REGINA v. SIKYEA

(1964), 43 D.L.R. (2d) 150 (also reported: [1964] 2 C.C.C. 325, 46 W.W.R. 65, 43 C.R. 83)

Northwest Territories Court of Appeal, Smith C.J.A., Johnson, Kane, McDermid JJ.A., and Parker J., 24 January 1964

(On appeal from judgment of Northwest Territories Territorial Court, supra p.571)

(Appealed to Supreme Court of Canada, reported **sub nom. Sikyea v. The Queen, infra** p.597)

Constitutional law - Treaty and implementing legislation under B.N.A. Act, s. 132 - Whether validity of legislation affected by post-Statute of Westminster amendments where treaty still on foot - Migratory Birds Convention, 1916 - Migratory Birds Convention Act, 1917.

Statutes validly enacted by the Parliament of Canada before the *Statute of Westminster,* 1931, to implement a treaty properly made under s. 132 of the *B.N.A. Act*, may be amended subsequent thereto as may be necessary to carry out the terms of the treaty so long as the treaty has not been denounced, and consequently the fact that the treaty concerns matters which fall within provincial legislative jurisdiction does not preclude such Federal legislation. *Held,* in any event, an extension of all Federal Acts to the enlarged territorial jurisdiction of Canada (as by the *Extra-territorial Act,* 1933 (Can.), c. 39 and by the Act of 1949, c. 1 approving the agreement by which Newfoundland became a Province) is not a re-ratification or re-implementation of treaties made under s. 132 and when it was fully effective. *Held,* further, the Migra*tory Birds Convention* Act, 1917 (Can.), c. 18, and Regulations thereunder remain valid Federal legislation in implementation of the Migratory Birds Convention of 1916 with the United States made pursuant to s. 132. It may well be that the preservation of migratory birds comes within Federal competence (apart from s. 132) as being the concern of the Dominion as a whole, and it would appear that there is room for provincial as well as Federal legislation in this field.

[*A.-G. Ont. et al. v. Canada Temperance Federation,* [1946] 2 D.L.R. 1, 85 G.C.C. 225, [1946] A.C. 193, 1 C.R. 229, [1946] 2 W.W.R. 1, consd; *R. v. Paling*, [1946] 3 D.L.R. 54, 85 C.C.C. 289, 54 Man. R. 43, 1 C.R. 461, [1946] 2 W.W.R. 49; *A.-G. Can. v. A.-G. Ont.,* [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299; *Johannesson et al. v. Rural Municipality of West St. Paul,* [1951] 4 D.L.R. 609, 69 C.R.T.C. 105, [1952] 1 S.C.R. 292, refd to]

Constitutional law - Indian treaty - Derogating legislation - Breach of promise - Validity of legislation not affected if otherwise valid Migratory Birds Convention Act (Can.).

Indians - Treaty embodying Government promise to permit usual vocation of hunting, trapping and fishing - Derogating legislation in breach of promise - Validity not affected.

A treaty with an Indian Band, as for example Treaty 11 of 1921 respecting Indian rights in the Yellowknife area, by which the Government covenants that the Indians shall have the right to pursue their usual vocations of hunting, trapping and fishing (but subject to such Regulations as may from time to time be made by the Government) cannot stand against derogating legislation which goes beyond contemplated Regulations that would assure that a supply of game for the needs of the Indians would be maintained. Although legislation which, in imposing game restrictions, goes beyond the permission of the treaty to make Regulations, may be a breach of promise to the Indians, Parliament is not thereby prevented from legislating competently on the subject thereof, as it did in enacting the *Migratory Birds Convention Act*, and Regulations to implement a Convention entered into by Great Britain on behalf of Canada with the United States as authorized by s. 132 of the *B.N.A. Act. Held,* although the Convention and implementing legislation preceded the Treaty of 1921, the prohibition in the legislation and Regulations thereunder against shooting mallard ducks out of season is binding as against an Indian who shot such a duck for food in reliance on the terms of the treaty.

[*R. v. Wesley,* [1932] 4 D.L.R. 774, 58 C.C.C. 269, 26 A.L.R. 433, [1932] 2 W.W.R. 337; *A-G. Can. v. A.-G. Ont., A.-G. Que. v. A.-G. Ont.* [1897] A.C. 199, apld]

APPEAL from a judgment of Sissons, J.T.C., 40 W.W.R. 494, setting aside a conviction against an Indian, on appeal by way of a trial *de novo,* for shooting a migratory bird out of season in violation of the *Migratory Birds Convention Act* and Regulations.

