REX v. SMITH

[1935] 3 D.L.R. 703 (also reported: [1935] 2 W.W.R. 433, 64 C.C.C. 131

Saskatchewan Court of Appeal, Turgeon, Martin and Mackenzie JJ.A., 12 June 1935

Indians--Game Act, R.S.S. 1930, c. 208--Carrying firearms upon a game reservation--Natural Resources Agreement.

The words "on unoccupied Crown lands" as used in para. 12 of the Natural Resources Agreement between the Dominion and the Province of Saskatchewan must be given their plain and ordinary meaning and be taken to include lands required for the establishing of game reserves. And the words "on any other lands to which the said Indians may have a right of access" does not give Indians a right or access to a game reserve beyond that accorded to all other persons as they too are subject to the reserves of the Game Act.

APPEAL by way of stated case by an Indian from his conviction on a charge of carrying fire-arms on a game reserve. Affirmed.

J. G. Diefenbaker, K.C., for appellant.

H. E. Sampson, K.C., for Attorney-General.

TURGEON, J.A.:--This appeal comes before us by way of stated case arising out of the conviction by J. E. Lussier, Police Magistrate, of a treaty Indian named John Smith, Jr., charged with carrying fire-arms on Fort La Corne Game Preserve in this Province, contrary to the provisions of s. 69(1) of the Game Act, R.S.S. 1930, c. 208, and amendments thereto. The section in question is as follows:--

"69 (1) Notwithstanding anything in this Act contained, those areas of land set forth in schedule B and such other areas as are from time to time determined by the Lieutenant Governor in Council are hereby declared game preserves for the propagation and perpetuation of birds and animals, and shooting, hunting, trapping or carrying of firearms, except as provided in subsection (2) within the said preserves is forbidden.

(2) Within such preserves every constable, guardian or forestry official may carry firearms in the performance of his duties, which duties may under instructions from the minister necessitate the killing or taking of certain animals for the maintenance of proper control."

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 the 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] 3 D.L.R. 788, 64 Can. C.C. 106, the learned Chief Justice quoted from the re- marks of Lord Watson in the course of the argument in *C.P.R. v. Notre Dame de Bonsecours Parish*, [1899] A.C. 367. The statement quoted by the learned Chief Justice may fittingly be repeated here (p. 790 D.L.R., p. 108 Can. C.C.):--

" '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, 1930, 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 Carlton, 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. The paragraph of the treaty to which counsel referred is as follows:--

"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."

Counsel submits that, having regard to this provision, the words "unoccupied Crown lands" in para. 12, should be defined as all Crown lands not required or taken up for settlement, mining, lumbering or for other purposes, and that the expression "other purposes" should be interpreted as not including the setting aside of areas for the preservation of game. This sub- mission resolves itself into an argument that the Crown by specifying in the treaty the purposes of settlement, mining, and lumbering, excluded itself for all time from setting aside tracts of land as game preserves, the words "other purposes" not being sufficiently broad to include such setting aside. Counsel invokes the *ejusdem generis* rule. On the ground so chosen by counsel I find I must differ from him. Looking at the words "settlement," "mining" and "lumbering," I do not see how they can be grouped into any *genus* to which the *ejusdem generis* rule can be applied. I do not think the

words "other purposes" were meant to be construed in such a manner.

When the treaty was made in 1867 the necessity for game preservation was probably not present in the minds of the parties. Nevertheless it was within reason that the time might come in this, as in all populated countries, when the establishment of game preserves would be beneficial to all interested in hunting and fishing, including the Indians themselves. But a game preserve would be one in name only if the Indians, or any other class of people, were entitled to shoot in it. It is evident that the Parliament of Canada did not put any such narrow meaning on the words of the treaty, but had in mind that nothing in it prevented the due preservation of game, be- cause the Indian Act, R.S.C. 1927, c. 98, s. 69, provides as follows:--

"The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient."

