REGINA v. NIPPI

(1969), 70 W.W.R. 390

Saskatchewan District Court, Maher D.C.J., 25 August 1969

Game Laws- Treaty Indian Hunting in Game Preserve- Whether Offence under Game Act.

Appeal by the crown from the dismissal by a magistrate of an information charging respondent, a treaty Indian, with unlawfully hunting in a game preserve contrary to sec. 5 of *The Game Act*, RSS, 1965, ch. 356. Appeal allowed.

It was *held* by Maher, D.C.J., on a review of the authorities, that the present state of the law in Saskatchewan was that while forest preserves had been held to be unoccupied crown lands and legislation declaring them to be otherwise was *ultra vires* of the provincial legislature, lands designated as game preserves ceased to be unoccupied crown lands and treaty Indians were bound by the provisions of *The Game Act* prohibiting hunting thereon: *Rex v. Smith* [1935] 2 WWR 433, at 437, 64 CCC 131, 20 Can Abr 1157 (Sask. C.A.); *Rex v. Strongquill* (1953) 8 WWR (NS) 247, at 257, 262, 16 CR 194, 105 CCC 262, 5 Abr Con (2nd) (Sask. C.A.) applied.

[Note up with 12 CED (2nd ed.) Game Laws, sec. 2.]

M.H. Dolken, for crown, appellant.
R. Price Jones, for respondent.

August 25, 1969.

MAHER, D.C.J.- This is an appeal on behalf of the crown from the dismissal by H.D. Parker, judge for the magistrates' court, of an information charging the respondent with unlawfully hunting in a game preserve, contrary to sec. 5 of *The Game Act*, RSS, 1965, ch. 356.

Evidence lad on behalf of the crown satisfied me that the respondent is a treaty Indian and that he shot and killed a moose for food within the boundaries of the Pasquia Game Preserve, an area designated as a game preserve by order in council 205/62 dated February 2, 1962, issued pursuant to the provisions of *The Game Act*.

The relevant sections of *The Game Act* are as follows:

> "4.-(1) The Lieutenant Governor in council may constitute any area of land a game preserve for the protection, propagation and perpetuation of birds and animals, and may alter any order made for that purpose and rescind any order made pursuant to this subsection.
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> "(2) Every order made under subsection (1) shall be published in *The Saskatchewan Gazette* and shall take effect on and from a date to be named in the order.
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> "5. Except as otherwise provided in this Act and *The Fur Act*, or in the regulation under either of those Acts, no person shall:
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> "(a) hunt, shoot, trap, snare, poison or otherwise destroy or molest any animal or bird in a game preserve; or
>
> "(b) carry or have in his possession in, or discharge over, a game preserve, any firearm or any bow and arrow.
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> * * *
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> "8. The minister may, when necessary, authorize the capture within the boundaries of a game preserve of birds or animals for propagation, exhibition or proper control, and may permit the collection of specimens for scientific purposes, and may exempt from protection and permit the destruction of such species as he deems injurious to public improvements, agricultural pursuits, beneficial wild life or domestic stock.

* * *

"15.-(1) Notwithstanding anything in this Act, and in so far only as is necessary in order to implement the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the statutes of 1930, Indians within the province may 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 is continued on behalf of the crown that the respondent had no right to kill the moose, as he did so within the confines of a game preserve, which is neither unoccupied crown lands or lands to which Indians have a right of access. Counsel for the crown does not rely on the provisions of subsec. (2) of sec. 15 of the Act, which has been held to be *ultra vires* by the court of appeal for Saskatchewan, but on the decision of the same court in *Rex v. Smith* [1935] 2 WWR 433, 64 CCC 131, which held game preserves to be occupied crown lands and not lands to which Indians had any special right of access.

Counsel for the respondent contends that the decision in *Reg. v. Strongquill* (1953) 8 WWR (NS) 247, 16 CR 194, 105 CCC 262 (Sask. C.A.), holding that the present sec. 15 (2) was *ultra vires* of the powers of the legislature has the effect of finding game preserves to be "unoccupied Crown lands" on which Indians may hunt for food at all seasons of the year.