M. M. de Weerdt, for appellant.

W. G. Morrow, Q.C., and *Mrs. E. R. Hagel,* for respondent.

The judgment of the Court was delivered by

JOHNSON, J.A...-The respondent in this case was convicted by a Magistrate at Yellowknife upon a charge of unlawfully killing a migratory bird in an area described in Schedule A, Part XI, of the *Migratory Bird Regulations* P.C. 1958-1070, SOR/58-308, at a time not during an open season for that bird in the area, in violation of s.5(1)(*a*) of the *Migratory Bird Regulations.* He was fined $10 and costs, and apparently (although the original conviction is not before us), both the bird and the respondent's gun were seized. The respondent appealed to Sissons, J.T.C. [40 W.W.R. 494] and, after a trial *de novo,* that Judge set aside the conviction, acquitted the respondent and ordered the return of the gun and the duck to the respondent. From that decision the Crown appeals.

On May 7, 1962, not far from Yellowknife airport in the .Northwest Territories, the respondent was arrested by a constable of the Royal Canadian Mounted Police shortly after he had shot a female mallard duck. The respondent admitted shooting the duck but stated that he did not know that he was not to shoot ducks out of season.

The respondent is an Indian and a member of Band Number 84 under Treaty 11. He had contracted tuberculosis in 1959 and had been sent out to Edmonton for treatment. Since his return he had been unable to work and he and his family had been receiving welfare assistance. On this day he was on his way out to the bush to see if he was able to do his customary work. He had taken his tent, gun and muskrat traps and was planning to trap muskrats. He expected to be away two or three weeks. He had taken no food, expecting shoot game. He shot this duck for food.

The right of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada -- in the early days as an incident of their "ownership" of the land, and later by the treaties by which the Indians gave up their ownership right in these lands. McGillivray, J.A., in *R v. Wesley*, [1932] 4 D.L.R. 774, 58 C.C.C. 269, 26 A.L.R. 433, [1932] 2 W.W.R. 337, discussed quite fully the origin, history and nature of the right of the Indians both in the lands and under the treaties by which these were surrendered and it is unnecessary to repeat what he has said. It is sufficient to say that these rights had their origin in the *Royal Proclamation*, R.S.C. 1952, vol. 6, App., III, p. 6127, that followed the *Treaty of Paris* in 1763. By that Proclamation it was declared that the Indians "should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds". The Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the Proclamation, and it is doubtful, to say the least, if the Indians of at least the western part of the Northwest Territories could claim any rights under the Proclamation, for these lands at the time were *terra incognita* and lay to the north and not "to the westward of the Sources of the Rivers which fall into the Sea from the West and North West" (from the 1763 Proclamation describing the area to which the Proclamation applied). That fact is not important because the Government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson Bay Company, as having an interest in the lands that required a treaty to effect its surrender.

Two of the earliest treaties (called the "Robinson Treaties" in the book, "The Treaties of Canada with the Indians of Manitoba, the North-West Territories, and Knee-Wa-Tin" by The Honourable Alexander Morris, P.C.), entered into in 1850 contained the following [p. 302]:

> And the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees . . . to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the Provincial Government.

In The North-West Angle Treaty of 1873, a clause that became the model for all subsequent treaties appears. By 1877, seven treaties had been signed by which the Indians surrendered most of the arable and grazing lands from the Great Lakes to the mountains. In 1899 by Treaty 8, the Indians surrendered the Peace River and Northern Alberta area. It was not until 1921 that the Indian rights in that part of the Northwest Territories that includes Yellowknife were surrendered by Treaty 11. As part of the consideration for surrendering their interest in the lands covered by the treaty, the Indians received the following covenant:

> And His Majesty the King hereby agrees with the said Indians that they shall have the 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 His 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.

This is substantially the same covenant as appears in all of the other treaties that I have been able to examine.

From these treaties and from the negotiations preceding the signing of these treaties as reported in Mr. Morris' book, it is,I think, obvious that while the Government hoped that the Indians would ultimately take up the white man's way of life, until they did, they were expected to continue their previous mode of life with only such regulations and restrictions as would assure that a supply of game for their own needs would be maintained. The regulations that "the Government of the Country" were entitled to make under the clause of the treaty which I have quoted, were, I think, limited to this kind of regulation. Certainly the Commissioners who represented the Government at the signing of the treaties so understood it. For example, in the report of the Commissioners who negotiated Treaty 8, this appears:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing *so* restricted as to render it impossible to make a livelihoodby such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as tree to hunt and fish after the treaty as they would be if they never entered into it.

