# REGINA v. DENNIS AND DENNIS

(1974), 56 D.L.R. (3d) 379 (also reported: [1975] 2 W.W.R. 630,28 C.R.N.S. 268 , 22 C.C.C. (2d) 152)

British Columbia Provincial Court, O'Connor Prov. Ct. J., 25 November 1974

**Indians - Aboriginal title - Accused Indians charged with unlawfully hunting wildlife contrary to provincial statute - Accused hunting food in traditional hunting area on unoccupied Crown land - Whether accused having aboriginal hunting rights - Whether provincial statute capable of overriding hunting rights - Whether accused should he acquitted - Wildlife Act (B.C.), ss.4(1)(c), 26, 53(1)(b), 2 - Indian Act (Can.), s.88 - British North America Act 1867, s.91(24).**

**Constitutional law - Validity of legislation - Indians - Hunting rights - Whether provincial legislation capable of extinguishing aboriginal hunting rights - Wildlife Act (B.C.), s.4(1)(c) - Indian Act (Can.), s.88 - British North America Act, 1867, s.91(21).**

Indians hunting for food on their traditional hunting grounds on unoccupied Crown land have always had an aboriginal or native interest or title to do so, and such rights have not apparently been, in general, extinguished. Whatever else the aboriginal title may encompass the right to hunt for food is certain. Therefore where, in respect o such activities, an Indian is charged with unlawfully hunting wildlife contrary to a provincial statute, the *Wildlife Act*, 1966 (B.C.), c.55, s.4(1)(c), he must be acquitted, since provincial legislation cannot extinguish or restrict such a right. Section 91(24) of the *British North America Act, 1867*, confers exclusive legislative jurisdiction with respect to Indians upon the federal Parliament, and to the extent that it is sought to apply provincial legislation to restrict native hunting rights, the legislation would be ultra vires the Province.

Nor does s. 88 of the Indian Act, R.S.C. 1970, c.I-6, providing that "laws of general application . . . in force in any province are applicable to . . . Indians", operate to make such legislation applicable to an Indian accused. The phrase "of general application" should not be interpreted to include such provincial legislation, since to do so would result in different treatment of Indian rights as between the Provinces and further would have the effect of permitting the extinction of native rights in the absence of any treaty or compensation.

[*R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, apld; *Cardinal v. A.-G. Alta*. (1973), 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553, [1973] 6 W.W.R. 205, [1974] S.C.R. 695, distd; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485, not folld; *Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1; *Re Paulette et al. and Registrar of Titles* (No. 2) (1973), 42 D.L.R. (3d) 8, [1973] 6 W.W.R. 97, 115; *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd 52 D.L.R. (2d) 481n, [1965] S.C.R. vi; *R. v. Sikyea*, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306; *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267, 47 C.R. 382; *Union, Colliery Co. of B.C. Ltd. v. Bryden*, [1899] A.C. 580; *A.-G. Alav. v. A.-G. Can*., [1929] 1 D.L.R. 369, [1929] 1 W.W.R. 136, [1929] A.C. 260; *A.-G. (,an. v. Reader's Digest Ass'n* (Con.) Ltd. (1961), 30 D.L.R. (2d) 296, [1961] S.C.R. 775, [1961] C.T.C. 530; *R. v. Martin* (1917), 29 C.C.C. 189, 39 D.L.R. 635, 41 O.L.R. 79; *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403, 46 W.W.R. 121; *St. Catherine's Milling and Lumber Co. v. The Queen* (1889), 14 App. Cas. 46; *R. v. Shade* (1952), 102 C.C.C. 316, 14 C.R. 56, 4 W.W.R. (N.S.) 430; *Re Adoption Act* (1974), 44 1).L.R. (3d) 718, [1974] 3 W.W.R. 363, 14 R.F.L. 396, *sub nom. Re Birth Registration No. 67-09-022272*, refd to]

**Indians - Treaty rights - Accused Indians charged with offence -Treaty covering area providing defence to charge - Accused's tribe not signatory of treaty - Treaty not applicable to accused - Only applicable to tribes signing treaty - Treaty similar to contract - Wildlife Act (B.C.), s.4(1)(c).**

[*R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd 52 D.L.R. (2d) 481n, [1965] S.C.R. vi, refd to]

TRIAL of the accused on a charge of unlawfully killing wildlife contrary to s.4(1)(c) of the *Wildlife Act* (B.C.).