I have read and considered a number of decisions of the courts of other provinces but I do not deem it necessary to refer to them as I have come to the conclusion that the matter falls squarely within the two foregoing decisions which are binding on this court. I might add that I have checked the wording of the legislation that was in effect then each of these cases were decided and found them to be substantially identical with the present *Game Act*, 1967, ch. 78. Any changes are in form only and have not altered the law applicable at the time the cases arose.

A careful study of the *Smith* and *Strongquill* cases satisfied me that there is no conflict in the decisions. In *Rex v. Smith* an appeal from the conviction of a treaty Indian charged with carrying a fire-arm on a game preserve was dismissed, the court unanimously holding that a game preserve was neither unoccupied crown lands or lands to which Indians had a right of access. I do not consider it necessary to refer to either the relevant treaties made between the crown and the Indians or to the agreement with respect to the transfer of natural resources to the province. Both were dealt with at length by the court which held unanimously that the provisions of *The Game Act* prohibiting anyone from hunting, shooting, trapping or carrying fire-arms on a game preserve were binding on treaty Indians. Turgeon, J.A. said at p. 437:

" * * * When the treaty was made in 1867 the necessity for game preservation was probably not present in the minds of the parties. Nevertheless it was within reason that the time might come in this, as in all populated countries, when the establishment of game preserves would be beneficial to all interested in hunting and fishing including the Indians themselves. But a game preserve would be one in name only is the Indians, or any other class of people, were entitled to shoot in it."

It follows that, in the absence of changes in the legislation, this finding is still the law of the province unless it has been overruled, modified or altered by a later decision. I have been unable to find any such decision unless it is *Reg. v. Strongquill, supra*. In that case the court of appeal, by majority decision, held that a provincial forest preserve was unoccupied crown land on which Indians had a right to hunt for food at all seasons and that sec. 13 (2) of *The Game Act* (now sec. 15[2]), was *ultra vires*. It is to be noted that in arriving at their decision the majority members of the court were careful to point out the distinction between a game preserve and a provincial forest.

Gordon, J.A. said at p. 257:

"For the crown it was contended that the decision of this court in *Rex v. Smith* [*supra*], was conclusive against the accused. With every deference I think there is a material difference. In the Smith case the accused Indian was hunting on a game preserve on which all hunting was absolutely prohibited."

And Proctor, J.A. said at p. 262:

> "Thereafter Turgeon, J.A. held in effect that it was originally contemplated in the old Indian treaties and carried forward into par. 12 [of the Natural Resources Agreement of 1929], 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 par. 12 and the Indian for whose benefit the area had been occupied had no longer the right to hunt and shoot thereof."

It seems almost unnecessary to add that Martin, C.J. in dissent, Culliton, J.A. concurring, followed *Rex v. Smith*.

The present state of the law therefore is, that while forest preserves have been held to be unoccupied crown lands and legislation declaring them to be otherwise is *ultra vires* of the provincial legislature, lands designated as game preserves cease to be unoccupied crown lands and treaty Indians are bound by the provision s of *The Game Act* prohibiting hunting thereon.

While it is not relevant to these proceedings, it is of some significance that in the present *Game Act* game preserves are still included in lands deemed to be unoccupied crown lands but forest preserves have been deleted: *Vide* sec. 8(2).

It was contended by counsel for the respondent that the facts in the case at bar were distinguishable from the *Smith* case by reason of the fact that there was evidence that permits were issued for the hunting of big game on the Pasquai Game Preserve while in the *Smith* case it was found from the facts that hunting on the Fort A La Corne Game Preserve was absolutely prohibited. As pointed out above there have been no meaningful changes in the provisions of *The Game Act* dealing with the matters in issue before me. The provisions prohibiting hunting on a game preserve are the same and I can only conclude that any permits that may have been issued permitting hunting on the Pasquai Game Preserve were issued by the minister under the authority of the present sec. 8 of the Act, which section, in almost identical terms, was in effect at the time of the offence in the *Smith* case as sec. 71 of RSS, 1930, ch. 208.

The appeal will be allowed and the respondent found guilty as charged. I would ask that the matter of penalty and costs be spoken to in chambers on Thursday, September 11, at 10:30 a.m.