# DANIELS v. THE QUEEN

(sub non. **Daniels v. White and The Queen)**

(1968), 2 D.L.R. (3d) 1 (also reported: [1969] 1 C.C.C. 299, [1968] S.C.R. 517, 4 C.R.N.S. 176, 64 W.W.R. 385)

Supreme Court of Canada, Cartwright C.J.C., Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ., 29 April 1968

(on appeal from judgment of Manitoba Court of Appeal, reported **sub nom. Regina v. Daniels**, **supra** p.190)

**Indians - Right to hunt game birds for food in Manitoba - Possession of game birds contrary to Migratory Birds Convention Act (Can.) - Whether Manitoba Indians subject to Act or exempted therefrom by virtue of agreement between Canada and Manitoba - Migratory Birds Convention Act (Can.), s. 12(1) - Manitoba Natural Resources Act (Can.) - Manitoba Natural Resources Act (Man.) - B.N.A. Act, 1930 - Indian Act (Can.).**

The accused was an Indian from the Province of Manitoba and was convicted of having game birds in his possession in contravention of a. 12(1) of the *Migratory Birds Convention Act,* R.S.C. 1952, C. 179. The issue in the appeal was whether para. 13 of an agreement made on December 14, 1929, between the Government of Canada and the Government of Manitoba exempted the accused from the provisions of the *Migratory Birds Convention Act* and the Regulations thereunder. Paragraph 13 of the agreement provided as follows:

> "13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistance, Canada agrees that the law 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."

*Held,* Cartwright, C.J.C., Ritchie, Hall and Spence, JJ., dissenting: The appeal should be dismissed and the conviction affirmed.

*Per* Judson, J. (Fauteux, Abbott and Martland, JJ., concurring): Paragraph 13 of the agreement did not have the effect of exempting the accused from the provisions of the *Migratory Birds Convention Act* and the Regulations thereunder. The whole tenor of the agreement was that of a conveyance of land imposing specified obligations and restrictions on the transferee, not on the transferor. This applied particularly to para. 13, which made provincial game laws applicable to Indians in the Province, subject to the proviso contained therein. That only provincial game laws were in the contemplation of the parties, and not federal enactments, was underscored by the words "which the Province hereby assures to them" in para. 13. Care was taken in framing para. 13 that the Legislature of the Province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands. The agreement and the legislation confirming it did no more than impose specified obligations and restrictions on the transferee Province. They did not repeal implication a statute of Canada, giving to an international convention.

*Per* Pigeon J.: This was a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. It could not be said that when Canada stipulated in para. 13 of the agreement "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 seasons of the year ..." an intention was expressed in clear language and without ambiguity, that the provisions of *the Migratory Birds Convention Act* would be amended contrary to Canada's international obligations. The least that could be said was that the intention to derogate from the statute implementing the treaty was not clearly expressed. It was perfectly possible without doing violence to the language in the agreement to construe the provision under consideration as applicable solely to provincial laws and thus to avoid any conflict. The purpose of the agreement as stated in its preamble was that the Province of Manitoba be placed in a position of equality with the other Provinces with respect to the administration and control of its natural resources. It was quite consistent with this declared object to provide that provincial laws respecting the use of some resources, namely, fish and game, should apply to Indians, subject to restriction, the effect of which was to carry out Canada's treaty obligation towards the Indians in that respect. On the other hand, it would not only be foreign to this object, but even inconsistent with it, to provide for an implied modification of the *Migratory Birds Convention Act.*

*Per* Cartwright, C.J.C. (dissenting): The words "which the Province hereby assures to them" do not cut down "the right of hunting, trapping and fishing game and fish for food at all seasons of the year" which, in plain and unequivocal words, the clause says that the Indians shall have. The right of hunting, trapping and fishing given to the Indians by the words of para. 13 of the agreement has been, since 1930, enshrined in an amendment to our Constitution and given the force of law notwithstanding anything in any Act of the Parliament of Canada. It was impossible to uphold the conviction of the accused unless, by the application of some rule of construction, there could be inserted in s. 1 of the *B.N.A. Act,* 1930 (U.K.), c. 26, immediately after the words "Parliament of Canada" the words "except the *Migratory Birds Convention Act".* There was no such rule of construction which would permit such a course.

*Per* Hall, J. (Ritchie and Spence, JJ., concurring), dissenting: The words in para. 13 of the agreement "which the Province hereby assures to them" did not have the effect of limiting the rights thereby accorded to the Indians to provincial rights, but constituted additional assurance of the general rights described in that paragraph. In view of s. 1 of the *B.N.A. Act, 1930,* giving the agreement the force of law "notwithstanding anything in . . . any Act of Parliament of Canada", the agreement took precedence over the *Migratory Birds Convention Act* and the Regulations thereunder with the effect that that Act did not apply to the accused.

[*Collco Dealings Ltd. v. Inland Revenue Commissioners*, [1962] A.C. 1, consd*; Sikyea v. The Queen*, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, 44 C.R. 266, [1964] S.C.R. 642, 49 W.W.R. 306; affg [1964] 2 C.C.C 325, 43 D.L.R.

(2d) 150, 43 C.R. 83, 46 W.W.R. 65*; R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, 47 C.R. 382, [1966] S.C.R. 267; *Sigeareak E1-53 v. The Queen,* [1966] 4 C.C.C. 393, 57 D.L.R. (2d) 536, 49 C.R. 271, [1966] S.C.R. 645, 56 W.W.R. 478*; Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, 41 C.R. 403, [1964] S.C.R. 81, 46 W.W.R. 121*; R. v. Wesley,* 58 C.C.C. 269, [1932] 4 D.L.R. 774, 26 Alta. L.R. 433 [1932] 2 W.W.R. 337*; R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi; *R. v. Smith*, 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 433; *British Columbia Elec. R. Co. Ltd. v. Stewart,* 14 D.L.R. 8, 16 C.R.C. 54, [1913] A.C. 816*; Summers v. Holborn District Bd. of Works,* [1893] 1 Q.B. 612*; Danby v. Coutts & Co*. (1885), 29 Ch.D. 500; *R. v. Leach,* [1912] A.C. 305, refd to]

APPEAL by the accused from the judgment of the Court of Appeal for Manitoba, 57 D.L.R. (2d) 365, 49 C.R. 1, 56 W.W.R. 234, restoring the accused's conviction registered by Macphee, P.M., on a charge of having game birds in his possession, contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

*William R. Martin, Q.C.,* for accused, appellant.
*D. H. Christie, Q.C.,* for the Crown, respondent,

CARTWRIGHT, C.J.C. (dissenting) :-The question to be determined on this appeal, the relevant facts (all of which are undisputed) and the historical background in the light of which the controversy must be considered are set out in the reasons of other members of the Court.