These Indians, as well as all others, would have been surprised indeed if in the face of such assurances, the clause in their treaty which purported to continue their rights to hunt and fish could be used to restrict their right to shoot game birds to one and a half months each year. I agree with the view of McGillivray, J.A., in the *Wesley* case where he says [p. 789 D.L.R., P. 284 C.C.C., p. 45 A.L.R.]:

> 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.

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.

The Government in dealing with the Indians, has, on the whole, treated its obligations under these treaties seriously. This was probably, not always the case if we may judge from the remarks of John Beverley Robinson, Attorney-General for Upper Canada, in 1924, as quoted in *Sero v. Gault* (1921), 64 D.L.R. 327 at p. 330, 50 O.L.R. 27 at pp. 31-2:

> "To talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada, upon lands purchased for them and given to them by the British Government, is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke street or with the French emigrants who have settled in England:" Canadian Archives, Q. 337, pt. IL, pp. 367, 368.

In refreshing contrast is a speech of Lieutenant-Governor Morris to the Indians during the negotiation of the Qu'Appelle Treaty as reported in his book (p. 96):

> Therefore, the promises we have to make to you are not for today only but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.

It is interesting to note that when the Government of Canada transferred the natural resources within the Province of Alberta to that Province in 1930 [*Alberta Natural Resources Act,* 1930 (Alta.), c. 21], the agreement contained the following paragraph:

> 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.

Because of the Government's concern with the Indians' right to pursue "their usual vocations of hunting, trapping and fishing", and that its obligations under the treaties should be performed, it is difficult to understand why these treaties were not kept in mind when the Migratory Birds Convention was negotiated and when its terms were implemented, by the *Migratory Birds Convention Act,* R.S.C. 1952, c. 179, and the Regulations made under that Act.

That Convention was entered into by Great Britain (on behalf of Canada), with the United States in August, 1916 and ratified by both Governments in December of that year. Part of the preamble and some of the terms of that Convention should be considered.

In the preamble these paragraphs appear:

> Whereas many species of birds in the course of their annual migrations traverse certain parts of the Dominion of Canada and the United States; and
>
> Whereas many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both Canada and the United States, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds;

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas, Emperor of India, and the United States of America, being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects, and to the end of concluding a convention for this purpose have appointed as their respective plenipotentiaries ...

Article I defines the birds covered by the Convention and among the migratory birds are "wild ducks". Article II reads:

The High Contracting Powers agree that, as an effective means of preserving migratory birds, there shall be established the following close seasons during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities.

1. The close season on migratory game birds shall be between 10th March and 1st September, except that the close of the season on the Limicolae or shorebirds in the Maritime Provinces of Canada and in those States of the United States bordering on the Atlantic Ocean which are situated wholly or in part north of Chesapeake Bay shall be between 1st February and 15th August, and that Indians may take at any time scoters for food but not for sale. The season for hunting shall be further restricted to such period not exceeding three and one-half months as the High Contracting Powers may severally deem appropriate and define by law or regulation.

2. The close season on migratory insectivorous birds shall continue throughout the year.

3. The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres and puffins, and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

It will be seen from the preamble that the purpose of the Convention was to save migratory birds "from indiscriminate slaughter" and to assure their preservation. This, it seems to me, would have allowed for exceptions or reservations in favour of the Indians, for there can be no doubt that the amount of game birds taken by the Indians for food during the close season would not have resulted in "indiscriminate slaughter" of birds nor would the preservation of those birds have been threatened. We are told that the treaty between the United States and Mexico negotiated in 1936 permits indigent persons in Mexico to take these types of birds for food.

The *Migratory Birds Convention Act,* 1917 (Can.), c. 19, "sanctioned, ratified and confirmed" the Convention. By s. 4 it provides:

4(1) The Governor in Council may make such regulations as are deemed expedient to protect the migratory game, migratory insectivorous and migratory nongame birds which inhabit Canada during the whole or any part of the year.

(2) Subject to the provisions of the said Convention, such regulations may provide,

(a) the periods in each year or the number of years during which any such migratory game, migratory insectivorous or migratory nongame birds shall not be killed, captured, injured, taken, molested or sold, or their nests or eggs injured, destroyed, taken or molested;

(b) for the granting of permits to kill or take migratory game, migratory insectivorous and migratory nongame birds, or their nests or eggs;

(c) for the prohibition of the shipment or export of migratory game, migratory insectivorous or migratory nongame birds or their eggs from any province during the close season in such province, and the conditions upon which international traffic in such birds shall be carried on;

(d) for the prohibition of the killing, capturing, taking, injuring or molesting of migratory game, migratory insectivorous or migratory nongame birds, or the taking, injuring, destruction or molestation of their nests or eggs, within any prescribed area;

(e) for any other purpose which may be deemed expedient for carrying out the intentions of this Act and the said Convention, whether such other regulations are of the kind enumerated in this section or not.

