REX v. RODGERS

[1923] 3 D.L.R. 414 (also reported: (1923), 33 Man.R. 139, 40 C.C.C. 51, [1923] 2 W.W.R. 353)

Manitoba Court of Appeal, Perdue C.J.M., Cameron, Fullerton, Dennistoun and Prendergast JJ.A., 16 April 1923

Game laws--Game Protection Act, 1916, (Man.) ch. 44, sec. 20 (4)--Treaty Indian killing fur-bearing animal on Reserve--Disposal of pelt outside of Reserve--Not within Act--Indian Act R.S.C. 1906, ch. 81, sec. 66--B.N.A. Act, sec. 91 (24).

In the absence of any declaration by the Superintendent-General under sec. 66 of the Indian Act, R.S.C. 1906, ch. 81, the Game Protection Act, 1916 (Man.), ch. 44, does not apply to a Treaty Indian who hunts and kills fur-bearing animals upon his Reserve, and in so doing, he is not a trapper within the meaning of the provincial Act and is not required to have a permit, nor does he, in disposing of the pelts of such animals outside of the Reserve become a trapper within the meaning of the Act and a purchaser is not guilty of an offence under sec. 20 (4) in failing to obtain at the time of the purchase his name and the number his trapper's permit.

[*Rex v. Hill* (1907), 15 O.L.R. 406; *Rex v. Martin* (1917), 39 D.L.R. 635, 41 O.L.R. 79, 29 Can. Cr. Cas. 189; *St. Catherines Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, referred to.]

APPEAL, by way of case stated, from the conviction by a Police Magistrate under the Game Protection Act, 1916 (Man.), ch. 44, and amendments. Conviction quashed.

J. W. Morrison and *E. R. Mills*, for accused, appellant.
John Allen, K.C., for Crown.

PERDUE, C.J.M.:--This is a case stated by A. E. Caldwell, Police Magistrate at Hodgson, Manitoba. The accused was charged that he did buy or acquire a skin or pelt of a furbearing animal without at the time of purchase ascertaining, taking and recording the name of the trapper, with the number of the trapper's permit, contrary to the provisions of the Game Protection Act, 1916 (Man.), ch. 44.

The Magistrate found the accused guilty but stated a case for the opinion of this Court. It was proved that the accused received the mink skin in question by way of pledge for goods obtained from him by one Henry Smith, treaty Indian No. 891 of the Peguis Indian Reserve. Subsequently, the pledge became a purchase. At the time he received it, the accused was informed by Smith that the latter was a treaty Indian.

Accused asked him for his certificate of identity number. Smith went to the Indian agent, obtained his treaty number and accused put it on the required form. The purchase was then completed. It appeared that the purchase was made outside the Indian Reserve and that there had been no declaration by the superintendent general under sec. 66 of the Indian Act, R.S.C. 1906, ch. 81, that the game laws of the Province of Manitoba applied to Indians in the Province. I take it that the mink had been killed on the reserve.

The magistrate submitted the following questions for the opinion of this Court:--"1. Is the Manitoba Game Protection Act *ultra vires* in so far as it concerns a Treaty Indian? 2. Does the Manitoba Game Protection Act of the Province of Manitoba apply to a Treaty Indian? 3. Does the word 'trap- per' in the Manitoba Game Protection Act include a Treaty Indian? 4. Did the said Robert G. Rodgers comply with the provisions of the Manitoba Game Protection Act, when he obtained and entered the Treaty Number? 5. Should the conviction be quashed?"

Section 20 (4) of the Game Protection Act, as amended by 1920 (Man.), ch. 44, sec. 7, enacts that no person shall buy or acquire any of the skins of fur-bearing animals protected by the Act, mink skins being included in these, "from any trapper unless such trapper is provided with a permit issued under this Act or without at the time of purchase or trade, ascertaining, taking and recording the name of such trapper, together with the number of the trapper's permit."

By sec. 91 (24) of the B.N.A. Act, the Parliament of Canada is given exclusive legislative authority over "Indians, and lands reserved for the Indians." It would, therefore, seem clear that no statutory provision of regulation made by the Province in regard to the hunting of game or fur-bearing animals on an Indian reserve would apply to treaty Indians re- siding on the reserve. Section 57 of the Game Protection Act declares that the Act shall not apply to Indians within the limits of their reserves, "with regard to any animals or birds killed at any period of the year for their own use for food only, and not for purposes of sale or traffic;" leaving the inference that if the clause cited does not apply to the case, the Act will apply to such Indians.

