REGINA V. GEORGE

(1963), 41 D.L.R. (2d) 31 (also reported: [1964] 1 O.R. 24, [1963] 3 C.C.C. 109)

Ontario High Court, McRuer C.J..H.C. . 29 May 1963

(Appealed to Ontario Court of Appeal, **reported sub nom. Attorney-General of Canada v. George, infra** p.348)

Indians - Treaty rights to hunt for food on reserve - Whether circumscribed by Migratory Birds Convention Act (Can.).

The rights of Indians to hunt for food on lands reserved to them, granted by the Royal Proclamation of 1763 (R.S.C. 1952, vol. 6, App. III, p. 3) and, in the instant case, confirmed by a treaty of 1827 establishing a reserve known as the Kettle Point Indian Reserve, cannot be taken away by Parliament short of legislation which expressly and directly extinguishes those rights. Indeed, it may be that no legislation can be effective to take away such rights, but in any event they are not affected by a general statute such as the *Migratory Birds Convention Act,* R.S.C. 1952, c. 179.

In the instant case accused Indian shot ducks for food on the aforesaid Kettle Point Reserve and was charged with hunting out of season contrary to s. 12(1) of the Act. *Held,* that the *Migratory Birds Convention Act* was ineffective to circumscribe the treaty rights of the accused to hunt for food at any time on the reserve and accordingly the charge must be dismissed.

[*R. v. Wesley,* [1932] 4 D.L.R. 774, 58 C.C.C. 269, 26 A.L.R. 433, [1932] 2 W.W.R. 337; *R. v. Sikyea* (1962), 40 W.W.R. 494, aprvd; *Dominion of Canada v. Province of Ontario,* [1910] A.C. 637; *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, consd; *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045; *The King v. Lady McMaster,* [1926] Ex.C.R. 68; *Sammut et al. v. Strickland,* [1938] A.C, 678, refd to]

APPEAL by Crown from decision of J. C. Dunlap, Q.C., P.M., acquitting accused of offence against *Migratory Birds Convention Act* (Can.).

F. C. Daily, for A.-G. Can., appellant.
H. D. Garrett, for accused, respondent.

McRUER, C.J.H.C.:-This is an appeal by way of stated case from the decision of J. C. Dunlap, Q.C., a Magistrate for the Province of Ontario, acquitting Calvin William George on a charge that he did on September 5, 1962, at Kettle Point Indian Reserve unlawfully hunt a migratory bird at a time not during the open season specified for that bird in violation *of* s. 5 (1) *(a)* of the *Migratory Bird Regulations,* P.C. 1958-1070, SOR/58-308, thereby committing an offence contrary to s. 12(1) of the *Migratory Birds Convention Act,* R.S.C 1952, c. 179.

The stated case shows that, (1) the accused is an Indian within the meaning of the *Indian Act,* R.S.C. 1952*,* c. 149; (2) on or-about September 5, 1962*,* he shot two ducks which were migratory birds within the definition of the *Migratory Convention Act;* (3) the ducks were shot on the reserve in an area purported to be prohibited by the Act at a time that was not an open season as prescribed by the Regulations published under the Act; and (4) the ducks were to be used for food and were not to be sold.

The learned Magistrate held that s.87 of the *Indian Act* made laws of general application applicable to Indians, subject to the terms of any treaties and that the treaty with the Chippewa Indians reserved to them the right to hunt at time on lands reserved under the treaty. The learned Magistrate held that the *Migratory Birds Convention Act* did not apply to the accused, an Indian hunting on the Kettle Point Reservation, and therefore dismissed the charge.

The rights of the accused as an Indian on a reservation have their roots very deep in Canadian history. Article 40 of the Articles of Capitulation signed by General Amherst as Commander in Chief of his Britannic Majesty's troops, and forces in North America and the Marquis de Vaudreuil "Governor and Lieutenant-General for the King in Canada" provides:

> The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chuse to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries. The actual Vicars General, and the Bishop, when the Episcopal see shall be filled, shall have leave to send to them new Missionaries when they shall judge it necessary.—"Granted except the last article, which has been already refused."

Following the Treaty of Paris in 1763 the Royal Proclamation of October 7, 1763, R.S.C. 1952, vol. 6, App. Ill, p. 3, gave to the Indians certain definite rights that have ever since been judicially recognized. The proclamation reads in part as follows [p. 6]:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been

> ceded to or purchased by Us, are reserved to them or any of them, as their *Hunting Grounds.* (The italics are mine.)

The proclamation forbids any Governor or Commander in Chief to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments or upon any lands which "not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them". The proclamation further provides that

> . . . all Persons whatever who have either wilfully or seated themselves upon any Lands within the Countries described, or upon any other Lands which, not having to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

Private purchase of lands from the Indians prohibited. It was further provided [p. 7]:

> . . . We have thought proper to allow Settlement; but that, it at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting of Assembly of the said Indians, to be held for that purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie . . .

For the purposes of this case the area reserved for the Indians included all that part of Ontario lying west of a line drawn from Lake Nipissing to the westerly head of Lake St. Francis, on the St. Lawrence River (see map appended to Part I, Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1750-1791).*

Trading with the Indians in this area was licensed regulated. This proclamation has been judicially interpreted in several cases and while I cannot find that the rights Indians on reserved land have been precisely define were the subject of consideration in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. At pp. 54-5 Lord Watson said:

> It was suggested in the course of the argument for the Dominion that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present" they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

"Usufructuary" is defined in Stroud's Judicial Dictionary 3rd ed., vol 4, p. 3190, as "One that hath the use and reaps the profit of anything".

In *Dominion of Canada v. Province of Ontario,* [1910] A.C. 637, Lord Loreburn, L.C., in considering a claim made by the Dominion of Canada to be recompensed by the Province of Ontario for compensation paid by the Dominion to the Salteaux tribe of the Ojibway Indians for release of their interest over a tract of land 50,000 square miles in extent, referred at p. 644 to "the overlying Indian interest" and stated that lands which are released from the overlying Indian interest enure to the benefit of the Province within which they are situated and said [pp. 644-5]:

> . . . And the principle sought to be enforced by the present appeal is that Ontario should recoup the Dominion for so much of the burden undertaken by the Dominion toward the Salteaux tribe as may properly be attributed to the lands within Ontario which had been *disencumbered of the Indian interest by virtue of the treaty.* (The italics are mine.)

Throughout the *Dominion of Canada* case and the *St. Catherine's* case it is recognized that the Indians' interest was an interest that attached to the land.

Mr. Ghobashy in his book *The Caughnawaga Indians and the St. Lawrence Seaway,* 1961, says at p. 25: "No case has been found where the Indian title was extinguished on Canadian territory by any process other than that of the revision of an old treaty or the making of a new one." I think that is a correct statement.

By a treaty made in 1827 between the "Chiefs and Principal Men of that part of the Chippewa Nation of Indians inhabiting and claiming the territory or tract of land" described in the treaty, and King George the Fourth (see Indian Treaties & Surrenders, vol. I, p. 71), an area of 2,200,000 acres of land in what is now part of Western Ontario was surrendered to the Crown in consideration of an annuity of £1,100 to be distributed as set out in the agreement. From this agreement certain parcels of land were reserved, totalling 17,951 acres, which include what is now known as the Kettle Point Indian Reserve. The treaty or agreement, as it may be called, recites in part (pp. 71-4) :

> Whereas, His Majesty being desirous of appropriating to the purposes of cultivation and settlement a tract of land hereinafter particularly described, lying within the limits of the Western District and District of London, in the Province of Upper Canada and heretofore *possessed and inhabited* by a part of the Chippewa Nation of Indians, it

was proposed to the Chiefs and Principal Men of the said Indians at a Council assembled for that purpose at Amherstburg, in the said Western District, on the twenty-sixth day of April, in the year of Our Lord one thousand eight hundred and twenty-five, that *they should surrender the said tract of land and the possession and the right of possession* heretofore enjoyed by them in the same to His Majesty, His heirs and successors for such recompense to be made by His Majesty to the said Nation of Indians as should at the said Council be agreed upon

. . . . .

And whereas, the tract of land intended and agreed to be surrendered as aforesaid has been since accurately surveyed, so that the same, as well as certain small reservations expressed to be made by the said Indians from and out of the said tract *for the use of themselves and their posterity,* can now be certainly defined. Now this Indenture witnesseth that . . . Chiefs and Principal Men of that part of the Chippewa Nation of Indians inhabiting and claiming the territory or tract of land hereinafter described, for and in consideration of . . . to be paid by His Majesty, His heirs and successors to the said Indians and their posterity in each and every year in the manner hereinafter mentioned, have, and each of them hath granted, bargained, sold, surrendered, released and yielded up, and by these presents do and each of them doth for themselves and on behalf of the said Nation of Indians whom they represent grant, bargain, sell, surrender, release and yield up unto our Sovereign Lord the now King, His heirs and successors, all and singular ... containing two million two hundred thousand acres, more or less, saving, nevertheless, and expressly reserving to the said Nation of Indians and their posterity at all times hereafter, for their own exclusive use and enjoyment, the part or parcel of the said tract which in hereinafter particularly described, . . . and which is situated at Kettle Point, on Lake Huron, that is to say (setting out in detail the area in which the Kettle Point Reserve is included) . . . together with all and every of the woods and underwoods, ways, waters, watercourses, improvements, profits, commodities, hereditaments and appurtenances on the said tract of land (saving and excepting the reserved tracts aforesaid) lying and being or thereto belonging, or in anywise appertaining, and also all the estate, right, title, interest, trust, property, possession, claim and demand whatsoever of them, the said Chiefs and Principal Men and of the people of the said Chippewa Nation of Indians and their heirs and posterity forever, of, in, to or out of the said two million and two hundred thousand acres of land (saving and excepting the several reserved tracts aforesaid) with their and every of their appurtenances ...