That the problem is not free from difficulty is attested by the differences of opinion in the Courts below and in this Court.

Since the decisions of this Court in *Sikyea v. The Queen,* [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642, and *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267, it must be accepted that, if it were not for the provisions contained in para. 13 of the agreement between the Government of Canada and the Government of Manitoba which was approved and given the force of law by statutes of the Imperial Parliament [*B.N.A. Act,* 1930 (U.K.), c. 26] the Parliament of Canada [*Manitoba Natural Resources Act*, 1930 (Can.), c. 29] and the Legislature of Manitoba [*Manitoba Natural Resources Act,* 1930 (Man.), c. 30, now R.S.M. 1954, c. 180], the conviction of the appellant would have to be upheld.

Nothing would be gained by my repeating the reasons which I gave in the *R. v. George* case for thinking that both it and *R. v. Sikyea* case should have been decided differently. I accept those decisions.

The first question before us is as to the meaning of the words used in para. 13 of the agreement and particularly the following:

> ... 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 might have a right of access.

I share the view of my brothers Ritchie and Hall that the words "which the Province hereby assures to them" do not cut down "the right ... of hunting, trapping and fishing game and fish for food at all seasons of the year" which in plain and unequivocal words the clause says that the Indians shall have.

In the *Sikyea,* case and the *George* case the Court decided that this right, secured to the Indians by treaty, could be, and as a matter of construction had been, abrogated by the terms of the *Migratory Birds Convention Act,* R.S.C. 1952, c. 179, and the Regulations *[Migratory Bird Regulations,* P.C. 1958-1070, SOR/58-308] made thereunder. In the *George* case the Court held that while s. 87 of the *Indian Act,* R.S.C. 1952, c. 149, preserved the treaty rights of the Indians against encroachment by laws within the competency of the provincial Legislature it had no such effect in regard to an Act of Parliament.

The situation in the case at bar is different. The right of hunting, trapping and fishing given to the Indians by the words of para. 13 quoted above has been, since 1930, enshrined in an amendment to our Constitution and given (*B.N.A. Act*, 1930 (U.K.), c. 26, s. 1]

> ... 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.

I find it impossible to uphold the conviction of the appellant unless we are able to say that, by the application of some rule of construction, there should be inserted in s. 1 of the *B.N.A. Act*, 1930, immediately after the words "Parliament of Canada" the words "except the *Migratory Birds Convention* Act". I know of no rule which permits us to take such a course.

I would dispose of the appeal as proposed by my brother Hall.

FAUTEUX, ABBOT and MARTLAND, JJ., concur with JUDSON, J.

JUDSON, J.:-The appellant is an Indian within the meaning of s. 2 (1) (*g*) of the *Indian Act,* R.S.C. 1952, c. 149. He was convicted on September 14, 1964, of having in his possession

> Migratory Game Birds, during a time when the capturing, killing, or taking of such birds, is prohibited, contrary to the Regulations under the *Migratory Birds Convention Act,* thereby committing an offence under Section 12(1) of the said *Migratory Birds Convention Act.*

On an appeal by way of trial *de novo* his conviction was quashed. On a further appeal to the Court of Appeal of Manitoba, his conviction was restored and the sentence affirmed by a majority judgment [57 D.L.R. (2d) 365, 49 C.R. 1, 56 W.W.R. 234]. He appeals to this Court with leave.

The issue in this appeal is whether by operation of para. 13 of the agreement made on December 14, 1929, between the Government of the Dominion of Canada and the Government of the Province of Manitoba (hereinafter referred to as "the agreement") the appellant was exempted from compliance with the *Migratory Birds Convention Act* [R.S.C. 1952, c. 179], and Regulations *[Migratory Bird Regulations,* P.C. 1958-1070, SOR/58-308], made thereunder bearing in mind that at the relevant time and place he was an Indian who had hunted game for food on land to which he had a right of access.

There can be no doubt that apart from para. 13 of the agreement above quoted the appellant was, in the circumstances of this case, subject to the *Migratory Birds Convention Act* and Regulations. See: *Sikyea v. The Queen,* [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642; *R. v. George,* [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267; *Sigeareak E1-53 v. The Queen,* [1966] 4 C.C.C. 393, 57 D.L.R. (2d) 536, [1966] S.C.R. 645.

Paragraph 13 of the agreement provides [see 1930 (Can.), c. 29]:

> 13. 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.

Paragraph 13 is part of an agreement dated December 14, 1929, between the Government of Canada and the Government of the Province of Manitoba for the transfer to the Province from the Dominion of all ungranted Crown lands. This agreement was approved by the Manitoba Legislature and by Parliament. *(Manitoba Natural Resources Act,* 1930 (Man.), c. 30; *Manitoba Natural Resources Act,* 1930 (Can.), c. 29.) It was subsequently affirmed by the *B.N.A. Act,* 1930 (U.K.), c. 26. Three similar agreements involving Alberta, Saskatchewan and British Columbia were subsequently affirmed.

Section 1 of the *B.N.A. Act,* 1930 (U.K.), c. 26, provides:

> 1. 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.

Prior to the coming into force of the agreement, title to all ungranted Crown lands in the Province of Manitoba was vested in the Dominion. Briefly, the relevant history is that by the *Rupert's Land Act,* 1868 (U.K.), c. 105 (see R.S.C. 1952, vol. VI, p. 99), provision was made for the surrender of Rupert's Land by the Hudson's Bay Company and for the acceptance thereof by Her Majesty. Section 3 of the said Act provided:

> . . . that such Surrender shall not be accepted by Her Majesty until the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty, and embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada in pursuance of the One hundred and forty-sixth Section of the British North America Act, 1867 . . .

