R. v. ROSS

Saskatchewan Provincial Court, Ferris J.P.C., September 10, 1984

Lyle W. Zuk, for the Crown
Douglas J. Kovatch, for the accused

The accused, a treaty Indian, was charged with unlawfully hunting without a licence in a game preserve contrary to s.5(1) of the Wildlife Regulations, 1981, made pursuant to the Wildlife Act, S.S. 1979, c.W-13.1. The accused was hunting for food. The defence argued that the provincial regulation purporting to create a game preserve was ultra vires as it attempted to circumscribe Indian hunting rights contrary to para. 12 of the Natural Resources Transfer Agreement.

Held: Guilty as charged.

1. A game preserve is occupied Crown land.

2. To be occupied, the land must, in fact, and bona fide, be utilized for a purpose, whether it be a game preserve or some other purpose. It is not required that that purpose imply. the inhabitation, or even the presence of people, buildings, or machines, continuously, or at all.

3. The province is entitled to establish game preserves. In doing so it may pass legislation which eliminates Indian hunting rights in such preserves. The legislation is valid so lone as it is incidental to an intention to create a preserve or otherwise further a bona fide program, and not simply to eliminate Indian hunting rights.

4. There was no evidence in this case that the actual intent of the legislation was to infringe on Indian hunting rights rather than what it appears to be, namely, the genuine creation of a game preserve for bona fide purposes.

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FERRIS J.P.C.: The issue in this case is whether a provincial regulation purporting to create a game preserve is ultra vires as being, in reality, an attempt by the province to circumscribe Indian hunting rights contrary to paragraph 12 of the Natural Resources Agreement of 1929.

"Indians" are, of course, a federal area of jurisdiction under the Constitution Act, 1867, while game laws are a matter of provincial legislative competence. Presumably to avoid an issue over whether the federal government was empowered to enact special game laws for 'Indians, either on or off reserve, and to ensure uniformity throughout the provinces affected, and to preserve treaty rights, by that agreement the province and the federal government contracted 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 land and on any other lands to which the said Indians may have a right of access.

That agreement was adopted by legislation, not only by the provincial and federal governments, but also by the government of the United Kingdom. It apparently was the intention to use wording broad enough to preserve rights guaranteed by any of the treaties signed with the various Indian bands. Whether or not that is so, the wording is at least broad enough to encompass any rights given by any treaty applicable to the land in issue. See my decision in R. v. Peters [unreported] and R. v. Merasty, [1984] 1 C.N.L.R. 153 and R. v. Eninew; R. v. Bear, 32 Sask. R. 237, 10 D.L.R. (4th) 137, 12 C.C.C. (3d) 365, [1984] 2 C.N.L.R. 126. The constitutional result is that the division of powers between the federal government and the province has been established so that provincial hunting laws cannot detract from the rights guaranteed to Indians under paragraph 12.

In interpreting that paragraph in R. v. Sutherland, [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 113 D.L.R. (3d) 374, 35 N.R, 361, [1980] 3 C.N.L.R. 71, Mr. Justice Dickson set out, what I hereinafter refer to as "the Indian hunting rule", as follows [pp.74 and 76 C.N.L.R.]:

> The constitutional right of a province to enact game laws of general application is undoubted, as is the right, in order to secure the continuance of the supply of game, to set aside reasonable and bona fide areas as game preserves.
>
> The Indians' right to hunt for food under paragraph 13 (the equivalent of paragraph 12 in the Saskatchewan Agreement) is paramount and overrides provincial game laws regulating hunting and fishing. The Province may deny access for hunting to Indians and non-Indians alike but if, as in the case at bar, limited hunting is allowed, then under paragraph 13, nondangerous hunting for food is permitted to the Indians, regardless of provincial curbs on season, method or Limit.