*P. Asselin*, for the Crown.
*R. Veale*, for accused.

O'CONNOR, PROV.CT.J.:-The two defendants are jointly charged that on or about March 11, 1974, at or near mile 3 of the Cassiar Rd., in the Province of British Columbia, they did unlawfully kill wildlife, to wit: one moose during the closed season without having previously obtained a permit, contrary to the form of statute in such case made and provided. Section 4(1)(c) [am. 1971, c.69, s.3] of the *Wildlife Act*, 1966 (B.C.), c.55, provides:

> 4(1) No person shall hunt, trap, wound, or kill wildlife
> (*c*) at any time not within the open season.

Section 26(1) of the Act provides,

> 26(1) The Director or his authorized representative may, to extent authorized by and in accordance with regulations made by the Lieutenant-Governor in Council, by the issuance of a permit, authorize any person to do anything that he may do only by authority of a permit or that he is prohibited from doing by this or Regulations ...

Section 53(1) [rep. & sub. 1971, c.69, s.25] of the provides:

> 53(1) Subject to subsection (2), a person who contravenes provision of this Act, or of the Regulations, or any term or condition of a licence or permit issued under this Act or the regulations, or refuses, omits, or neglects to fulfil, observe, carry out, or form any duty or obligation thereby created, prescribed, or posed, is guilty of an offence and is liable, on summary conviction,
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> . . . . .
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> (*b*) For shooting, killing, or taking big game except deer black bear, during the closed season, to a penalty of not less than one hundred dollars and not more than one thousand dollars for each animal, or to a term of imprisonment not exceeding ninety days, or to both such a fine and imprisonment.

A moose is big game, as that phrase is used in cl. (b) of s. 53(1).

The facts giving rise to the charge are not in dispute and were admitted by Crown counsel and defence at the trial. No witnesses were called. The facts are as follows: The two defendants, on March 11, 1974, shot a moose near mile 3 of the Cassiar Rd., in the Province of British Columbia. Both defendants are registered as Indians under the *Indian Act*, R.S.C. 1970, c.I-6, and are members of the Tahltan Band. The moose was shot for the purposes of providing food for the defendants themselves and for the wife and three children of the defendant, Jimmy Dennis. Jimmy Dennis resides in the Province of British Columbia with his family, near the location where the moose was shot. Joan Dennis resides in the Town of Watson Lake, in the Yukon Territory, which is approximately 15 miles from where the moose was shot.

The moose was shot at a time not within the open hunting season for moose, and neither defendant had a permit pursuant to s.26(1) of the *Wildlife Act* to kill moose o the open hunting season.

The Tahltan Indians historically have resided in the Telegraph Creek area of the Province of British Columbia. They have inhabited the area where the moose was shot from time immemorial, and have exercised hunting rights in that area continuously. The area where the moose was shot is described as being "unoccupied Crown land".

The first question to be determined is whether or not treaty No. 8 between the Crown and certain Indians specified therein applies to the defendants. This treaty is dated June 21, 1899. Mile 3 of the Cassiar Rd. is east of the central range of the Rocky Mountains and just south of the 60th parallel. An examination of the map appended to treaty No. 8 outlining the area covered by the treaty reveals that mile 3 of the Cassiar Rd. falls within the treaty area. However, the ancestors of the defendants were not signatories to treaty No. 8 nor to any adhesions thereto. Although they resided outside the western boundary of the treaty area, they did exercise hunting rights within that area. The treaty, if it applies, affords a complete defence as it reserves hunting rights to the Indians within the treaty area. It is now accepted that treaty-protected hunting rights supersede provincial game legislation: *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affirmed 52 D.L.R. (2d) 481n, [1965] S.C.R. vi.

A reading of the treaty makes it clear that only the signatories and chose whom they represented are legally affected by its provisions. The treaty is similar to an agreement or contract. Neither the Tahltan Indian Band from Telegraph Creek nor its chief were parties to that treaty. The treaty is not a surrender of Indian rights by Indians not parties to it, and conversely does not purport to confer on such Indians the hunting rights set out in the treaty. The fact that the incident giving rise to the charge occurred within the treaty area does not afford the defendants with an answer to the charge.