By Imperial Order in Council June 23, 1870, Rupert's Land was admitted into and became part of the Dominion of Canada effective July 15, 1870 (R.S.C. 1952, vol. VI, *p. 113).* By operation of the Manitoba Act, 1870 (Can.), c. *3,* subsequently affirmed with retrospective effect by the Parliament of the United Kingdom *(B.N.A. Act,* 1871 (U.K.), c. 28, s. 5, see R.S.C. 1952, vol. VI, p. 146), the Province of Manitoba was carved out of Rupert's Land and came into being on the same date Rupert's Land entered Confederation. By s. 30 of the Manitoba Act, 1870, all ungranted or waste lands in the Province vested in the Crown to be administered by the Government of Canada for the purposes of the Dominion.

The Crown in right of the Dominion being the owner of all Crown lands, including the mines and minerals therein, in the Province of Manitoba that Province, together with Alberta and Saskatchewan, was in a less favourable condition than the other Provinces who by operation of s. 109 of the *B.N.A. Act, 1867* retained Crown lands upon entering Confederation. The purpose of the agreement was to transfer these lands to Manitoba in order that it might be in the same position as the other Provinces under s. 109 of the *B.N.A. Act, 1867.* This is apparent from the preamble to and para. 1 of the agreement and from the following cases where the matter was

under consideration: *Saskatchewan Natural Resources Reference,* [1931] 1 D.L.R. 865, [1931] S.C.R. 263; affd [1931] 4 D.L.R. 712, [1931] 3 W.W.R. 488, [1932] A.C. 28; *Reference re Refunds of Dues re Timber Permits,* [1934] 1 D.L.R. 43, [1933] S.C.R. 616; affd [1935] 2 D.L.R. 1, 1 W.W.R. 607, [1935] A.C. 184; *Anthony et al. v. A.-G. Alta.,* [1943] 3 D.L.R. 1, [1943] S.C.R. 320; *A.-G. Alta. et al. v. Huggard Assets Ltd.,* [1951] 2 D.L.R. 305, [1951] S.C.R. 427; revd [1953] 3 D.L.R. 225, 8 W.W.R. (N.S.) 561, [1953] A.C. 420; *A.-G. Alta. v. West Canadian Collieries Ltd. et al. and A.-G. Man.,* [1953] 3 D.L.R. 145, 8 W.W.R. (N.S.) 275, [1953] A.C. 453.

The whole tenor of the agreement is that of a conveyance of land imposing specified obligations and restrictions on the transferee, not on the transferor. This applies, in particular, to para. 13, which makes provincial game laws applicable to Indians in the Province subject to the proviso contained therein. That only provincial game laws were in the contemplation of the parties, and not federal enactments, is underscored by the words "which the Province hereby assures to them" in para. 13. As indicated by para. 11 of the agreement and para. 10 of the Alberta and Saskatchewan agreements, Canada, in negotiating these agreements, was mindful of the fact it had treaty obligations with Indians on the prairies. These treaties, among other things, dealt with hunting by Indians on unoccupied lands. For example, Treaties 5 and 6, which cover portions of Manitoba, Saskatchewan and Alberta, provide:

> 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.

Treaty 8, which covers portions of Alberta and Saskatchewan, provides:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, 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, lumbering, trading or other purposes.

Treaty 7, which covers a portion of Alberta, is to the same effect.

It being the expectation of the parties that the agreement would be given the force of law by the Parliament of the United Kingdom (para. 25) care was taken in framing para. 13 that the Legislature of the Province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands. Under the agreement this could only be done by concurrent statutes of the Parliament of Canada and the Legislature of the Province, in accordance with para. 24 thereof.

The majority opinion in the Manitoba Court of Appeal held that the agreement, affirmed as it was by legislation of all interested Governments, could not be reconciled with the *Migratory Birds Convention Act* and that the latter Act must prevail. The *Migratory Birds Convention Act,* being of general application throughout Canada, ought not to be construed as circumscribed by the restricted legislation that is to be found in the *Manitoba Natural Resources Act.* It was desirable that a matter within the legislative responsibility of Parliament and governed by international treaty be uniform in application throughout the country unless specifically provided otherwise.

The dissenting opinion would have held that para. 13 of the agreement should prevail over the *Migratory Birds Convention Act* notwithstanding that such a result gives the Act a different effect in Manitoba from that which it has in other parts of Canada.

The *Migratory Birds Convention Act* was enacted in 1917. It confirms a treaty made between Canada and the United States. The Regulations under the Act go back to 1918 (P.C. 871, April 23, 1918). In my opinion, the agreement and the legislation of 1930 confirming it did no more than impose specified obligations and restrictions upon the transferee Province. They did not repeal by implication a statute of Canada giving effect to an international convention.

On this subject I adopt the law as stated in 36 Hals., 3rd ed., p. 465:

> Repeal by implication is not favoured by the courts for it is to he presumed that Parliament would not intend to effect so important a matter as the repeal of a law without expressing its intention to do so. If, however, provisions are enacted which cannot be reconciled with those of an existing statute, the only inference possible is that Parliament, unless it failed to address its mind to the question, intended that the provisions of the existing statute should cease to have effect, and an intention so evinced is as effective as one expressed in terms. The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together. If it is reasonably possible so to construe the provisions as to give effect to both, that must be done; and their reconciliation must in particular be attempted if the later statute provides for its construction as one with the earlier, thereby indicating that Parliament regarded them as compatible, or if the repeals expressly effected by the later statute are so detailed that failure to include the earlier provision amongst them must be regarded as such an indication.

I would dismiss the appeal.

RITCHIE, J. (dissenting) :-I have had the benefit of reading the reasons for judgment prepared by other members of the Court in which the circumstances giving rise to this appeal are fully recited.

I agree with Mr. Justice Hall that the words "which the Province hereby assures to them" as they occur in para. 13 of the agreement which is a schedule to the *Manitoba Natural Resources Act,* 1930 (Can.), c. 29, do not have the effect of limiting the rights thereby accorded to Indians, to provincial rights, but rather that they constitute additional assurance of the general rights described in the said paragraph.

