REGINA v. SMITH

(1969) , 10 D. L. R. (3d) 759 (also reported: [1970] 3 C.C.C. 83, 9 C.R.N.S. 117, 71 W.W.R. 66)

Yukon Territory Territorial Court, Morrow J., 27 October 1969

Indians - Right to hunt in game sanctuary - Validity of Game Ordinances - Game Ordinance (Y.T.), s. 74 - Yukon Act (Can.), s. 16.

The appellant, an Indian, shot and killed a moose for food within the confines of a game sanctuary as described in the *Game Ordinance,* R.O.Y.T. 1958, c. 50, and was convicted of hunting game within a sanctuary contrary to s. 74(2) of the *Game Ordinance.* On appeal from conviction, *held, s.* 74(2) was *ultra vires* the Commissioner in Council. Section 16 of the *Yukon Act,* 1952-53 (Can.), c. 53, empowers the Commissioner in Council to make ordinances for the preservation of game in the Territory. While such ordinances may apply to Indians because of s. 17 [am. 1960, c. 24, s. 4 (1)] of the Act, that section contains an exception to the general authority in respect of Indians in that hunting for food on unoccupied Crown land cannot be restricted or prohibited unless the game in question has been declared by the Governor in Council to be game that is in danger of becoming extinct. There was no evidence that any such declaration had been made nor that moose were in danger of extinction.

[*R. ex rel. Clinton v. Strongquill,* 105 C.C.C. 262, [1953] 2 D.L.R. 264, 16 C.R. 194, [1953] 8 W.W.R. (N.S.) 247, apld; *Sigeareak El-53 v. The Queen,* [1966] 4 C.C.C. 393, 57 D.L.R. (2d) 536, [1966] S.C.R. 645, 49 C.R. 271, 56 W.W.R. 478, distd; *R. v. Smith,* 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 435, refd to]

APPEAL by accused from his conviction, by John B. Varcoe, Magistrate, of unlawfully hunting game contrary to s. 74 (2) of the Yukon Territory *Game Ordinance.*

E. H. Nielson, Q.C., for accused, appellant.
D. S. Collins, Q.C., for the Crown, respondent.

MORROW, J.:-The present matter came before me at Whitehorse on February 10, 1969, as an appeal from the judgment of His Worship Magistrate John B. Varcoe dated December 30, 1968. The learned Magistrate found the accused guilty and fined him $25 or in default 7 days' imprisonment. The judgment of the learned Magistrate is contained in his reasons for judgment of the same date and is based on an agreed set of facts.

The information is as follows:

> The informant says that he has reasonable and probable grounds to believe and does believe that Tom Smith, on or about the 3rd. day of October A.D. 1968, in the Pine Creek Game Sanctuary as described in Schedule C of the Yukon Territory Game Ordinance, did unlawfully hunt game contrary to Section 74 (2) of the Yukon Territory Game Ordinance.

Both counsel before me filed the same agreement as to facts as had been placed before the learned Magistrate. The agreement was as follows:

1. The accused, Tom Smith, is an Indian within the definition set out in the Indian Act, R.S.C. 1952, ch. 149;
2. The accused shot and killed a moose for food on the 3rd day October, 1968.
3. The moose was shot and killed within the confines of the Creek Game Sanctuary as described in Schedule C of the Game Ordinance, R.O.Y.T., 1958 ch. 50;
4. There are no "reserves" as defined in the Indian Act, (supra), within the Yukon Territory;
5. There is not now, nor has there ever been in existence, an "treaty" with any of the Yukon Indian people, tribes or bands;
6. The Pine Creek Game Sanctuary forms part of the ancient hunting grounds of the accused (appellant) and his ancestors for purposes of providing food;
7. That no part of the Yukon Territory was ever included in lands granted to the Hudson's Bay Company, or commonly known as Rupert's Land.

Section 74 of the *Game Ordinance,* R.O.Y.T. 1958, c. 50 states:

> 74(1) Each area described in Schedule C is a game sanctuary and shall be known by the name immediately preceding its description in that Schedule.
> (2) Except as provided in section 38, no person shall hunt game within a game sanctuary.

It should be observed here that s. 38 [am. 1967 (1st Sess.), c. 11, s. 14] permits hunting for scientific purposes by special licence.

Schedule C under the heading "Description of Game Sanctuaries" describes three sanctuaries, the third one being called "Pine Creek Game Sanctuary".

Judgment was reserved until this date to permit counsel to prepare and file written argument.

In his reasons for judgment the learned Magistrate, after reviewing the relevant legislation and agreed facts, proceeded to satisfy himself that Indians in the Yukon Territory have hunting rights on unoccupied lands and that these rights have existed from time immemorial. He further found that these rights could be abrogated or regulated by the Parliament of Canada and that by s. 17 [am. 1960, c. 24, s. 4 (1)] of the *Yukon Act,* 1952-53 (Can.), c. 53, Parliament had empowered the

Commissioner in Council of the Yukon Territory to make Ordinances in relation to the preservation of game applicable to Indians. The next question was whether the sanctuary was unoccupied lands and this was found by him to be Crown land set aside for the special purpose of a game sanctuary and hence not "unoccupied" within the meaning of s. 17 above.

In his argument on the appeal, counsel for the appellant of course takes issue with the construction put on s. 17 by the learned Magistrate, but counsel goes further and argues generally that the Yukon was not Hudson's Bay land, that the Royal Proclamation of 1763 applies, it has the force of a statute, that it preserves the hunting rights of the Indians until the Parliament of Canada takes them away, and that the Commissioner in Council has no jurisdiction to abrogate these rights and that the *Game Ordinance* is *ultra vires* in so far as it tries to in the absence of a declaration by the Governor in Council that the game in question is in danger of becoming extinct.