The second question to be decided is whether or not the defendants have an aboriginal or native interest or title to hunt for food on the lands in question. III recent years there has been I great deal of judicial and academic writing with respect to the question of the existence of aboriginal rights in the native people of Canada. I have carefully reviewed the authorities dealing with the question and am in agreement with, and adopt the reasoning of those Judges and authors who conclude that aboriginal rights do exist in the native people of Canada until they have either been surrendered or extinguished by Act of Parliament. I refer to the following:
*Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, judgment of Hall, J., in the Supreme Court of Canada; *Re Paulette et al. and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8, [1973] 6 W.W.R. 97, 115, judgment of Morrow, J., in the Northwest Territories Supreme Court; *Kavatewat v. James Bay Development Corp.* (unreported), judgment of Hugessen, J., in the Superior Court of the Province of Quebec; *R. v. White and Bob* (1965), 52 D.L.R. (2d) 481n, [1965] S.C.R. vi; Cumming and Mickenberg, *Native Rights in Canada*, 2d ed. (1972), and D. E. Saunders "Indian Hunting and Fishing Rights", 38 Sask. L. Rev. 45 (1974).

It is submitted by the Crown that even if aboriginal rights did once exist in the Indian people of British Columbia, those rights have since been extinguished. The case of *Calder v. A.-G. B.C., supra*, dealt exhaustively with this very question. That case involved an application by the Nishga nation of Indians before the Supreme Court of British Columbia for a declaration that they held an aboriginal title or interest in the unoccupied Crown lands which they inhabited. The evidence indicated that the Nishgas had inhabited the area in question on the northwest coast of British Columbia near the southern tip of the Alaska Panhandle since time immemorial. The application for a declaration was dismissed at trial. The appeal by the Nishgas was dismissed by the Court of Appeal by a majority of three to two. The matter was further appealed to the Supreme Court of Canada and that appeal resulted in what amounts to a judicial stalemate on the substantive questions that were before the Court. Seven Judges sat on the appeal. Mr. Justice Hall writing a judgment, concurred in by Justices Spence and Laskin, concluded that aboriginal rights did exist in the Nishga peoples, that in so far as the natives of British Columbia were concerned, these rights had been recognized and confirmed in the Royal Proclamation of 1763, and that the rights had not been extinguished either by surrender or by legislative enactment. Mr. Justice Judson, writing a judgment concurred in by Justices Martland and Ritchie, concluded that even if aboriginal rights had existed as a result of the occupation of the lands by the Nishga Indians, such rights had been extinguished by the enactment of various Executive Orders between the years 1858 and 1871, which Orders asserted the Sovereignty of the Crown over the lands in question and which Orders were inconsistent with the continued existence of aboriginal rights in the native people occupying those lands. He further concluded that the Royal Proclamation of 1763 did not apply, in that the lands were terra incognita at the time of the enactment of that Proclamation. The seventh Judge hearing the appeal, Mr. Justice Pigeon, decided that the application by the Nishgas had been improperly brought, in that a fiat had not been obtained prior to its institution. He concurred in the result reached by Judson, J., and dismissed the appeal. The issues raised before the Court in that case are, therefore, left in a state of uncertainty, which uncertainty will only be resolved when the Supreme Court has an opportunity of deciding the questions some time in the future.

I do not propose to review the reasoning set out in the two conflicting judgments of the Supreme Court in the Calder case. With the greatest respect, I am strongly persuaded by the reasoning of Mr. Justice Hall, to the effect that aboriginal rights in the Province of British Columbia were not extinguished by the Executive Orders enacted between 1858 and 1871 and that except where surrendered, they continue to exist. I find particularly compelling the argument that subsequent to the enactment of those Executive Orders the federal Government entered into negotiations and treaties with some native peoples in the Province, providing for the surrender of their aboriginal rights. It only seems logical that had the federal Government intended to extinguish aboriginal rights by the enactment of the Executive Orders, no subsequent negotiations or settlements would have been necessary, The existence of such rights having been recognized at the time of the treaties, and compensation for their surrender having been provided in the treaties, it would be an unfortunate result to now conclude that the natives of the Province not covered by the treaties had been dispossessed of their rights and are, therefore, left in an inferior position to treaty Indians.