I do not think that the Provincial Legislature has any power to pass laws interfering with the rights of treaty Indians to hunt, fish and trap on their own reserves. If a treaty Indian leaves his

reserve and takes up any calling or occupation outside of it, he comes under the control of the provincial laws as an ordinary citizen: *Rex v. Hill* (1907), 15 O.L.R. 406. If he commits an offence against a provincial law outside his reserve he is liable: *Rex v. Martin* (1917), 39 D.L.R. 635, 41 O.L.R. 79, 29 Can. Cr. Cas. 189.

In *Rex v. Martin*, 39 D.L.R. 635, the accused, an Indian, was convicted of an offence against the provisions of the Ontario Temperance Act, 1916 (Ont.), ch. 50, committed outside the limits of an Indian reserve. Long before that Act was passed, the Parliament of Canada appears to have occupied the field of liquor prohibition in so far as Indians are concerned. The Indian Act, R.S.C. 1906, ch. 81, contains stringent provisions against giving or selling liquor to Indians, whether on or outside an Indian reserve, and also against giving or selling liquor to any person on any such reserve, or having liquor in his possession on a reserve, etc., etc.: See secs. 135-146. Where the offence against the provincial law was committed beyond the limits of an Indian reserve, it was held in the above case that the Indian offender might be convicted and punished under the provincial law.

The right of an Indian to hunt or fish on his reserve without restraint or interference is often essential to the well-being of himself and of those dependent upon him. Any legislation, therefore, affecting this right would naturally come under sec. 91 (24) of the B.N.A. Act. From an expression used by Lord Watson in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, I would take it that this was the view adopted by that eminent authority. He said at p. 60:--

"The fact that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario."

On the previous page (p. 59) he had said:--

"It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority."

The rights of the Indian come under consideration in this case only in this way: if he had a right to catch the mink on his reserve, had he not a right to deal with his own property legally acquired? The prohibition in sec. 20 (4) of the Game Protection Act is, that no person shall buy or acquire any of the skins of furbearing animals protected by the Act from any trapper unless the trapper is provided with a permit under the Act. But if the Legislature cannot compel a treaty Indian to take out a permit to hunt on his reserve, the subsection is inapplicable. It can only apply where the "trapper" is a person coming within the provisions of the Act and, therefore, bound to take out a permit.

I would answer question No. 5 in the affirmative. It is not necessary to give any formal answers to the other questions.

CAMERON, J.A., was present at the hearing but died before judgment.

FULLERTON, J.A., concurs with PERDUE, C.J.M., and PRENDER- GAST, J.A.

DENNISTOUN, J.A. (dissenting):--A. E. Caldwell, one of His Majesty's Police Magistrates in and for the Province of Manitoba, at Hodgson, Manitoba, submits the following stated case for the opinion of this Court:--

"1. On December 7, 1921, an information was laid, under oath, before me by the above named Clifford Ostle, for that the said Robert G. Rodgers on December 6, 1921, did buy or other- wise acquire a skin or pelt of a fur-bearing animal without at the time of purchase or trade ascertaining, taking and recording the name of such trapper together with the number of the trapper's permit, contrary to the provisions of the Game Protection Act, 1916 (Man.), ch. 44, sec. 20 (4), (as added by 1920 (Man.), ch. 44, sec. 7).

2. On December 19, 1921, the said charge was duly heard before me in the presence of both parties, and, after hearing, the evidence adduced and the statements of the said constable, Clifford Ostle and Robert G. Rodgers and T. H. Carter, Indian agent, and counsel, I found the said Robert G. Rodgers guilty of the said offence and convicted him thereof, but at the request of the counsel for the said Robert G. Rodgers I state the following case for the opinion of this Honourable Court.

It was shown before me that the said Robert G. Rodgers had the mink in question in his possession by way of pledge for goods obtained by one Henry Smith, Treaty Indian No. 891, Peguis Reserve, but that, subsequently, the pledge was turned into a purchase, and at the time of the said acquisition, the said Robert G. Rodgers had asked from the trapper his number but had been informed that he, the said person was a Treaty Indian.

The said Rodgers then asked him for his Indian's certificate of identity number. He kept the fur in pledge until the Indian had gone to the Indian Agent and had obtained the Treaty number, which the said Robert G. Rodgers then put on the required form.