I am therefore of the opinion that nothing in the treaty referred to can assist the contention of counsel for the accused, because under its terms Parliament might have set up game preserves in the area surrendered, without violating any promise made by the Crown to the Indians.

We return therefore to the words "unoccupied Crown lands" in para. 12 of the aforesaid agreement without having found in the treaty anything to help the accused's case.

Looking now at the ordinary dictionary meaning of the word "unoccupied," I think that among its possible uses, the parties to the agreement and the Legislature intended in this case to express those which invoke the idea of "idle," "not put to use," "not appropriated," etc.

To refer again, by way of illustration, to the treaty of 1876 I think that tracts set aside for mining, lumbering, settlement or other purposes (and upon which the right to hunt was withheld from the Indians) might have been said to be "occupied." So I take it that when the Crown, in the right of the Province, appropriates or sets aside certain areas for special purposes, as for game preserves, such areas can no longer be deemed to be "unoccupied Crown lands" within the meaning of para. 12 of the agreement.

But it is also urged that the land of this game preserve is land to which the Indians have a right of access and that they are authorized to shoot on it because of that right. Any so called "right" of access which the Indians may enjoy in respect to this preserve is, so far as we were shown, merely the privilege accorded to all persons to enter the preserve *without carrying firearms*. We were not told of any special, peculiar right of access to this preserve conferred upon or enjoyed by the In- dians. The Indians assuredly have a peculiar right of access to certain Crown lands, as, for instance, the reservations upon which they live and which are vested in the Crown, but it does not appear that they have any similar right of access to the land comprising this preserve.

For the above reasons I think that the conviction must be upheld and the appeal, by way of stated case, dismissed.

MARTIN, J.A.:--This is an appeal by way of a stated case from a conviction of a treaty Indian, John Smith, Jr., who was charged with carrying fire-arms, to wit a rifle, on the Fort La Corne Game Preserve, contrary to the provisions of s. 69(1) of the Game Act.

A number of questions are submitted in the stated case but I do not consider it necessary to refer to them in detail. The issue raised in the appeal is whether a treaty Indian is bound by the provisions of the Game Act, s. 69, and therefore prohibited under the generality of the words used in the section from shooting, hunting, trapping or carrying fire-arms within certain areas of land which are declared to be game preserved and which are particularly described in Sch. B to the Game Act. Among the areas so set aside is the Fort La Corne Reserve and it is admitted that John Smith, Jr., did on October 17, 1934 carry fire-arms on this preserve.

The issue must be determined upon the construction of para. 12 of the Natural Resources Agreement, made between the Government of the Dominion of Canada, and the Government of the Province of Saskatchewan, and which provided the terms upon which the natural resources within the boundaries of the Province were transferred by the Dominion to the Province. This agreement was affirmed by the Legislature of the Province by c. 87 of the statutes of 1930, and by the Parliament of Canada by c. 41 of the Statutes of Canada, 1930. It was also affirmed by the Parliament of the United Kingdom of Great Britain and Northern Ireland, by the B.N.A. Act, 1930 (Imp.), c. 26. By the Act of the Imperial Parliament the agreement was declared to have the force of law notwithstanding anything in the B.N.A. Act of 1867, or any amending Act or any Act of Parliament of Canada or any Order in Council, or by any terms or conditions of union made or

approved under any such Act. The Natural Resources Agreement, therefore, has been given the force of law by the Imperial statute and the law with respect to any subject dealt with therein must be determined by an interpretation of the terms of that agreement.

Paragraphs 10, 11 and 12 of the Natural Resources Agreement set out the terms with respect to the Indians and these para- graphs contain the law on the subject, notwithstanding anything in the B.N.A. Act, and notwithstanding anything in any Act of the Parliament of Canada. Paragraph 12 makes provision for the right of the Indians to hunt and fish and is as quoted *supra*.