It is suggested, however, that because this issue was left unsettled by the Supreme Court of Canada, the majority decision of the British Columbia Court of Appeal in the Calder case continues to be the law of the Province until overruled. The majority of the Court, Davey, C.J.B.C., Tysoe and MacLean, JJ.A., decided, as did Judson, J., in the Supreme Court of Canada, that if the Indians of the Province of British Columbia were ever possessed of aboriginal rights, those rights had been lawfully extinguished. The minority took the contrary view and decided as Hall, J., did in the Supreme Court, that aboriginal rights had been vested in tile native peoples of British Columbia and had not been extinguished prior to British Columbia's confederation. This same view of the situation was taken by Norris, J.A., of the British Columbia Court of Appeal in the case of *R. v. White and Bob, supra*. He was not a member of the Court which heard the *Calder* case. Therefore, of the six Justices of that Court who have dealt with the question, there has been an even split of opinion. It is true that the majority In the *Calder* case decided that such rights had been extinguished, however, it is of significance that the decision was appealed on the very point in question, and was neither upheld nor reversed.

I find myself in the difficult position of deciding whether or not I am bound as a matter of *stare decisis* by the majority decision of the Court of Appeal in the *Calder* case.

The preferable view to take, it seems to me, is that the question remains undecided, The issue can only be clarified by the Supreme Court of Canada. To decide that the Court of Appeal decision is binding is to bring certainty to an issue that is uncertain. To do so in circumstances where a trial Judge is strongly persuaded by the opposite view, and where the decision will result in a conviction and the carriage of an appeal will fall to the defendants, is not a desirable result. The issue involved is one of great public importance with broad social, economic and cultural consequences to the native people of British Columbia. The matter ought to be clarified by the Courts and it is important that either this or a case with the same issue be appealed so the uncertainty might he resolved. In the meantime, I am of the view that there has been such a differ-

ence of judicial opinion in both the Supreme Court of Canada and the British Columbia Court of Appeal that the question remains open. I am aware that the contrary view on this point was taken by Mr. Justice Aikins of the British Columbia Supreme Court in the case of *R. v. Derriksan*, unreported [since reported 20 C.C.C. (2d) 157, 52 D.L.R. (3d) 744, [1975] 1 W.W.R. 56]. However, with the greatest of respect, for the reasons set out above, I conclude that I am not bound as a matter of *stare decisis* to follow the majority of the Court of Appeal in the *Calder* case.

In the many judgments and articles dealing with the question of aboriginal rights, there has been surprisingly little written oil what these rights encompass. However, it does appear certain that at the very least there is included the right of Indians to hunt for food for themselves and their dependants oil unoccupied Crown lands. I, therefore, am able to conclude that in the present case that at the time tile two defendants shot the moose, they were doing so in exercise of their aboriginal or native rights.

The question then arises whether or not non-treaty aboriginal hunting rights can be extinguished or restricted by the enactment of provincial legislation. There are two possible Sources of legislative jurisdiction for the Provinces in this area. The first is by virtue of the jurisdiction conferred on the Provinces under the *British North America Act, 1867*, and the second by virtue of s.88 of the *Indian Act*. Section 91(24) of the *B.N.A. Act, 1867* provides that the federal Government has exclusive legislative jurisdiction with respect-to Indians and lands reserved for Indians. It is settled that federal legislation can extinguish or restrict aboriginal hunting rights without compensation in circumstances where there has been no surrender of such rights: *R. v. Sikyea*, [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.

It is well accepted that the Provinces have legislative jurisdiction with respect to the enactment of game laws. The *Wildlife Act* of British Columbia is general and purports to apply to all who come within the boundaries of the Province. It makes no specific reference to Indians other than defining an Indian in s.2. The legislation in so far as it purports to apply to Indians must be tested against two standards. Does it fall within the area of exclusive federal jurisdiction set out in s.91(24) of the *B.N.A. Act, 1867*? If so, then the Province is not competent to enact legislation in that field. The fact that the federal Government may itself not have enacted any legislation to occupy the field, does not have the effect of transferring to the Province the legislative authority assigned to the federal Government under s.91(24): *Union Colliery Co. of B.C. Ltd. v. Bryden*, [1899] A.C. 580. If the legislation is not within the exclusive jurisdiction of Parliament, then the question is whether or not the legislation is overridden by any existing federal legislation.