The defence submitted that no evidence was adduced to shew that sec. 66 of the Indian Act was complied with whereby the Game Laws of the Province of Manitoba apply to Treaty Indians,

and the defence submitted evidence of the Indian agent that this section had not been complied with.

The counsel for the said Robert G. Rodgers desires to question the validity of the said conviction on the ground that it is erroneous in point of law, the question submitted for the judgment of this Honourable Court being: [See judgment of Perdue, C.J.M., p. 415.]"

The conviction is under sec. 20 the Game Protection Act, 1916, as amended by 1916 (Man.), ch. 45, sec. 1, and by 1920 (Man.), ch. 44; sec. 7, to read in part as follows:--

"20. (1) No person shall hunt, shoot at, trap, take, wound, kill or capture any of the animals mentioned in secs. 17 and 18 of this Act without having first obtained a permit to do so, which permit shall be issued by the Department of Agriculture and Immigration, in such form, as the Minister in charge of the Department may approve, and shall be valid for the then cur- rent or next ensuing open season, and for which the following fees shall be paid:--(a) By any person actually domiciled and resident within the Province of Manitoba, fifty cents. [See amendment 1918 (Man.), ch. 28, sec. 6.]

(2) The holder of a permit issued under the provisions of this section, shall carry the said permit on his person and pro- duce the same on demand of any person.

(4) No person shall buy or otherwise acquire any of the skins or pelts of fur-bearing animals protected by this Act from any trapper unless such trapper is provided with a permit issued under this Act or without at the time of purchase or trade, ascertaining, taking and recording the name of such trapper, together with the number of the trapper's permit."

The accused has been found guilty of an infraction of the second part of clause (4) in that he did not take and record the number of the trapper's permit.

It must be assumed that the Magistrate duly found the Indian who sold the pelt to be a "trapper" within the meaning of the section.

It was argued by Mr. Morrison that the meaning of the word must be limited to the persons referred to in secs. 17 and 18 of the Act, that is to say, to persons who are compelled to take out a license before they are permitted to trap, and that as an Indian is permitted by sec. 57 to trap for certain purposes on his reserve, he is not a trapper within the meaning of the Game Protection Act.

The point is ingenious but is, I think too fine to be apprehended as the intention of the Legislature.

"Trapper" should, in my view, be given its ordinary, common meaning without any restriction, and includes an Indian who lawfully traps an animal upon his reserve, and takes the skin outside the reserve for the purpose of sale. When he leaves his reserve and offers his pelts for sale he is subject to the general laws of the Province in respect to property and civil rights.

In this case, the Magistrate has decided that the vendor is a trapper, unless his status as an Indian protects him from the obligations and duties of trappers who offer furs for sale.

Having heard the evidence and having exercised his judicial discretion in determining the point, which is within his juris- diction, an Appellate Court will not disturb the finding, unless it involves legal error.

Had the vendor of this pelt been a "white man" there can be no doubt that the conviction would be valid.

Does it make any difference that he is an Indian? I do not think so.

It is to be noted that the Act refers to Indians in two secs. only, 56 and 57.

Section 56 refers to game north of the 53rd parallel of north latitude, and does not concern this case.

Section 57 is as follows:--

"This Act shall not apply to Indians within the limits of their reserves, with regard to any animals or birds killed at any period of the year for their own use for food only; and not for purposes of sale or traffic."

Outside an Indian reserve, and south of the 53rd parallel, the Act applies to citizens of Manitoba without restriction moreover, the defendant is not an Indian, but a white man. This does not appear in the stated case, but was admitted on the argument, and the fact is assumed for the purpose of this judgment.

In *Rex v. Martin*, a judgment of the Appellate Division of Ontario, 39 D.L.R. 635, at pp. 638-9, 41 O.L.R. 79, 29 Can. Cr. Cas. 189, Riddell, J., quoting from, and paraphrasing, *C.P.R. Co. v. Parish of Nôtre Dame de Bonsecours*, [1899] A.C. 367, at pp. 372, 373, says:--

"The B.N.A. Act, whilst it gives the legislative control of the Indian defendant, *quâ* Indian, to the Parliament of the Dominion, does not declare that the defendant shall cease to be a denizen of the Province in which he may be, or that he shall, in other respects, be exempted from the jurisdiction of the provincial Legislatures . . . It therefore appears . . . that any attempt by the Legislature of Ontario to regulate by enactments his conduct *quâ* Indian, would be in excess of its powers. If, on the other hand, the enactment had no reference to the conduct of the defendant *quâ* Indian, but provided generally, that no one was to sell etc., liquors, then the enactment would . . . be a piece of legislation competent to the Legislature."