(3) A regulation shall take effect from the date of the publication thereof in the *Canada Gazette,* or from the date specified for such purpose in any regulation, and such regulation shall have the same force and effect as if enacted herein, and shall be printed in the prefix in the next succeeding issue of the Dominion Statutes*,* and shall also be laid before both Houses of Parliament within fifteen days after the publication thereof if Parliament is then sitting, and if Parliament is not then sitting, within fifteen days after the opening of the next session thereof.

Section 5(1) and (2) of the present Regulations 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, take or molest a migratory bird at any time except during an open season specified for that bird and that area in Schedule A, or

(b) from any area described in Schedule A, kill, hunt, capture, injure, take or molest a migratory bird at any time in another area described in Schedule A except during an open season specified for that bird and both those areas in Schedule A.

(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.

The "scoter" mentioned in this section and in the Convention is defined in Murray's New English Dictionary:

Scoter. [Of obscure origin.] A duck of the genus *Oedemia,* esp. *Oedemia nigra,* a native of the Arctic regions and common in the seas of Northern Europe and America. Also *scoter-duck*.

There is no evidence that there are any of these ducks in the Yellowknife area which is several hundred miles from the sea.

The open season under Regulations for mallard ducks in the Yellowknife area if from September 1st to October 15th.

Sissons, J.T.C., in his reasons for judgment [(1962), 40 W.W.R. at p. 504] says:

> There are no express words or necessary intendment or implication in the *Migratory Birds* Con*vention* Act abrogating, abridging, or infringing upon the hunting rights of the Indians.

I have quoted s. 5(1) of the Regulations which says that "no person shall . . . kill . . . a migratory bird at any time except during an open season . . . ". It is difficult to see how this language admits of any exceptions. When, however, we find that reference in both Convention and in the Regulations to what kind of birds an Indian and Eskimo may "take" at any time for food, it is possible for me to say that the hunting rights of the Indians as to these migratory birds, have not been abrogated or infringed upon.

It is, I think, clear that the rights given to the Indians by 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 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 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.

I can come to no other conclusion than that the Indians, notwithstanding the rights given to them by their treaties, are prohibited by this Act and its Regulations from shooting migratory birds out of season. Unless one or other of the matters mentioned in the learned trial Judge's reasons for judgment or raised by the respondent's counsel at the hearing of the appeal is a defence to the charge, the appeal must be allowed and the conviction sustained.

The learned trial Judge in his reasons for judgment discusses the definition of the word "scoter" as used in the Convention and Regulations, and he finds that there is "a reasonable doubt as to what ducks are included in the word 'scoter,' and whether the word as used here is synonymous with 'ducks'." [p. 499] From the definition I have quoted, as well as the ones referred to by the learned trial Judge, I am satisfied that the female mallard duck which was shot by the respondent is one which, by the Regulations, could not be shot except in the open season.

The learned Judge also, because there was evidence that mallard ducks had been domesticated and kept by Constable Robin of the Royal Canadian Mounted Police at Fort Rae, Northwest Territories, felt he could not draw the inference that this was in fact a wild duck. By the common law as stated in Blackstone's Commentaries, this would be a wild duck even though it had once been domesticated. Speaking of property in wild animals, Blackstone says in Book II, p. 391:

> A qualified property may subsist in animals *ferae naturae per industriam hominis:* by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty.

And at p. 392:

> These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi,* which is only to be known by their usual custom of returning.

It would, I think, follow, that once such ducks escape they are wild ducks. There can be no doubt that mallard ducks are *ferae naturae* even though they are sometimes domesticated.