Like my brother Hall, I can only read the provisions of s. 1 of the *British North America Act,* 1930, as giving the agreement "the force of law notwithstanding anything in ... any Act of the Parliament of Canada . . ." and I am therefore of opinion that the agreement takes precedence over he *Migratory Birds Convention Act,* R.S.C. 1952, c. 179, and the Regulations made thereunder, with the result that these enactments do not apply to Indians in Manitoba when engaged in hunting migratory birds for food in the areas set out in para. 13.

I would accordingly dispose of this matter in the manner proposed by my brother Hall.

HALL, J. (dissenting) :-The facts in this appeal are not in dispute. The appellant, Paul Daniels, who is a Treaty Indian of the Chemahawin Indian Reserve in the Province of Manitoba, was convicted by Police Magistrate Neil Macphee, at The Pas, Manitoba, for an offence contrary to 9. 12(1) of the *Migratory Birds Convention Act,* R.S.C. 1952, c. 179. The charge on which he was convicted was that he, the said

> Paul Daniels, of Chemahawin Indian Reserve, Manitoba, on the 3rd day of July, A.D. 1964, at Chemahawin Indian Reserve, in the Province of Manitoba, did unlawfully and without lawful excuse have in his possession Migratory Game Birds, during a time when the capturing, killing or taking of such birds is prohibited, contrary to the regulations under the Migratory Birds Convention Act, thereby committing an offence under Section 12(1) of the said Migratory Birds Convention Act.

Against the conviction the accused appealed to the County Court by way of trial *de novo*. His Honour J. W. Thompson, sitting as a Judge of the County Court of Manitoba, allowed the appeal and acquitted the accused. The Crown then took an appeal to the Court of Appeal for Manitoba which Court, Freedman, J.A., dissenting, allowed the appeal and restored the conviction. The appellant then applied for and was given leave to appeal to this Court.

On July 3, 1964, the appellant had in his possession two wild ducks, one described as a redhead and the other a mallard or greenhead. At a point along the Saskatchewan River, within the Reserve, he had, on his own admission, shot and killed the birds for food and they were being cooked over a campfire when two constables of the R.C.M.P. entered the area. Section 6 of the *Migratory Birds Convention* Act provides:

> 6. No person, without lawful excuse, the proof whereof shall lie on such person, shall buy, sell or have in his possession any migratory game bird, migratory insectivorous bird or migratory nongame bird, or the nest or egg of any such bird or any part of any such bird, nest or egg during the time when the capturing, killing or taking of such bird, nest or egg is prohibited by this Act.

Under s. 3 (*b*) (i) "migratory Game birds" includes wild ducks. Section 12 (1) of the Act provides that every person who violates any provision of this Act or any Regulation, is, for each offence, liable upon summary conviction to a fine of not more than $300 and not less than $10, or to imprisonment for a term not exceeding six months or to both fine and imprisonment.

Section 5(1) of the Regulations [*Migratory Bird Regulations*, P.C. 1958-1070, SOR/58-308] provides:

> 5(1) Unless otherwise permitted under these Regulations to do so, no person shall
> (a) in any area described in Schedule A, kill, hunt, capture, injure, or take or molest a migratory bird at any time except during an open season specified for that bird and that area in Schedule A . . .

Part VII of sch. A to the Regulations defines the open season for ducks in Manitoba. In the area north of parallel 53 which includes the Chemahawin Indian Reserve, the open season is from noon September 11th to November 28th, inclusive of the closing date.

It is further provided in s. 5 (2) of the Regulations:

> (2) Indians and Eskimos may take auks, auklets, guillemots, murres, puffins and scoters and their eggs at any time for human food or clothing, but they shall not sell or trade or offer to sell or trade birds or eggs so taken and they shall not take such birds or eggs within a bird sanctuary.

Unless the appellant's status as an Indian in Manitoba permits him to hunt and possess migratory game birds at all seasons of the year, he was properly convicted: *R. v. Sikyea,* [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 641.

The appellant claimed immunity from the provisions of the *Migratory Birds Convention Act* by virtue of the *Manitoba Natural Resources Act,* 1930 (Can.), c. 29, which he contends exempts him from the operations of the *Migratory Birds Convention Act* because he is an Indian residing in the Province of Manitoba.

In the year 1929, some 12 years after the enactment of the *Migratory Birds Convention Act,* the Government of Canada and the Government of Manitoba reached an agreement respecting the transfer to Manitoba of the unalienated natural resources within the Province. The agreement was approved by the Parliament of Canada in the *Manitoba Natural Resources Act* and by the Legislature of Manitoba by the *Manitoba Natural Resources Act,* R.S.M. 1954, c. 180 [originally 1930, c. 30]. The schedule to both statutes contains the terms of the agreement, in which para. 13 reads as follows:

> 13. 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.

This paragraph of the agreement was dealt with by this Court in *Prince and Myron v. The Queen,* [1964] 3 C.C.C. 2, 41 C.R. 403, [1964] S.C.R. 81, which held that Indians in Manitoba hunting for food on all unoccupied Crown lands and on any other lands to which they may have rights of access were not subject to any of the limitations which the *Game and Fisheries Act,* R.S.M. 1954, c. 94 [since renamed *Fisheries Act* by 1963, c. 29, ss. 1, 21, imposes upon the non--Indian residents of Manitoba. Section 72(1) [since rep. 1963, c. 29, s. 6] of the *Game and Fisheries Act,* R.S.M. 1954, c. 94, read as follows:

> 72(1) Notwithstanding this Act, and in so far only as is necessary to implement The Manitoba Natural Resources Act, any Indian may hunt and take game for food for his own use at all seasons of the year on all unoccupied Crown lands and on any other lands to which the Indian may have the right of access.

The question which falls to be determined in this appeal is whether the terms of the agreement between the Government of Canada and the Government of Manitoba as ratified by Parliament and by the Legislature of Manitoba and confirmed at Westminster in the *B.N.A. Act,* 1930 (U.K.), c. 26, take precedence over the provisions of the *Migratory Birds Convention Act* and the Regulations made thereunder. If full effect is to be given to para. 13 of the agreement in question, it must be held that the provisions of the *Migratory Birds Convention* Act and the Regulations made thereunder do not apply to Indians in Manitoba when engaged in hunting migratory birds for food in the areas set out in the section. On the other hand, if the provisions of the *Migratory Birds Convention Act* take precedence, the right of Indians in Manitoba to hunt game for food at all seasons of the year in accordance with said para. 13 is wiped out. Accordingly, the decision must be made as to which legislation is paramount.