It will be observed that Canada agreed that the provincial laws with respect to game in force from time to time should apply to the Indians, subject to the proviso at the end of the paragraph, and the reason stated for so doing is "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence." The application of the game laws of the Province is, however, made subject to the proviso that the Indians are to have the right to hunt and fish for food at all seasons of the year "on all unoccupied Crown lands and on any other land to which the said Indians may have a right of access." The Fort La Corne Game Preserve consists of Crown lands and the right of the accused, John Smith, Jr., to carry fire-arms on the preserve depends upon whether the lands therein are "unoccupied" or are lands to which Indians "have a right of access."

The word "unoccupied" used in conjunction with the words "Crown lands" means, I think, lands which have not been appropriated or set aside by the Crown. Counsel for the accused for the purpose of defining the word, referred to the treaty made with the Indians in 1876, under the terms of which the Indians surrendered their title in the area of which the Fort La Corne Game Preserve forms a part and, on the other hand, the Crown agreed that the Indians should have certain rights. Among the rights extended to the Indians was one to the effect that they should have the right to hunt and fish throughout the tract surrendered but subject to such regulations as might from time to time be made by the Government of the Dominion of Canada and excepting tracts of land which might from time to time be required or taken "for a settlement, mining, lumbering or other purposes by the Government of the Dominion of Canada or by any of the subjects duly authorized by the said Government. "

Counsel submitted that the meaning assigned to the word "unoccupied" should not go beyond the words of the treaty and that it should be limited to lands required for "settlement, mining, lumbering or other purposes." It was further submitted that the *ejusdem generis* rule applied and that the words "other purposes," could not be construed so as to include lands required or set apart as game preserves.

The *ejusdem generis* rule was laid down by Lord Campbell, C.J., in *Reg. v. Edmundson* (1859), 28 L.J.M.C. 213, at p. 215, as follows:--"Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." The principle applies only where the special words are of the same nature and can be grouped together in the same *genus*: where there are different *genera* the meaning of the general words is unaffected by their collocation with the special words and must be given their full and ordinary meaning. *Reg. v. Payne* (1866), 35 L.J.M.C. 170. *Tillmanns & Co. v. SS. "Knutsford" Ltd.*, [1908] 2 K.B. 385. Craies on Statute Law, 3rd ed., pp. 154-5. Maxwell on the Interpretation of Statutes, 7th ed., pp. 284 and 290.

The words "settlement, mining, lumbering" are not of the same *genus*: they each describe a different use for which Crown lands may be required or taken up and therefore the words "or other purposes" must be given their plain and ordinary meaning and, when given such meaning, may very reasonably be taken to include lands required for the establishing of game preserves. Nothing therefore in the treaty of 1876 can help the accused because under it the Government of the Dominion of Canada might have set up game preserves in the land surrendered by the Indians without in any way breaking faith with them. In this connection it is interesting to note that the Parliament of Canada by s. 69, of R.S.C. 1927, c. 98, has pro- vided that the Superintendent-General of Indian Affairs may from time to time by public notice declare game laws of Manitoba, Saskatchewan and Alberta applicable to the Indians in these Provinces, or in such part thereof as seems expedient. This provision was first enacted with respect to Manitoba and the North-West Territories in 1890, by 53 Vict., c. 29, s. 10, and Parliament at the time must have had in mind the preservation of game and did not consider that such an enactment was in any way in violation of the provisions of the treaty of 1876. Moreover when the Natural Resources Agreement was enacted in law in 1930 game preserves had already been created in the Province of Saskatchewan, as appears by the Game Act, R.S.S. 1930, c. 208, and had been in existence for many years. *Vide*, s. 33 of c. 128, R.S.S. 1909.

The Fort La Corne Game Preserve is not therefore "unoccupied Crown lands." It was argued however that the accused had a right of access to the game preserve. Indians undoubtedly have a

right of access to certain reserves set apart for them and upon which they reside, but they have no right of access to game preserves beyond that accorded to all other persons and they are subject, as all persons are, to the provisions of s. 69 of the Game Act.

The appeal by way of stated case should be dismissed and the conviction affirmed.

MACKENZIE, J.A., concurs with TURGEON, J.A.

Appeal dismissed.