It becomes necessary therefore to examine the constitutional question as well as the meaning of the word "unoccupied".

The *Yukon Act* provides for the Government of the Territory by a Commissioner in Council. Section 16 of this statute sets forth legislative powers. The appropriate portion sets forth:

> 16. The Commissioner in Council may, subject to the provisions of this Act and any other Act of the Parliament of Canada, make ordinances for the government of the Territory in relation to the following classes of subjects, namely,
>
> (*q*) the preservation of game in the Territory;

Power to delegate authority to legislate has been well recognized by all levels of the Courts: *Hodge v. The Queen* (1883), 9 A.C. 117; *Ouimet v. Boyer* (1912), 20 C.C.C. 458, 3 D.L.R. 593, 46 S.C.R. 502, and *Reference re Regulations (Chemicals) under War Measures Act,* 79 C.C.C. 1, [1943] 1 D.L.R. 248, [1943] S.C.R. 1. The provisions of the *Game Ordinance* with which we are here concerned would appear to have been passed under the authority of s. 16 of the *Yukon Act* above. It is interesting to note that the ordinance itself is recited as:

> An Ordinance respecting the Conservation of Game in the Yukon Territory.

While the use of the word "preservation" as used in s. 16 of the *Yukon Act* might have brought the objective more clearly within the authority, I do not consider there is sufficient difference in the normal meanings of "conservation" and "preservation" to make any difference. For the purposes of the present case I will use the terms as synonymous. The whole tone of the Ordinance appears to be directed to the same general objective, namely, the preservation of game and to provide for regulated hunting.

The problem, however, is as to whether it can applicable to Indians or whether if applicable then can it be held to be *ultra vires* of the legislative authority of the Commissioner in Council. It is unnecessary for me to discuss the issue as to whether such an Ordinance can bind Indians in the Yukon in abrogation of their time-honoured hunting rights because of the view I take of the legislation itself. Accordingly, I do not propose discussing treaty or non-treaty rights, the effect of the Royal Proclamation of 1763 and such related matters.

An amendment to the *Yukon* Act took place in 1960 (c. 24). Prior to the amendment, s. 17 set forth a restriction on the powers of the Commissioner in Council as follows:

> 17. Nothing in section 16 shall be construed to give the Commissioner in Council greater powers with respect to any class of subjects described therein than are given to legislatures of the provinces of Canada under sections 92 and 95 of the *British North America Act, 1867*, with respect to similar subjects therein scribed.

The 1960 amendment [by s. 4 (1)] added two subsections s. 17:

> “(2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make Ordinances for the government of the Territory, in relation to the preservation of game in the Territory, that are applicable to and in respect of Indians and Eskimos, and Ordinances made by the Commissioner in Council in relation to the preservation of game in the Territory, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.
>
> "(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct."
>
> 4(2) From the day on which this Act comes into force, the provisions of the Ordinance entitled "An Ordinance respecting the Conservation of Game in the Yukon Territory", . . . being chapter 3 of the Ordinances of the Yukon Territory, First Session have the same force and effect in relation to Indians and Eskimos as if on that day they had been re-enacted in the same terms.

Whatever the situation may have been before the amendment, in my opinion the amendment now purports to give the Commissioner in Council power to legislate "in relation to the preservation of game in the Territory" and to make it "applicable to Indians and Eskimos". The amendment is made retroactive in effect so as to include the present ordinance.

Subsection (2) above requires the exercise of this power to be clearly directed to the preservation of game before it can apply to and affect Indians and Eskimos.

Subsection (3), however, sets forth a very critical and important exception to the general authority in respect to Indians and Eskimos. Hunting for food on unoccupied Crown land cannot be restricted or prohibited. This applies to all game unless it has been "declared by the Governor in Council to be game in danger of becoming extinct". Unlike the situation encountered in the caribou case from the Northwest Territories, *Sigeareak El-53 v. The Queen,* [1966] 4 C.C.C. 393, 57 D.L.R. (2d) 536, [1966] S.C.R. 645, where there was such a declaration, there is no evidence before me of any such declaration in respect of moose, nor is there any suggestion that moose are in any danger of extinction in the Yukon at the present time.

Unless, therefore, a game sanctuary can be considered as "occupied Crown land" it would appear that the prohibition cannot be upheld. The learned Magistrate reached the conclusion that the Pine Creek Sanctuary was occupied land. In referring to the reasoning of Turgeon, J.A., at p. 136 in *R. v. Smith,* 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 435, he concludes by saying: "It was held in the *Smith* case that when land was set aside for a special purpose, it can no longer be regarded as 'unoccupied Crown lands'." If this be a correct construction on the wording used then the effect is that the Commissioner in Council by merely designating land to be a game sanctuary can circumvent the "exception" contained in s. 17 (3). In my opinion the language of s. 74 when read in its normal context with the whole ordinance constitutes a complete prohibition which if allowed to stand would have the effect of nullifying the exceptions and accordingly must be declared to be *ultra vires* of the Commissioner in Council.

In reaching the above conclusion I am not unmindful of the decisions on somewhat similar legislation by the Saskatchewan Court of Appeal in *R. ex rel. Clinton v. Strongquill,* 105 C.C.C. 262, [1953] 2 D.L.R. 264, 16 C.R. 194. I quote from McNiven, J.A., in part, where he says at pp. 285-6:

> 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.

and again at pp. 287-8:

> 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 par. 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 par. 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 par. 12.

In the result the appeal is allowed, the conviction is set aside, and the fine and costs, if any, will be refunded. Under the circumstances there will be no costs of the appeal.

Appeal Allowed.