Freedman, J.A., in his dissenting judgment in the Court of Appeal [57 D.L.R. (2d) 365, 56 W.W.R. 234, 49 C.R. 1] dealt with the problem as follows [pp. 369-70] :

> At first blush it might be thought that the reference to Indians and their hunting rights both in the Convention and in the regulations of the *Migratory Birds Convention Act* - under which they are permitted to hunt scoters, auks, auklets, etc. - settles the matter. Obviously such rights are far smaller than the unrestricted right to hunt all game for food, which is provided by para. 13 of *The Manitoba Natural Resources Act.* The reference to Indians in the Convention and in the regulations is in general terms, no exception being made with regard to Indians of Manitoba or elsewhere. It might accordingly be plausibly argued that the Indians in Manitoba have only such rights with respect to migratory birds as are conferred by the *Migratory Birds Convention Act.* But this is not necessarily so. We must remember that when the Convention of 1917 was entered into, the agreement relating to the transfer of Manitoba's natural resources was not yet in existence nor even in contemplation. Hence no exception with regard to Manitoba Indians could have been expected in the Convention. As for the regulations of 1958, it is true that they were enacted subsequent to *The Manitoba Natural Resources Act* and that they contain no exception in favour of Indians of Manitoba. But the regulations could not enlarge or go beyond the provisions of the statute pursuant to which they were enacted. Rather they would conform to the terms of that statute; so no such exception would be expected in the Regulations either.
>
> The parallel argument on the other side appears to me to be far more cogent. The terms of para. 13 contained in the *Manitoba Natural Resources Act* are comprehensive and permit the hunting by Indians of game for food at all seasons of the year. No exception is made with respect to migratory birds, even though the *Migratory Birds Convention Act* had been on the statute books since 1917. Instead of making the provisions of para. 13 subject to the terms of the *Migratory Birds Convention Act,* the legislators did quite the opposite. They enshrined the agreement within the Canadian constitutional frame work by having it confirmed at Westminster in the *B.N.A. Act, 1930,* and declared it should have the force of law "notwithstanding anything in . . . any Act of the Parliament of Canada". I believe it should be given that force and not be read as subject to the provisions of the *Migratory Birds Convention Act.*
>
> I am conscious of the fact that this conclusion will give to the *Migratory Birds Convention Act* a different effect in Manitoba (and incidentally in Saskatchewan and Alberta, which have similar provisions to para. 13) from that which

it has in other parts of Canada. The decision of the Supreme Court of Canada in *R. v. Sikyea,* 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642, upheld the application of the *Migratory Birds Convention Act* to an Indian of the Northwest Territories notwithstanding hunting rights contained in treaties. The decision of that Court in *R. v. George* (January 25, 1966), not yet reported [since reported 55 D.L.R. (2d) 386, [1966] 3 C.C.C. 137, [1966] S.C.R. 267], came to the same conclusion as regards an Indian of Ontario. In neither case, of course, did para. 13 in the *Manitoba Natural Resources Act* apply. If the application of para. 13 gives to the *Migratory Birds Convention Act* a disparate result in different parts of Canada, that is simply an unfortunate but inevitable consequence of the conflicting legislation on the subject. If any remedy is thought desirable it would have to come from Parliament.

I am in full agreement with Freedman, J.A., and the fact that the conclusion arrived at by him gives the Indians of Manitoba, Saskatchewan and Alberta a latitude while hunting for food on unoccupied Crown lands and on other lands to which Indians might have a right of access greater than that possessed by other Indians in Canada is not of itself a reason for putting a strained interpretation on said para. 13 or for failing to give effect to the very plain language in the *B.N.A. Act, 1930*. The lamentable history of Canada's dealings with Indians in disregard of treaties made with them as spelt out in the judgment of Johnson, J.A., in *R. v. Sikyea*, [1964] 2 C.C.C. 325 at pp. 327-36, 43 D.L.R. (2d) 150 at pp. 151-9, 43 C.R. 83; affd [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642, and by McGillivray, J.A., in *R. v. Wesley,* 58 C.C.C. 269 at pp. 274-85, [1932] 4 D.L.R. 774 at pp. 779-91, 26 Alta. L.R. 433, ought in justice to allow the Indians to get the benefit of an unambiguous law which for once appears to give them what the treaties and the Commissioners who were sent to negotiate those treaties promised.

I said at p. 132 C.C.C., p. 84 D.L.R., p. 646 S,C.R., of my reasons in Sikyea which were concurred in by the six other members of this Court who heard the appeal:

> On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson, J.A., in the Court of Appeal, [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

It should be noted that in *Sikyea* the *B.N.A. Act,* 1930 had no application because the offence there being dealt with had occurred in the Northwest Territories, an area wholly within the legislative jurisdiction of the Parliament of Canada. Parliament has the power to breach the Indian treaties if it so wills: *R. v. Sikyea.* That point is dealt with by Johnson, J.A., at p. 330 C.C.C., p. 154 D.L.R., as follows:

> Discussing the nature of the rights which the Indians obtained under the treaties, Lord Watson, speaking for the Judicial Committee in *A-G. Can. v. A-G. Ont., A.-G. Que. v. A.-G. Ont.,* [1897] A.C. 199 at p. 213, said:
>
> > "Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due . . ."
>
> While this refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing. It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement", like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the *B.N.A. Act,* from doing so.

However, Parliament cannot legislate in contravention of the *B.N.A. Act* and that is why the *B.N.A. Act,* 1930, is decisive in this case.

A reading of Johnson, J.A.'s historical review in *Sikyea,* particularly at pp. 335-6 C.C.C., pp. 158-62 D.L.R., where he said:

> It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked - a case of the left hand having forgotten what the right hand had done. The subsequent history of the Government's dealing with the Indians would seem to bear this out. When the treaty we are concerned with here was signed in 1921, only five years after the enactment of the *Migratory Birds Convention Act,* we find the Commissioners who negotiated the treaty reporting:
>
> > "The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case, and the Government will expect them to support themselves in their own way, and, in fact, that more twine for nets, and more ammunition were given under the terms of this treaty than under any of the preceding ones; this went a long way to calm their fears. I also pointed out that any game laws made were to their advantage, and, whether they took treaty or not, they were subject to the laws of the Dominion."