This case concerns what amounts to a restriction by the *Wildlife Act* of the natives' aboriginal right to hunt for food. The inclusion in the *British North America Act, 1867* of a separate head of legislative power respecting Indians and Indian lands, was a recognition that consideration was to be given to the uniqueness of their situation within the framework of Confederation. Part of the unique position of the Indian, which it was felt required a separate head of legislative authority in the federal Government, must have been the treatment of the Indian's right to hunt, fish and trap on the lands he had occupied since time immemorial.

In characterizing the legislation for purposes of determining whether nor not it falls within s.91(24) of the *B.N.A. Act, 1867* one must look not only to the purpose of the legislation but also to its effect: *A.-G. Man. v. A.-G. Can.,* [1929] 1 D.L.R. 369, [1929] 1 W.W.R. 136, [1929] A.C. 260; *A.-G. Can. v. Reader's Digest Ass'n* (Can.) Ltd. (1961), 30 D.L.R. (2d) 296, [1961] S.C.R. 775, [1961] C.T.C. 530. The effect of ss.4 [am. 1971, c.69, ss.3 and 4] and 26 of the *Wildlife Act* in so far as Indians are concerned is to restrict heir aboriginal right to hunt for food for themselves or their dependants. In the case of *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193, Norris, J.A., at p. 648 said:

> It is well that what is now attempted by the enforcement of the game laws against the Indians in this case be understood. This is not a case merely of making the law applicable to native Indians as well as to white persons so there may be equality of treatment under the law, but of depriving Indians of rights vested in them from time immemorial, which white persons have not had, viz., the right to hunt out of season on unoccupied land for food for themselves and their families.

The decision of the Court was upheld by the Supreme Court of Canada.

Such legislation is seems to me, as a matter of common sense, ought to be considered as being legislation "in respect to Indians", or to use the expression of Mr. Justice Martland in the case of *Cardinal v. A.-G. Alta*. (1973), 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553 [1973] 6 W.W.R. 205, "legislation relating to Indians *qua* Indians".

The British Columbia Court of Appeal in the case of *R. v. White and Bob, supra*, decided that the treaty-protected right to hunt food prevailed over conflicting provisions in provincial game legislation. Chief Justice Davey [then J.A.] at p. 618 stated:

> Legislation that abrogates or abridges the hunting rights re. served to Indians under the treaties and agreements by which they sold their ancient territories to the Crown and to the Hudson's Bay Company for white

> settlement is, in my respectful opinion, legislation in relation to Indians because it deals with rights peculiar to them.

It would seem a logical extension of this proposition that legislation that extinguishes or restricts aboriginal hunting rights is also legislation in relation to Indians because it also deals with rights peculiar to them.

This same question of provincial competence to enact game legislation that affects the hunting rights of Indians was discussed indirectly in the recent decision of the Supreme Court of Canada in the case of *Cardinal v. A.-G. Alta., supra*. That case dealt with a status Indian selling moose meat on a reservation in the Province of Alberta. The Court was concerned there with the interpretation of ss.10 and 12 of the Alberta Natural Resources Transfer Agreement, and whether or not provincial game legislation was *intra vires* the Legislature in so far as Indians on reserves were concerned. The appellant in the case, in Indian, argued that the Parliament of Canada had exclusive legislative authority concerning Indian reservations and that provincial laws could not apply unless referentially introduced through federal legislation. I will deal with the question of referential incorporation of' legislation later in the judgment. Presently I wish to refer to comments made by Air. Justice Martland with respect to the legislative competence of the Provinces in the area of game laws as those lands might affect the rights of Indians. Mr. Justice Martland in writing the majority judgment, concurred in by Fauteux, C.J.C., Abbott, Judson, Ritchie, and Pigeon, JJ., at p. 9 C.C.C., p. 562 D.L.R., p. 213 W.W.R., approved a statement of Mr. Justice Riddell in the case of *R. v. Martin* (1917), 39 D.L.R 635, 41 O.L.R. 79, as follows:

> "In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there. is no reason why general legislation may not affect them."

