lands to which Indians have a right of access."

This section is not of general application but limited to the Indians and therefore does not come within the meaning of s. 87 of the *Indian Act*. By s. 91(24) of the *B.N.A. Act* the right to enact laws with regard to Indians and land reserved for the Indians is vested exclusively in Parliament. Subsection (1) of s. 13 merely restates a substantial part of para. 12 of the Natural Resources Agreement which was approved by the Legislature. It does not amplify, extend, or curtail any rights granted the Indians under the agreement. It is merely a basis for the enactment of s-s. (2) which is limited in its application to the purposes of s-s. (1).

This subsection designates certain Crown lands which shall be deemed, not to be unoccupied Crown lands or other lands to which the Indians have a right of access. Irrespective of the facts applicable to such lands and no matter what the common ordinary and generally accepted meaning of the words and phrases used therein may be the Legislature by the use of the word "deemed" has imposed its own meaning upon the language used. In effect this section declares the named lands to be occupied Crown lands to which the Indians have no right of access.

In my opinion the Legislature has no power by unilateral action to define the language used nor amplify, extend, modify or alter the terms of the said Natural Resources Agreement, nor to derogate from the rights granted to the Indians by the said agreement. These are constitutional rights which can only be amended or interpreted as provided for in the *B.N.A. Act* and amendments thereto: *vide C.P.R. v. Notre Dame de Bonsecours Parish*, [1899] A.C. 367.
In my opinion s-s. (2) of s. 13 of the *Game Act* is *ultra vires* and has no application to the accused. The appeal will be allowed and the conviction quashed with costs both here and in the Court below.

C**ULLITON** J.A. concurs with M**ARTIN** C.J.S.

Appeal allowed.