> and there is nothing in this report which would indicate that the Indians were told that their right to shoot migratory birds had already been taken away from them. I have referred to Art. 12 of the agreement between the Government of Canada and the Province of Alberta signed in 1930 by which that Province was required to assure to the Indians the right of "hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands". (The amendment to the *B.N.A. Act* (1930 (U.K.), c. 26) that confirmed this agreement, declared that it should "have the force of law notwithstanding anything in the British North America Act . . . or any Act of the Parliament of Canada. . . .") It is of some importance that while the Indians in the Northwest Territories continued to shoot ducks at all seasons for food, it is only recently that any attempt has been made to enforce the Act.

confirms what I said in *Sikyea* and I am fortified in that view by the judgment of McGillivray, J.A., in *R. v. Wesley,* particularly at pp. 283-4 C.C.C., pp. 788-9 D.L.R., where, in dealing with s. 12 of the Alberta agreement, identical in effect with s. 13 of the Manitoba agreement, he said:

> In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements. See *A.-G. Can. v.* A.-G. Ont. (Indian Annuities case), [1897] A.C. 199, at p. 213.
>
> Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles which the Senate and the House of Commons declared in addressing Her Majesty in 1867, uniformly governed the British Crown in its dealings with the aborigines.
>
> At the time of the making of this Indian Treaty it was of first class importance to Canada that the Indians who had become restless after the sway of the Hudson's Bay Co. had come to an end, should become content and that such title or interest in land as they had should be peacefully surrendered to permit of settlement without hindrance of any kind. On the other hand it goes without saying that the Indians were greatly concerned with "their vocations of hunting" upon which they depended for their living.
>
> In this connection it is of historical interest although of no assistance in the interpretation of the treaty, that Governor Laird who with Colonel Macleod negotiated this treaty, said to the Chiefs of the Indian tribes:-
>
> "I expect to listen to what you have to say today, but first, I would explain that it is your privilege to hunt all over the prairies, and that should you desire to sell any portion of your land, or any coal or timber from off your reserves, the Government will see that you receive just and fair prices, and that you can rely on all the Queen's promises being fulfilled."
>
> And again he said:- "The reserve will be given to you without depriving you of the privilege to hunt over the plains until the land be taken up."
>
> It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land.
>
> In the case *A-G. v. Metropolitan Electric Supply Co., 74* L.J. Ch. 145, at p. 150, Farwell, J., said:-
>
> "I think it is germane to the subject to consider what the Legislature had in view in making the provisions which I find in the Act of Parliament itself. As Lord Halsbury said in *Eastman Photographic Materials Co. v. Comptroller General of Patents, Designs, and Trade Marks,* [1898] [A.C. 571] referring to *Heydon's Case* (1584), [3 Co. Rep. 7*a*] 'We are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy.' That is a very general way of stating it, but no doubt one is entitled to put one's self in the position in which the Legislature was at the time the Act was passed in order to see what was the state of knowledge as far as all the circumstances brought before the Legislature are concerned, for the purpose of seeing what it was the Legislature was aiming at."
>
> If as Crown counsel contends, s. 12 taken as a whole gives rise to apparent inconsistency and is capable of two meanings then I still have no hesitation in saying in the light of all the circumstances relative to Indian rights in this Dominion to which I have alluded, that the law makers in 1930 were in the making of this proviso, aiming at assuring to the Indians covered by the section, an unrestricted right to hunt for food in those unsettled places where game may be found, described in s. 12.

It was argued that para. 13 of the agreement in question is limited in its application solely to provincial laws because of the presence of the clause "which the Province hereby assures to them", in the sentence under consideration. That clause inserted parenthetically between commas cannot derogate from the thrust of the principal clause which contains the specific declaration "that the said Indians shall have the right, . . . of hunting, trapping and fishing game and fish for food at all seasons of the year". In my view it adds emphasis to the declaration by making manifest the application of the declaration to the Province as though the clause read "which the Province also hereby assures to them".

If all that para. 13 of the agreement was intended to achieve in 1930 was a declaration by the Province that Indians were to have the right to fish, hunt and trap for food at all seasons of the year, it was, according to that interpretation, an empty, futile and misleading gesture. Either the Indians then had those rights or they did not have them for the *Migratory Birds Convention Act* had been on the statute books since 1917. The only interpretation that makes sense is the one that acknowledges that the right of hunting, trapping and fishing game and fish for food at all seasons

of the year existed in 1930 regardless of the *Migratory Birds Convention Act* and the federal Government wanted those rights to continue notwithstanding the transfer to the Provinces of Manitoba, Saskatchewan and Alberta of the unalienated natural resources withheld when the Provinces were formed. What logic could there have been in having the Provinces assure to Indians non-existing rights?

The federal authority was already under treaty obligations contained in Treaties 5 and 6 which read:

> 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.

to preserve the Indians' right to hunt and fish for food at all seasons of the year, and It was merely making certain that the Provinces would accord the same rights when they got control of the unalienated Crown lands. The obligation of Canada to preserve the right to hunt and fish for food at all seasons was an historical one arising out of the rights of Indians as original inhabitants of the territories from which Manitoba, Saskatchewan and Alberta were carved and arising out of the treaties above mentioned. The subject of aboriginal rights as they apply to Indians of Western Canada and the effect of the treaties made with the Indians were dealt with by the Court of Appeal for British Columbia in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at pp. 629-664, *52* W.W.R. 193*.* This Court upheld that decision in an oral judgment (52 D.L.R. (2d) 481*n,* [1965] S.C.R. vi) as follows:

> Mr. Justice Cartwright delivered the following oral judgment:
>
> "Mr. Berger, Mr. Sanders and Mr. Christie. We do not find it necessary to hear you. We are all of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, Exhibit 8, was a 'treaty' within the meaning of that term as used in s. 87 of the *Indian Act* [R.S.C. 1952, c. 149]. We therefore think that in the circumstances of the case, the operation of s. 25 of the *Game Act* [R.S.B.C. 1960, c. 160] was excluded by reason of the existence of that treaty."