It will be noted that under the Indian hunting rule, if lands are "unoccupied" Crown lands, or there is any right of access to hunt on either private land, or "occupied" Crown land, Indians can hunt without any restriction except as to dangerousness. In Sutherland the court was dealing with a Manitoba law that stated that certain Crown lands were deemed to be "occupied", The effect was, of course, to prevent Indian hunting. The court struck down that legislation as an attempt to restrict Indian hunting rights as the clause purported to "cause something to be taken to be different from that which it might have been".

In this case there is no such "deeming" provision. However, in this case, as in that, the defendant is a treaty Indian who was hunting for food. He shot and killed two moose, on December 29, 1983, on Crown land which, if it is not a valid game preserve, I would find to be "unoccupied"

The Crown says that the impugned legislation does create a valid game preserve and that a game preserve has been held to be "occupied" Crown land by the decision of the Court of Appeal in R. v. Smith [1935] 2 W.W.R. 433. The defence says that the intention behind the Legislation is not bona fide to create a game preserve, but rather simply to declare the lands in issue to be such, so that they will be seen by the. courts to be "occupied" Crown land, and thus to prevent Indians from hunting thereon, albeit at the price of preventing everyone from hunting thereon.

The lands in issue are within the boundaries of the "106 Narrow Lake 120 Road Corridor Game Preserve". That preserve was purportedly created by order-in-council 1329/83, under the Wildlife Act [S.S. 1979, c.W-13.1], effective September 1, 1983. Those regulations, entitled "The Wildlife Management Zones and Special Areas Boundaries Regulations", created the first "road corridor" game preserves in this province. They ate defined to consist of "all lands within 400 meters of the center line" of named roads.

Thus they are strips, or corridors of land running adjacent to described roads. They are stated in s.4 of those regulations to be:

> ...constituted as areas for protecting, propagating, managing, controlling, regulating or enhancing wildlife or wildlife habitat.

In my view a finding of "occupancy" by the court does not flow merely from a declaration by the province that land is a game preserve.

For the reasons stated in my decision in R. v. Peters and R. v. Merasty to be "occupied" land must, in fact, and bona fide, be utilized for a purpose, whether it be a game preserve or some other purpose. It is not required that that purpose imply the inhabitation, or even the presence of people, buildings, or machines, continuously, or at all.

Thus, to my mind, the defence argument herein could be cast in terms of an inquiry into whether or not there is, in fact, a bona fide "occupancy" of the lands in issue for purposes of a game preserve. That issue, if decided in favor of the defence, would simply lead to an acquittal, while the defence argument, as framed herein, would lead to the striking down of the legislation in question. However, on either approach, the issue is whether the legislation is bona fide what it purports to be or, as defence counsel describes it:

> ...at best an unsuccessful attempt to meet the criteria set out in (Mr. Justice) Dickson' s judgment, and, at worst, an out and out attempt to legislate in respect of Indian hunting rights.

The defence alleges mala fides for several reasons.

Firstly, counsel says that the fact that it is a corridor preserve, rather than a large tract area of the type created before now, shows that the intent is not to encourage breeding but simply to prevent hunting. He points out that the province cannot simply pass a law forbidding everyone from hunting which would be binding upon Indians unless the land was "occupied", and says that the fact that there is no intent to encourage propagation is one factor that shows that the real purpose is to describe lands as a preserve only so as to prevent Indian hunting.

The Crown replies that the legislation is designed to prevent hunting by everyone, and thus that it is a legitimate preserve, and that it may be, as in the case of other preserves in the province, that hunting will be allowed for certain species for limited seasons at some time in the future with the result that the Indian hunting rule will then apply.

I accept that such a narrow strip of land is not well suited, nor intended, to encourage breeding, especially when one considers that hunters can operate on the fringes.

I do not accept that in order for a game preserve to be entitled to be viewed as bona fide that it has to be designed to encourage propagation.

In my view, the very word "preserve" indicates that one prime purpose of a game preserve is simply to preserve the lives of the animals. Certainly that muse be the prime motivation behind corridor preserves. The evidence is that the 400 meter width has been chosen because that is about as far as a man is liable to be able to get a clear view to shoot given the prevailing bush cover patterns. It is not a distance designed to prevent danger to travellers. There are other provisions in the law that deal with that.