It is noted that Mr. Justice Riddell was dealing with a charge laid against in Indian not on a reserve under the *Ontario Temperance Act*. Mr. Justice Martland at pp. 9-10 C.C.C. p. 562 D.L.R., pp. 213-4 W.W.R., went on to say:

> In none of these cases is it decided that a provincial game law, of general application, would not affect an Indian outside a reserve Legislation of this kind does not relate to Indians, qua Indians, and the passage above quoted would, in my opinion, be applicable to such legislation.
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> Cases decided before the Agreement, such as R. v. Martin, supra, had held that general legislation by a Province, not relating to Indians qua Indians, would apply to them. On their facts, these cases dealt with Indians outside reserves. The point is that the provisions of para. 12 were not required to make provincial game laws apply to Indians of the reserve.

Mr. Justice Martland proceeds in his judgment to interpret para. 12 of the Alberta Land Resources Transfer Agreement as applying to Indian reserves and finds that the game laws of Alberta are therefore applicable to Indians on reservations. It is important to note that Mr. Justice Martland was dealing with a charge against an Indian on a reserve of selling moose meat. He was not dealing with a charge relating to a factual situation where an Indian was hunting for food. In Alberta, Manitoba and Saskatchewan, such right to hunt for food is specifically excluded from the Provincial legislation by virtue of provisos contained in para. 12, or similar paragraphs of the Land Transfer Agreements. It can be persuasively argued that the comments of Mr. Justice Martland relating to the application of provincial game laws to Indians were intended only to apply to situations were a provincial Legislature is regulating hunting for sport or for commerce. Laws of this nature are laws of general application, and fall within the ambit of the passage of Mr. Justice Riddell in the case of *R. v. Martin* (1917), 29 C.C.C. 189, 39 D.L.R. 635, 41 O.L.R. 79. These laws have the same general effect on the people to whom they apply. On the other hand, legislation that restricts Indians from hunting for purposes of food for themselves or for their dependants has much more serious consequences to them than the rest of the population. It infringes on their aboriginal rights and, in my view, should not be characterized in so far as Indians are concerned as legislation of general application.

The importance of the distinction between the kind of hunting involved was discussed by Mr. Justice McGillivray of the Alberta Court of Appeal in the case of *R. v. Wesley* (1932), 58 C.C.C. 269, [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337. That case was concerned with a charge against an Indian in respect of hunting activities on unoccupied Crown land. The deer which he had killed was used for food, and the issue before the Court was the interpretation of the protection afforded to him under para. 12 of the Alberta Land Resources Transfer Agreement. Mr. Justice McGillivray, at p. 276 C.C.C., p. 781 D.L.R., p. 344 W.W.R., stated:

> I cannot think that the language of the section supports the view that this was the intention of the lawmakers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life,

> the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the provision of s.12 reassured of the continued enjoyment of a right which be has enjoyed from time immemorial.

This passage was quoted with approval by the Supreme Court of Canada in the case of *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 41 C.R. 403.

In deciding whether or not the legislation falls within the exclusive jurisdiction of the federal Government under s.91(24) of the *B.N.A. Act, 1867* it is important as well for the Court to consider the most desirable social objective in the over-all legislative scheme dealing with Indians. To hold that the Provinces in enacting game legislation have authority to extinguish or restrict aboriginal hunting rights of Indians would result in Indians in the various Provinces and territories being, treated differently with respect to this matter which is of such importance to their livelihood and to their culture. The *Yukon Act*, R.S.C. 1970, c. Y-2, and the *Northwest Territories Act*, R.S.C. 1970, c. N-22, provide that territorial Ordinances cannot restrict Indian and Eskimo rights to hunt for food. Similarly, the Natural Resources Transfer Agreements between the federal Government and the Provinces of Manitoba, Saskatchewan and Alberta [see 1930 (Can.), cc. 29, 41 and 3], provide that the laws respecting game in force in the Provinces from time to time shall apply to Indians with the exception that Indians shall have the right of hunting, trapping and fishing game and fish for food at all seasons of the year in all unoccupied Crown lands. The rights of the native people of the two territories and the three prairie Provinces to hunt for food can only be interfered with by legislation of Parliament. These rights are protected from infringement by the territorial or provincial Governments. The protection of hunting rights contained in the agreements between the federal Government and the Governments of the three prairie Provinces has been given the force of law by virtue of the affirmation of the agreements by the *British North America Act, 1930* (U.K.), c.26.