It follows that if ex. 8 in *White and Bob* which reads:

> Know all men that we the Chiefs and people of the Sanitch Tribe who have signed our names and made our marks to this Deed, on the 6th day of February 1852 do consent to surrender entirely and forever, to James Douglas the Agent of the Hudsons Bay Company, in Vancouver Island that is to say for the Governor, Deputy Governor and Committee of the same, the whole of the lands situate and lying between Mount Douglas and Cowitchen Head on the Canal de Arro and extending thence to the line running through the centre of Vancouver Island north and south.
>
> The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people forever; *it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.* We have received as payment -Forty one pounds thirteen shillings and four pence. - In token whereof we have signed our names, and made our marks at Fort Victoria, on the seventh day of February, One thousand eight hundred and fifty two.

(italics added) was a treaty within s. 87 of the *Indian Act,* R.S.C. 1952, c. 149, so are Treaties *5* and 6 aforesaid.

Soon after the agreement in question was entered into, the Court of Appeal for Saskatchewan in *R. v. Smith,* 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 433, dealt with the effect of para. 12 of the Saskatchewan agreement which is identical with para. 13 now under review and in that case Turgeon, J.A. (later C.J.S.), said [pp. 132-5]:

> Although this case is of great interest and importance I do not think it will be necessary in disposing of it to examine minutely the state of the law existing prior to recent date, nor the Indian treaty or treaties referred to in the argument. If these treaties, or the various Dominion or Provincial Statutes referred to have any present bearing on the case it is only in so far as they may throw some light upon the interpretation of certain words in the instrument which, in my opinion, now governs the relations of these Indians with the game laws of Saskatchewan, and to which I am about to refer.
>
> Subsection 24 of s. 91 of the *B.N.A. Act* confers upon the Parliament of Canada exclusive jurisdiction upon the subject of "Indians, and Lands reserved for the Indians," while, on the other hand, the Provinces have power to make laws concerning the hunting, fishing preservation, etc., of game in the Province. As a result controversies have arisen in the past as to the application of provincial game laws to Indians: *Rex v. Rodgers*, [1923] 3 D.L.R. 414, 40 Can. C.C. 51.
>
> But in the years 1929 and 1930 something occurred which, in my opinion, had the effect of recasting the jurisdiction of the Province of Saskatchewan in respect to the operation of its game laws upon our Indian

population. In December, 1929, an agreement was entered into between the Dominion and the Province having for its primary object the transfer from the one to the other of the natural resources within the Province. This transfer was accompanied by many terms, some of which had to do with matters pertaining to the Indians. Among these is para. 12 of the agreement, which 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."

It is admitted in this case that the accused was hunting for food.

This agreement between the Dominion and the Province was made "subject ... to approval by the Parliament of Canada and the Legislature of the Province . . . and also to confirmation by the Parliament of the United Kingdom." Ratification by the Imperial Parliament was necessary insofar at least as the agreement purported to make any change in the constitutional powers of the Dominion or of the Province. In a recent decision of this Court, *Rex v. Zaslavsky* (1935), 64 Can. C.C. 106, the learned Chief justice quoted from the remarks of Lord Watson in the course of the argument in *C.P.R. v. Notre Dame do Bonsecours Parish*, [1899] A.C. 367. The statement quoted by the learned Chief Justice may fittingly be repeated here (p. 108) :-

"The Dominion cannot give jurisdiction or leave jurisdiction with the province. The provincial Parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or other can enlarge the jurisdiction of the other or surrender jurisdiction."

Consequently no legislative jurisdiction can be taken from the Dominion Parliament and bestowed upon a provincial Legislature, or *vice versa,* without the intervention of the parliament of the United Kingdom.

The Imperial statute confirming the agreement is c. 26, 1980, s. 1, of which enacts that the agreement shall have the force of law "notwithstanding anything in the British North America Act, 1867, or any Act amending the same" etc. 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.*

Counsel for the accused, in proposing a test for the meaning which must be given to the words "occupied" and "unoccupied," referred to the treaty made between the Crown and certain tribes of Indians near CarIton, on August 23, 1876, whereby, on the one hand, these Indians' consented to the surrender of their title of whatsoever nature in an area of which this game preserve forms part, and on the other hand, the Crown undertook certain obligations towards them and assured them certain rights and privileges. As I have said, it is proper to consult this treaty in order to glean from it whatever may throw some light on the meaning to be given to the words in question, *I would even say that we should endeavor, with the bounds of propriety, to give such meaning to these words as would establish the intention of the Crown and the Legislature to maintain the rights accorded to the Indians by the treaty.*

(Italics added.)

I have already dealt with the meaning of para, 13 of the Manitoba agreement. To me it is clear and unambiguous and by s. 1 of the *B.N.A. Act,* 1930 (U.K.), c. 26, which reads:

1. 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.

has the force of law, notwithstanding "any Act of Parliament of Canada". The *Migratory Birds Convention Act* is an Act of the Parliament of Canada. One would suppose that that should end the matter, but it is urged that s. 1 of the *B.N.A. Act, 1930,* does not necessarily refer to every provision of the agreement and, in particular, that para. 13 is outside the plain and unambiguous language of the Act in that Ottawa and Westminster could not conceivably have intended para. 13 to take precedence over the *Migratory Birds Convention Act* of 1917. One should, I think, be slow to accept the argument that the negotiators of the Manitoba agreement and Parliament at Ottawa were in 1929 and 1930 totally forgetful of the existence of the *Migratory Birds Convention Act* of 1917. Rather is it not more logical that knowing of the solemnity with which the Indian treaties have been negotiated and how highly they were regarded by the Indians, neither the negotiators of the agreement nor the Government at Ottawa had the slightest intention of breaching those treaties.

If it had been intended that the *Migratory Birds Convention Act* should take precedence, it would have been a simple matter to have said so in the agreement or in the *Manitoba Natural Resources*

*Act.* Much would have to be read into para. 13 of the agreement to make it subject to the *Migratory Birds Convention Act*. I am not prepared to add exclusions which Parliament and Westminster did not see fit to do.