It was argued before us, as it was before the learned Judge appealed from, that the *Migratory Birds Convention Act* is now *ultra vires.* It is, of course, conceded that when it was passed in, 1917 it was validly passed under s. 132 of the *B.N.A. Act.* It is suggested that its validity can now be questioned because of the *Statute of Westminster* and two Acts of the Parliament of Canada which have been passed since that statute became effective and which had the effect, to use counsel's words, "of reaffirming the Migratory Birds Convention Act". There are two cases decided since the *Statute of Westminster* which discusses the effect of that statute upon s. 132 and the treaty making powers under the *B.N.A. Act.* The first of these cases *(A.-G. Can. v. A.-G. Ont.,* [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299), dealt with Acts whereby the Parliament of Canada sought to implement certain treaties adopted by the International Labour Organization of the League of Nations in accordance with the labour part of the Treaty of Versailles, 1919, and the Judicial Committee of the Privy Council held that, the legislation being matters of "property and civil rights within the Province", Parliament lacked the power to pass them. In the second case *(Johannesson et al. v. Rural Municipality of West St. Paul,* [1951] 4 D.L.R. 609, 69 C.R.T.C. 105, [1952] 1 S.C.R. 292), the Supreme Court of Canada held that the Province of Manitoba had no power to legislate with respect to aeronautics, that field belonging exclusively to the Parliament of Canada. Both of these cases dealt with treaties entered into after the *Statute of Westminster* had been passed and Canada had acquired full treaty making powers. There would seem to be no doubt that statutes which implement treaties made before the *Statute of Westminster,* remain valid legislation even though the subject-matter of that treaty is one which falls exclusively under s. 92, so long, of course, as those treaties have not been denounced. Mr. Morrow for the respondent does not dispute this but he argues that Parliament cannot further legislate upon these matters contained in the treaty in a manner to indicate an intention to re-ratify the treaty, and if it does so, the whole Act can then be reviewed and if it is found that its subject-matter properly belongs to the Province, it then becomes *ultra vires.* He says that Parliament passed two such Acts which extend the operation of the *Migratory Birds Convention Act* beyond its original scope and, as the Court of Appeal in Manitoba in *R. v. Paling*, [1946] 3 D.L.R. 54, 85 C.C.C. 289, 54 Man. R. 43, 1 C.R. 461, [1946] 2 W.W.R. 49, has held that the preservation of game is a matter of provincial jurisdiction, the Act is now *ultra vires.* The two Acts referred to are, (1) the *Extra-territorial Act, 1933,* 1932-33 (Can.), c. 39, which gives extra-territorial operation to every statute of the Parliament of Canada "which in terms or by necessary or reasonable implication was intended ... to have extra-territorial operation", and (2) 1949 (Can.), c.1, the Act which approves the agreement by which Newfoundland became a Province of Canada. Paragraph 18(2) of that agreement makes provision for the bringing into force in the Province of Newfoundland by proclamation the statutes of the Parliament of Canada.

It would appear to me that statutes made to implement treaties properly made under s. 132 of the *B.N.A. Act* can still be amended if that be necessary to properly carry out the terms of the treaty. In any case, an extension of all Acts of the Parliament of Canada to the enlarged territorial jurisdiction of Canada which came about immediately before these Acts were passed, cannot be said to be a re-ratification or re-implementation of those treaties made when s. 132 was fully effective.

Viscount Simon, L.C., in *A.-G. Ont. et al. v. Canada Temperance Federation,* [1946] 2 D.L.R. 1 at pp. 5-6, 85 C.C.C. 225 at pp. 230-1, [1946] A.C. 193 at pp. 205-6, 1 C.R. 229, [1946] 2 W.W.R. 1, said this:

> In their Lordships' opinion, the true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the *Aeronautics Case* [*Re Aerial Navigation, A.-G. Can.* v. *A.-G. Ont.],* [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108 and the *Radio Case [Re Regulation & Control of Radio Communication, A.-G. Que.* v. *A.-G. Can.*], [1932], *2* D.L.R. 81, A.C. 304, 39 C.R.C. 49*)* then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures. War and pestilence, no doubt, are instances; so too may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen,* 7 App. Cas. 829, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a Provincial Legislature dealing with in aspect of the same subject in so far as it specially affects that Province.

It may well be that the preservation of migratory birds which are (to quote the preamble to the Convention), "of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain", comes within the class of subjects that Viscount Simon, L.C., mentions as being within the competence of Parliament. It would appear that there

would be room for a Provincial Legislature as well as the Parliament of Canada to legislate in this field.

We were invited by counsel for the respondent to apply to the Migratory Birds Convention those rules which have been laid down for the interpretation of treaties in international law and we have been referred to many authorities on how these treaties should be interpreted. We are not, however, concerned with interpreting the Convention but only the legislation by which it is implemented. To that statute the ordinary rules of interpretation are applicable and the authorities referred to have no application.

The appeal must be allowed and the conviction imposed by the Magistrate affirmed. In coming to this conclusion, I regret that I cannot share the satisfaction that was expressed by McGillivray, J.A., in *R. v. Wesley*, [1932] 4 D.L.R. at p. 790, 58 C.C.C. at p. 285, 26 A.L.R. at p. 451, when he was writing his judgment dismissing the appeal in that case:

> It is satisfactory to be able to come to this conclusion and not to have to decide that "the Queen's promises" have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be "convinced of our justice and determined resolution to remove all reasonable cause of discontent."

Appeal allowed.