The headnote of the case, 39 D.L.R. 635, says that an Indian is punishable as other persons

are, for offences committed outside a reservation against provincial laws, and Meredith, C.J. C.P., Riddell, Lennox and Rose, JJ., concurred in that opinion.

Rex v. Hill, 15 O.L.R. 406, deals with the case of an Indian who practiced medicine for hire, but not upon the Reserve, without being registered pursuant to the provisions of the Ontario Medical Act, R.S.O. 1897, ch. 91. Osler, J.A., says, at p. 410:--

"Section 111 [R.S.C. 1906, ch. 81] assumes that an Indian may become a member of any of the learned professions, and I find nothing in the Act to indicate that, except where pro- visions are made, which expressly or by implication declare his obligations and the consequences which attach to their breach or otherwise specially deal with him, the conduct and duty of an Indian in his relations with the public outside the reserve are not subject to the control of the provincial laws in the same manner as those of ordinary citizens. Parliament may, I suppose, remove him from their scope, but, to the extent to which it has not done so, he must in his dealings outside the reserve govern himself by the general law which applies there. He is no more free to infringe an Act of the Legislature than to disregard a municipal by-law, the general protection of both of which he enjoys when he does not limit the operations of his life to the reserve, but, though unenfranchised, seeks a wider sphere."

I find nothing in the Indian Act, R.S.C. 1906, ch. 81, which permits an Indian when off his Reserve to act in defiance of provincial game protection laws. Section 66 says that such game laws may be made applicable to Indians by public notice by the superintendent-general, but does not say that, in the absence of such notice, they shall have no effect.

In the absence of express legislation to the contrary by the Dominion, an Indian whether on or off his reserve is, I think, subject to the general law of the Province.

The B.N.A. Act, sec. 91 (24) enables the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to Indians, and lands reserved for Indians.

By the same Act, sec. 92 (13) the Provinces may exclusively make laws in relation to property and civil rights in the province.

In cases where the jurisdiction of the Dominion and the Provinces may overlap and the field is clear, either Legislature may occupy it. If in such domain the two Legislatures meet, then the Dominion legislation must prevail. *G.T.R. Co. v. Att'y- Gen'l for Canada*, [1907] A.C. 65. The Province, therefore, has jurisdiction to legislate in respect to property and civil rights of all citizens, with an over-riding power on the part of the Dominion, by special legislation, to take possession of the field, in so far as Indians are concerned. The Dominion has not seen fit to interfere with the general law of this Province in respect to the buying and selling of pelts, in order to remove Indians from its operation, and, in my view, the provincial law is enforceable against Indians until the Dominion Parliament sees fit to act.

In my view, the defendant in this case when dealing for this pelt was not protected by the fact that the vendor was an Indian, and I would answer the questions of the Magistrate as follows:--1. The sections of the Manitoba Game Protection Act in question do not purport to deal with Indians, as such. They apply to all citizens alike, and are within the competence of the provincial Legislature. 2. The Manitoba Game Protection Act applies to treaty Indians when off their Reserves in the absence of legislation by the Dominion to the contrary.

3. The word "trapper" may include a Treaty Indian in the absence of legislation by the Dominion to the contrary. 4. Robert G. Rodgers did not comply with the provisions of the Manitoba Game Protection Act when he obtained and entered the treaty number of the Indian, without taking and recording the name and permit number of the trapper. 5. The conviction should be affirmed.

PRENDERGAST, J.A.:--This is a case stated by a Police Magistrate under sec. 761 of the Cr. Code in the matter of a conviction under the Game Protection Act, 1916 (Man.), ch. 44.

The facts are that an Indian, apparently not recognized as such at the moment, who was purchasing goods from the accused (a white man) in his store at Hodgson, offered him a mink skin in payment. Upon being asked by the accused for his name and the number of his trapper's permit, he replied that his name was John Smith and that he was a treaty Indian. Being next required to produce a certificate of identity showing his number as a treaty Indian, he went and procured the same from the Indian agent and brought it back to the accused who took note of its contents and then accepted the skin in payment of the goods.

It is also to be assumed from the statement of the case and from counsel's argument, that the mink had been trapped or otherwise captured by this Indian in open season on the reserve to which he belonged, and Hodgson, where the accused acquired the skin, is not, of course, in any reserve.