In my view preventing hunting and encouraging propagation are both valid objects of preserves as listed in s.4. However, there is nothing in that section, nor any legal authority that I am aware of, that suggests that both of those objectives, nor any of the others listed in s.4, must be pursued all at once to constitute a valid preserve.

The legislation itself mentions not just "protecting" and "propagating", but also "managing", "controlling", and "regulating", not merely the wildlife, but their habitat.

It does not Indicate that all such objectives have to be pursued at once, nor that any one of them has to be promoted to the limit.

In my view they need not be. I note that limited harvesting of animals is viewed as an appropriate practice in many preserves, be they wildlife preserves, or forest preserves, or other preserves, throughout the world.

In my view the fact that propagation may not be a goal does not, per se, mean that it is not a valid game preserve any more than a lack of reforestation programs means that an area is not a bona fide forest preserve.

I accept the evidence of Mr. Runge, the wildlife management specialist, who testified for the Crown, to the effect that creating a preserve with signs recognized by the public for over fifty years, is more effective than simply passing a law forbidding hunting since, by some quirk of human nature, more people are prepared to violate a no-hunting rule than a game preserve. Perhaps that is because some people view a simple no-hunting rule as another bureaucratic interference in their lives, but ate sympathetic with preserves which they may see as the government actually trying to do something positive for their sport, rather than just order them about.

In my view it is sufficient to create a valid preserve that prohibition of hunting be the prime motive, with or without any motive of propagation.

Needless to say, defence counsel does not say that this is not so. The defence argues that the mere fact that the province may bona fide wish to prevent hunting via the creation of the preserve route, will not protect the legislation if the real intent is to restrict Indian hunting rights. The defence merely points to the strip effect as one factor that might, together with other evidence, be seen as evidencing a mala fide intent.

Defence counsel notes that, apart from the possibility of land being seen as "occupied" there are few other legal effects consequent on the creation of a preserve. He says that those are so few, and of so little consequence, that I should infer that the real purpose is to gain "occupancy" status, and thus restrict Indian hunting rights.

The only effects mentioned are that you must encase guns while in the preserve and, due to the definition of "hunting", you cannot chase an animal you have wounded outside a preserve, into a preserve, but must invoke the aid of a resources officer.

Thus the defence says that the real motive muse be to prevent Indian hunting.

In my view this lack of other legal effects does not advance the defence case any further than the argument that the prime purpose is to prevent hunting, not encourage propagation, as I accept that

the prime purpose is indeed to prevent hunting, with the added benefits of a "preserve" approach, rather than a simple no-hunting rule. Thus I am not surprised to see very few other legal effects.

The issue still remains as to whether that purpose is only an "apparent purpose" being used to camouflage a mala fide attempt to restrict Indian hunting rights.

Next the defence points out that by creating a preserve, and, it is assumed, thereby causing the land to be seen as "occupied", that Indians lost hunting rights, unrestricted by bag limits, for 52 weeks of the year, because under the Indian hunting rule they are not subject to seasonal or bag limit rules. Everyone else only loses seasonal and bag limitations such as were in effect at the time of the creation of the preserve, i.e. a two-week season for birds only.

It is suggested that this disproportionate effect leads to the inference that, in pith and substance, the legislation is intended to encroach on Indian hunting rights.

I do not accept that that is necessarily so, since, of course, non-Indians can reply that they too once had unrestricted hunting rights, and they too lost all the hunting rights that they presently have, and that the only reason they had so few left to lose was because seasons and limits have been whittled down to next to nothing over the years, with the result that they lost most of their rights much sooner than Indians. Thus it can be argued that the effect may be disproportionate, but the only intent that can be inferred from that effect is one to stop such hunting, by everyone, as was heretofore allowed.