A perusal of this treaty makes it clear that the Indians on the Kettle Point Reserve still have all the rights enjoyed by their ancestors in that area.

Ever since the judgment of Lord Mansfield in *Campbell* v. *Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 it has been recognized that the Proclamation of 1763 at least had all the effect of a statute of the Parliament of Great Britain.

In *The King v. Lady McMaster,* [1926] Ex. C.R. 68 at p. 72, Maclean, J., said: "The proclamation of 1763, as has been held, the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed." With respect, I think there are authorities that warrant the view that the proclamation has even a greater force than a statute. *Campbell v. Hall* was discussed at length in *Sammut et al. v. Strickland,* [1938] A.C. 678, which dealt with the prerogative right of the Crown to legislate by letters patent and Orders in Council for the ceded colony of Malta. I think this case leaves it open to argue that since there was no reservation of a power of revocation of the rights given to the Indians in the Proclamation of 1763, those rights cannot now be taken away even by legislation. Whether this be true or not this much seems clear - that the Indians' rights to hunt for food on the lands reserved to them in the Treaty of 1827 cannot now be taken away by the Parliament of Canada short of legislation which expressly and directly extinguishes those rights. Further than this I need not go for the purposes of the case before me. Hence a general statute such as the *Migratory Birds Convention Act* is ineffective to circumscribe the rights of the Indians conferred on them by the Proclamation of 1763 in so far as those rights are enjoyed on land which has been reserved under the provisions of a treaty such as that of 1827. This view is reinforced by a study of the *Dominion of Canada* case which deals with the Treaty of 1873 made between the late Queen Victoria, acting on the advice of the Government of Canada, and the Salteaux tribe of Ojibway Indians. The effect of the treaty was to extinguish by agreement the Indians' interest in respect of a large tract of land described in the treaty in return for certain payments and other rights. Lord Loreburn, L.C., said [1910] A.C. at p. 644: "In making this treaty the Dominion Government acted upon the rights conferred by the Constitution" and at p. 646: "The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered *to take a surrender of it and to give equivalents in return. .* ." (The italics are mine.)

This case clearly recognizes that the "overlying Indian interest" in the lands reserved to the Indians is not something to be disposed of by any general Act of Parliament applicable to all citizens.

Counsel for the Crown relies on s. 9(1) of the *Interpretation Act,* R.S.C. 1952, c. 158, which reads:

9 (1) Every Act of the Parliament of Canada, unless the contrary intention appears, applies to the whole of Canada.

This provision must be read with s. 87 of the *Indian Act* which reads:

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

In any case, for reasons already stated, it would take much more than the provisions of the *Interpretation Act* to affect the rights claimed by the Indians in this case.

I wish to make it quite clear that I am not called upon to decide, nor do I decide, whether the Parliament of Canada by legislation specifically applicable to Indians could take away their rights to hunt for food on the Kettle Point Reserve. There is much to support an argument that Parliament does not have such power. There may be cases where such legislation, properly framed, might be considered necessary in the public interest but a very strong case would have to be made out that would not be a breach of our national honour.

The conclusions that I have arrived at are supported by two Canadian cases.

In *R. v. Wesley,* [1932] 4 D.L.R. 774, 58 C.C.C. 269, [1932] 2 W.W.R. 337, the Alberta Court of Appeal held that the Alberta *Game Act,* R.S.A. 1922, c. 70*,* did not take away the right of the Indians to hunt for food on unoccupied Crown lands or other lands on which the Indians have a right of access. McGillivray, J.A., speaking for the majority of the Court, did not put his judgment on the basis that the Alberta Act was *ultra vires* but based his judgment on the treaty rights of the Indians.

In *R. v. Sikyea* (1962), 40 W.W.R. 494, Sissons, J., held that the *Migratory Birds Convention Act* did not apply to Indians hunting for food in the Northwest Territories. At p. 504 he said: "There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging, or infringing upon the hunting rights of the Indians."

With this I agree but I would go further. Since the Proclamation of 1763 has the force of a statute, I am satisfied that whatever power the Parliament of Canada may have to interfere with the treaty rights of the Indians, the rights conferred on them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an Order in Council passed under the *Migratory Birds Convention Act.*

The appeal will be dismissed with costs.

Appeal dismissed.