The importance of the uniformity of legislation dealing with Indians in Canada was referred to by Lord Watson in *St. Catharines Milling & Lumber Co. v. The Queen*. (1889), 14 App. Cas. 46 at p. 59.

> It appears to be the plain policy of the Act [B.N.A. 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.

Concern for the uniformity of legislation extinguishing or restricting aboriginal hunting rights of Indians leads to an interpretation of s.91(24) of the *B.N.A. Act, 1867* which will confer exclusive jurisdiction in this matter on Parliament. Mr. Justice Laskin in a dissenting judgement in the *Cardinal* case makes reference to the importance of the uniformity of legislation relating to Indians and adopts that as a consideration in his decision that legislation with respect to Indian reservations should be within the exclusive jurisdiction of Parliament. For the reasons set out above, I conclude that legislation which extinguishes or restricts aboriginal hunting rights of Indians is legislation relating to Indians and within the exclusive jurisdiction of Parliament. Provincial legislation is therefore incompetent to do so.

A further argument can be made that such legislation falls exclusively within federal competence because it is legislation, that relates to lands reserved for Indians, in that hunting rights are integrally tied to the lands over which they are exercised. In view of the conclusion I have reached, I do not find it necessary to deal with that proposition, nor is it necessary to consider the question whether there is federal legislation occupying the field.

The final question to be considered is whether or not the sections of the *Wildlife Act* of British Columbia in question have been referentially incorporated as a part of federal legislation by virtue of s.88 of the *Indian Act*. Section 88 of the Indian Act reads:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Section 88 was first enacted in 1951. It can be interpreted as either being a statement of what was the situation prior to its enactment - namely, that provincial laws of general application are not laws in respect of Indians, and if otherwise competent they continue to be so, or as being a referential incorporation into federal legislation of provincial legislation not already competent with respect to Indians.

I have been able to find only two authorities directly dealing with the interpretation of s.88. The first case is a decision of Judge Schultz of the British Columbia County Court in the case of *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485. In that case the learned trial Judge decided that the game laws of British Columbia were laws of general application and fell within s.88 of the *Indian Act* and were, therefore, applicable to the Indian defendant charged with hunting

without a permit. The second decision is a decision of Judge Washington, also of the British Columbia County Court in the case of *R. v. Kruger and Manuel*, unreported [since reported 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435, [1974] 6 W.W.R. 206]. That case dealt with a fact situation indistinguishable from the facts in the present case. It involved a charge of hunting moose out of season in the Penticton area. The defendants were non-treaty Indians, and it was admitted that their ancestors had inhabited the lands in question since time immemorial. The lands on which the kill took place were unoccupied Crown lands. The learned trial Judge chose to follow the judgment of Mr. Justice Hall in the *Calder* case and decided that aboriginal rights continued to exist at the present time in the non-treaty Indians of the Province. He went on to find that these rights had been recognized by the Royal Proclamation of 1763, and concluded that only Parliament could interfere with aboriginal rights of Indians to hunt for food. Since Parliament has not done so lie concluded the law remained as it has been since the Royal Proclamation of 1763. He went on to decide that the Royal Proclamation of 1763 has the force and effect of an Act of Parliament and as such the operation of s.88 of the *Indian Act* is subject to the provisions of the Proclamation and, therefore, provincial game laws do not apply to Indians hunting for food.

I agree with the result reached in the *Kruger and Manuel* case. However, I base my decision on reasons other than those expressed by the learned Judge in that case. His decision, based its it was upon the applicability of the Royal Proclamation of 1763, has two difficulties. The first is that there is considerable difference of opinion as to whether or not the Royal Proclamation applies to Indians resident in the Province of British Columbia. This issue was thoroughly discussed in both judgments in the *Calder* case in the Supreme Court of Canada. Suffice it to say that the possibility exists that when the matter is before that Court again, the Supreme Court will decide that the Royal Proclamation of 1763 has no application to Indians resident in this Province. Should that be the case, the reasoning in *Kruger and Manuel* would be without foundation.