Upon these facts, the accused was convicted under sec. 20 (4) of the Game Protection Act, as amended by 1920 (Man.), ch. 44, sec. 7, which section is as follows: [See judgment of Dennistoun, J.A., *ante* p. 415.]

Of the four questions submitted in the case, there are three that it is not necessary to consider, in my opinion.

The other: "Does the word 'trapper' in the Manitoba Game Protection Act apply to a treaty Indian?" is altogether too broad, and should be made to read: "Was the treaty Indian in this case a

'trapper' under the Act?"

Stated in these terms, the question raises the only point that need be considered in my view of the case.

Section 20, under sub-sec. (4) of which the conviction was made, is found in a division of the Act coming under the heading, Fur Bearing Animals, where it is preceded by two others (being secs. 17 and 18) which provide that "no person shall hunt, shoot at, trap, take, wound, kill or capture" certain fur-bearing animals at certain times of the year, and certain others at any time or at all. [See also 1921 (Man.), ch. 26, sec. 1].

Now, these prohibitions, as well as those contained in sec. 20 (1) (and I think this is also true of the whole Act) were not meant to and cannot at all apply to Indian reserves which are placed under the jurisdiction of the Dominion Parliament by virtue of sec. 91 (24) of the B.N.A. Act. This is also emphasized by sec. 66 of the Indian Act, R.S.C. 1906, ch. 81, which provides that the superintendent-general of Indian affairs may, from time to time, declare by public notice that the game laws in force in the Province shall apply to Indians.

Provincial statutes, even of general application, do not, as a rule, expressly state the territory to which they are meant to apply. They are generally worded as if they applied to all the territory comprised within the boundaries of the Province. But everyone understands that they cannot apply to regions in the Province (if any) over which the Legislature has no jurisdiction in the particular matter, and that, however broad the terms, these regions were meant to be excepted.

Clearly, in this case, secs. 17, 18 and 20 (1), which all provide in the same words that "No person shall hunt, shoot at, trap, take, etc.," must be read, consistently with the territorial jurisdiction, as if they contained in each case the words:-- "within the Province but excepting Reserves."

Now, what is a "trapper" under this statute?

It seems to me clear, upon reading this division of the Act as a whole, that this term "trapper" is not used therein in its strict or technical meaning; that is to say, that it is not restricted to those who make an habitual occupation of capturing fur-bearing animals, nor to those only who use traps in that pursuit as distinguished from other means of capture.

"Trapper" in sec. 20 (4)--which is the only part of the Act where the word is used--refers, in my opinion, to sec. 20 (1) as it is natural that it should do, and also to secs. 17 and 18 as they are in the same terms and is meant for short to designate anyone who, as set forth in these three sections, "shall hunt, shoot at, trap . . . any of the animals mentioned," reading those prohibitions, as I expressed the opinion that we should do, as if they contained, to all intents and purposes, the words: "within the Province but excepting Reserves."

In other words, a "trapper" is one who does some one of these things provided for in secs. 17, 18 and 20 (1), and which the Legislature could only have undertaken to provide for and regulate to the extent of their being done on territory submitted to its jurisdiction, which excludes Reserves.

This Indian, having captured the mink on the Reserve, is not then a trapper within the meaning of the Act.

There can be no doubt that an unenfranchised Indian, when out of his reservation, is subject to provincial legislation in precisely the same way as a non-Indian: *C.P.R. Co. v. Parish of Nôtre Dame de Bonsecours*, [1899] A.C. 367; *Rex v. Hill*, 15 O.L.R. 406, and *Rex v. Martin*, 39 D.L.R. 635, 41 O.L.R. 79, 29 Can. Cr. Cas. 189.

But in *Rex v. Hill, supra*, Meredith, J.A., said at p. 414:-- "It is not needful to say what would have been the result if the defendant had confined his practice to Indians."

I am of the opinion that the Game Protection Act does not extend to Reserves and that sec. 57 is of no effect whatsoever.

The Legislature could, undoubtedly, prohibit the purchase of mink skins from *anyone*, and this term would of course include a Treaty Indian.

In the present case, however, the prohibition is not with reference to acquiring a mink skin from anyone, but from one who is a trapper in the meaning of the Act.

Had this Indian captured the mink outside the Reserve, he would have been doing one of the things provided for in secs. 17, 18 and 20 (1), and that would have made him a trapper, which he is not as he secured the animal on the Reserve.

The answer should be: the Indian in question was not a trapper under the Act.

The conviction should be quashed.