That, in my view, is the crux of the argument. The defence says that because Indians are the only ones with any substantive hunting rights left to lose in the area that the legislation must be seen as a mala fide attempt to restrict their hunting rights.

It may well be that some of the preserves created by the regulations in question, including the one in issue, have been created with the intent of cutting down on the number of animals taken by Indians. In my view, it does not necessarily follow that that is an attempt to restrict Indian hunting rights as such. It may equally well be a bona fide conservation effort, which affects Indians disproportionately, because everyone else has long since lost their rights, with the result that there is nobody but Indians left to affect if game is to be preserved.

It is noted that in addition to 21 "wildlife Management units" and 19 "wildlife refuges", the legislation creates 31 "game preserves", some of the blanket type, and some of the corridor type. It may or may not be true that the proportion of Indians hunting in some is high, and in others low. If so, it may be that in some areas the legislation seeks to cut down on harvesting by Indians while in others it does not.

Insofar as the legislation may intend to stop hunting by Indians (well, of course, as by all others) it does not necessarily follow that that intent is mala fide against Indians rather than bona fide conservation which affects them disproportionately because they are the only ones with anything left to lose.

On the contrary, it may well be that fear of it being suggested that the province was interfering with Indian hunting rights has resulted in continuing curtailment of hunting rights for everyone else, year by year, for so long that the stock of game is now so low that preserves ate the only answer, whether they affect Indiana disproportionately or not.

The evidence indicated that the moose population in the "central core" area of Saskatchewan dropped something like 90% in the decade or so prior to the implementation of the preserves on September 1, 1983.

Some of that decline was due to weather and predators, both animal and human. The latter, of course, includes lawful hunters, Indian or otherwise, and poachers, Indian or otherwise. Disease has not been an important factor.

The weather cannot be controlled. Measures have been taken with respect to predators, human and otherwise. For example, in 1967, the hunting season for non-treaty citizens was seven weeks, with a bag limit of one moose of either sex.

In 1973 a quota was established and a draw for licenses held.

The quota was reduced each year until 1976. In 1977 the shooting of moose cows was prohibited. Between 1977 and 1983 the sport harvest allowed was cut by 75 percent.

However, in the meantime, the local pulp company, which was established in the late 1960's, was continually cutting hundreds of miles of access roads into the bush. A program has been implemented to close many of them. However, four-wheel drive and all-terrain vehicles have become more readily available, and that has added to the kill rate.

The result has been what the D.T.R.R. officer refers to as the rise of the "rubber tire hunter", who seldom gets out and walks, but instead drives around all day until he sees an animal.

Indeed, that was the method used by the defendant in the instant case. As he said, it might have taken him a week to make a kill on foot. Moreover, in winter, moose seek out salt used to treat roads.

It is no more realistic to expect a treaty Indian to hunt in traditional ways these days than anyone else.

It may even be true, as suggested by defence counsel, that most of the animals now being taken in the relevant area are being taken by treaty Indians. I do not know. The evidence did not deal with the treaty status of hunters. Such statistics may not have been taken.

However, the evidence did establish that the 1983 aerial survey found 12 moose per 100 square miles in an area where, in the later 1960's there had been over 100.

It also established that in 1972 in two game management zones 1400 animals were taken, while in 1983 only 136 were taken, despite the constantly increasing limitations on hunting seasons, bag limits, and the age and sex of animals allowed to be taken.

If counsel is right and most kills are now being made by Indians, the result is the same: that fact may be due to the fact that they are the only ones left with any substantive hunting rights. It does not necessarily follow that the legislation is an invalid attempt to restrict Indian hunting rights, rather than a last ditch attempt to legislate a bona fide game preserve, which disproportionately affects Indian hunting rights because they are the only ones with many rights left.

When there is only one moose left, some people might argue that a law creating a preserve where it lives is in reality an attempt to interfere with Indian hunting rights, but most would not. I doubt

that the moose population would have to be reduced to such a critical stage before it could be accepted by most people, of good faith, with or without Indian hunting privileges, that conservation measures might be in good faith.