It is argued that this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. The rule does not, of course, come into operation if a statute is unambiguous for in that event its provisions must be followed even if they are contrary to the established rules of international law. The case of *Collco Dealings Ltd. v. Inland Revenue Com'rs*, [1962] A.C. 1, is a case in which this very argument was made. In that case the Court was being asked to read into a section of the *Income Tax Act, 1952* additional words which would enlarge the meaning of the section so as to include persons not included by the precise words of the enactment but which were included under an agreement between the British Government and the Republic of Ireland providing for exemption from tax where the claimant was a resident in the Republic of Ireland and was not a resident in the United Kingdom**.**

In dealing with the argument, Viscount Simonds said at pp. 18-19:

> It had been urged that the general words of the subsection should be so construed as not to have the effect of imposing or appearing to impose the will of Parliament upon persons not within its jurisdiction. This argument, which had influenced the special commissioners, was not advanced before this House. A somewhat similar argument was, however, pressed upon your Lordships and was perhaps more strongly than any other relied on by the appellant company. It was to the effect that to apply section 4(2) to the appellant company would create a breach of the 1926 and following agreements, and would be inconsistent with the comity of nations and the established rules of international law; the subsection must, accordingly, be so construed as to avoid this result.
>
> My Lords, the language that I have used is taken from a passage at p. 148 of the 10th edition of "Maxwell on the Interpretation of Statutes" which ends with the sentence: "But if the statute is unambiguous, its provisions must be followed even if they are contrary to international law." It would not, I think, be possible to state in clearer language and with less ambiguity the determination of the legislature to put an end in all and every case to a practice which was a gross misuse of a concession. What, after all, is involved in the argument of the appellant? It is nothing else than that, when Parliament said "under any enactment," it meant "any enactment except . . ." But it was not found easy to state precisely the terms of the exception. The best that I could get was "except an enactment which is part of a reciprocal arrangement with a sovereign foreign state." It is said that the plain words of the statute are to be disregarded and these words arbitrarily inserted in order to observe the comity of nations and the established rules of international law. I am not sure upon which of these high-sounding phrases the appellant company chiefly relies. But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear.

I would paraphrase the latter part of this statement as follows in applying it to the Indians of Manitoba, Saskatchewan and Alberta by saying: *But I would answer that neither comity nor ride of international law can be invoked to prevent a sovereign State (Canada) from taking what steps it thinks fit to protect its own aboriginal population (Indians) from being deprived of their ancient rights to hunt and to fish for food assured to them in Treaties 5 and 6* made with them.

It took those steps when it included para. 13 of the Manitoba agreement, confirmed by the *Manitoba Natural Resources Act* and petitioned Parliament at Westminster to enact s. 1 of the *B.N.A. Act, 1930.* If there is inconsistency or repugnancy between the *Migratory Birds Convention Act* and the *Manitoba Natural Resources Act* the later prevails over the earlier. *British Columbia Elec. R. Co. Ltd. v. Stewart,* 14 D.L.R. 8, 16 C.R.C. 54, [1913] A.C. 816, and *Summers v. Holborn District Board of Works,* [1893] 1 Q.B. 612 at p. 619. It is difficult, I think, to find language more forthright and less ambiguous than s. 1 of the *B.N.A. Act, 1930.* To repeat, it reads:

> 1. 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.

I would, accordingly, allow the appeal and quash the conviction. The appellant is entitled to his costs in this Court and in the Courts below.

SPENCE, J. (dissenting), concurs with HALL, J.

PIGEON, J:--The facts are summarized in the reasons of my brother Judson with whom I am in agreement.

I wish to add that, in my view, this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. It is a rule that is not often applied, because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law, as was said recently in *Collco Dealings Ltd. v. Inland Revenue Com'rs,* [1962]

A.C. 1, where all relevant authorities are reviewed. In that case, the House of Lords came to the conclusion that the intent of Parliament was clear and unmistakable and, therefore, the plain words of a statute could not be disregarded in order to observe the comity of nations and the established rules of international law. However, the principle of construction was recognized as applicable in a proper case.

Here we must not be misled by the clear and unambiguous provision of s. 1 of the *British North America Act, 1930,* into believing that, because it is there said that the agreement shall have the force of law notwithstanding any Act of the Parliament of Canada, every provision of the agreement was intended to override all federal legislation.

The question to be decided is whether in para. 13 of the agreement, the words "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" contemplate laws of Canada as well as laws of Manitoba. The language certainly is not that which one would normally use in referring to both classes of laws. It is rather the language one would be expected to use in a provision intended to subject the Indians to provincial game laws. This is further borne out by the fact that the proviso on which this appeal is based is in a form of an assurance by the Province only. Can it be said that where Canada stipulates in the agreement: "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 . . ." the intention was expressed in clear language and without ambiguity to amend the *Migratory Birds Convention Act* contrary to Canada's international obligations? In my view, the least that can be said is that the intention to derogate from the statute implementing the treaty is not clearly expressed. It is perfectly possible without doing violence to the language used to construe the provision under consideration as applicable solely to provincial laws and thus to avoid any conflict.

It must also be considered that an agreement is not to be construed as applying to anything beyond its stated scope unless the intention to do so is unmistakable. Here the purpose of the agreement is stated in its preamble to be that the Province he placed in a position of equality with the other Provinces with respect to the administration and control of its natural resources. It is quite consistent with this declared object to provide that provincial laws respecting the use of some resources, namely, fish and game, shall apply to Indians subject to a restriction the effect of which is to carry out Canada's treaty obligations towards the Indians in that respect. On the other hand, it would not only be foreign to this object but even inconsistent with it, to provide for an implied modification of the *Migratory Birds Convention Act.* The result would be to enact a provision having no relation with the stated purpose of the agreement and also to create a lack of uniformity by establishing in favour of the Indians in one Province an exception that does not exist in favour of the Indians in other Provinces.

In *Danby v. Coutts & Co.* (1885), 29 Ch. D. 500, it was held that a power of attorney granted in general terms for the purpose stated in the recitals, to act for the grantor during his absence from England, must be construed as limited to the duration of such absence. Concerning statutes, Maxwell say, (Interpretation of Statutes, 11th ed., p. 79): "General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act" and he adds, quoting Lord Halsbury in *R. v. Leach,* [1912] A.C. 305, "It would be 'perfectly monstrous' to construe the general words of the Act so as to alter the previous policy of the law.

***Appeal dismissed.***