In effect, the Crown reply to the defence argument that a no-shooting rule would accomplish the result of a preserve, except for Indians, is to agree, but argue that insofar as the legislation restricts Indian hunting rights, it does so not because the province wishes to legislate in a prohibited field, but because in order to have a substantial preservation of animals at all, the only course left, in some areas, such as the one in issue, is preserves, which do indeed eliminate everyone's hunting rights, including, and designedly so, those of treaty Indians.

In effect the Crown argues that it is entitled to eliminate Indian hunting rights so long as the purpose of legislation is not simply to do that, or to do it for mala fide reasons, but, on the contrary, where, as here, it is incidental to an intention to create a preserve, or otherwise further a bona fide program. As Mr. Runge stated, the corridors are just part of a package of attempted solutions, along with road closures, predator control, etc, which it is hoped will work without having to create large blanket preserves.

In my view, given the decisions in Rex v. Smith and R. v. Sutherland, supra, Crown counsel's argument is correct.

The province is entitled to establish game preserves. If, in so doing, it passes legislation intended to eliminate Indian hunting rights in such preserves, for the purposes of preservation, rather than simply because it wishes to cut down Indian hunting rights, it is entitled to do so. It is not forbidden to have multiple motives of both creating a preserve, and eliminating Indian hunting rights, (as well as those of everyone else) if the intent to eliminate Indian hunting rights is bona fide in furtherance of creating an effective game preserve. In my view that is the intention of the legislation here.

The only factor in evidence, apart from the arguably disproportionate effects the creation of the preserve has on Indian hunting rights, that might be seen to favor the defence, are statements found in the 1983 Big Game Guide. Assuming I am entitled to consider it (see Reference Re Anti-inflation Act (1976), 68 D.L.R. (3d) 452) it says, under the heading "Moose Restoration Projects", that:

> All Game Preserves are considered "occupied Crown Land" and are therefore closed to both sport hunters and Treaty Indians hunting for food....
>
> ... it' s apparent that pressure on moose from all sources, including sport hunters, predators, and Treaty Indians, must be further reduced....

Some may view such statements as implying a mala fide intent to restrict Indian hunting rights. Others may see them as an attempt to "sell the program" to those without such rights. Others may simply dismiss them as the work of pamphleteers, not the legislators. It may be, as defence counsel argues, that intent to preserve game does not mean that a preserve has been validly created, but assuming the correctness, in law, of the views I have just expressed, the Big Game Guide statements, even taken together with the other factors counsel suggests are indicative of mala fide intent, do not convince me that the province has not bona fide set out to create a game preserve rather than a sham preserve, designed to cover up an attempt to restrict Indian hunting rights.

I cannot see why the province should be credited with such a motive. Presumably, all that could be gained would be the support from the votes of those who wish to restrict Indian hunting rights at the expense of the votes of those who support Indian hunting rights, be they Indian, Metis, or otherwise.

It may be that the latter vote is larger than the former, or, given recent initiatives respecting treaty rights for female Indians, that it soon will be. Whether or not that is true, the past history of hunting legislation in this province indicates to me that the province has not sought out controversy by attempting to restrict Indian hunting rights. If anything, it could be argued that past legislative initiatives indicate an attempt to avoid any such thing; but rather an attempt not to do so while keeping as many non-Indian hunters happy as possible. There is no evidence before me to indicate that that situation, if, indeed, it be the real situation, has changed.

On the evidence before me I do not see how I could hold that the actual intent, or de facto effect, or pith and substance, if you prefer, of the legislation is an infringement on Indian hunting rights, rather than what it appears to be, namely, the genuine creation of a game preserve, for bona fide purposes.

In the result the defendant is found guilty.

I can only add that the evidence indicated that there have been no consultations between treaty Indians and provincial authorities on the inter-relationship between Indian hunting rights and provincial conservation objectives. If such can be arranged, it might be beneficial.