Secondly, the proviso in s.88 of the *Indian Act* reads:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada …

It may be argued that the Royal Proclamation of 1763 although having the force and effect of an Act of Parliament, is an Executive Order and not an Act of Parliament, and, therefore, not included within the execution set out at the beginning of s.88.

If s.88 is a referential incorporation of provincial legislation of general application, one must consider whether or not game legislation which has the effect of regulating or extinguishing native aboriginal hunting rights is legislation of general application. The phrase is open to two interpretations. The first is that the game laws apply to all persons within the Province including the Indians and are, therefore, by simple definition, laws of general application. The second is that the game laws if applied to all persons would affect the Indian differently than the rest of the population in that they would extinguish or restrict his aboriginal rights to hunt for food. It is not apparent from the legislation itself whether Parliament when enacting this section intended that one interpretation or the other be placed upon the wording used in the section.

The phrase, "of general application" should not be interpreted to include the legislation involved in the case before the Court. I say this for two reasons. First, to hold that s.88 confers on the Provinces jurisdiction to enact legislation regulating or interfering with the hunting rights of Indian people would result in different treatment of the Indian rights in this Province from that in the two territories and the three prairie Provinces. The undesirability of this result is magnified by the facts of the present case. Had the defendants shot the moose a very short distance to the north, they would have been within the boundary of the Yukon Territory, where territorial legislation has no application. The areas over which the Indians exercised their traditional hunting and fishing rights were not defined by the boundaries between Provinces and territories. To extinguish these rights on such a basis is unfair and illogical.

Secondly, there is undoubtedly legislative authority in the Parliament of Canada to extinguish or regulate Indian aboriginal rights, and indeed the Government has legislated to this effect on a number of occasions. There is a presumption that aboriginal rights once established or recognized, are to continue until the contrary is established by context or circumstances. Mr. Justice Hall in the *Calder* case, 34 D.L.R. (3d) 145 at p. 208, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, reviews the English and American authorities on the question of the extinguishment of aboriginal rights and concludes at p. 210 as follows:

> It would, accordingly, appear to be beyond question that the onus proving that the Sovereign intended to extinguish the Indian title lies on the respondent [in this case the Attorney-General for the Province of B.C.] and that intention must be "clear and plain"
>
> There is no such proof in the case at bar; no legislation to that effect.

Cumming and Mickenberg in *Native Rights in Canada* at p.43, on reviewing the American authorities had this to say:

> The policy of extinguishing Indian title only upon equitable terms has been so consistently applied in American history that not only will the courts presume that the government intended to act fairly, but further, only the most deliberate governmental action will be viewed as properly extinguishing aboriginal rights at all. The position has recently been restated in *Lipan Apache Tribe v. United States* (1967), 180 Ct. CI. 487 at p. 492):
>
> > While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of [claimants'] rights" in their property Indian title continues. In sum, while Congress can undoubtedly extinguish Indian title, such "an extinguishment cannot be lightly implied . . . (United States v. Santa Fe Pac. R.R., 314 U.S. at p. 354).

And further:

> The history of Canada demonstrates the traditional seriousness and respect with which the Crown regarded Indian rights. While the sovereign undoubtedly has had the authority to extinguish Indian title, the law and consistent political history in this area show that courts should proceed with great caution before assuming that an extinguishment has occurred.

The federal Government has, in the past, negotiated settlements of Indian title through treaties with the Indians residing in different areas throughout the country. Such treaties have provided for compensation to Indians by setting aside reserves, by protecting hunting and fishing rights, and otherwise in return for the surrender of the aboriginal title. To hold that s.88 of the *Indian Act* incorporates referentially provincial legislation restricting or extinguishing the hunting rights of non-treaty Indians would be to encourage the practice of doing, so without negotiation or compensation.

I conclude, therefore, that if s.88 operates to referentially incorporate provincial legislation, legislation restricting or extinguishing Indian hunting rights is not legislation of general application as the phrase is used in that section. The result of so concluding may be that no provincial legislation not otherwise competent is added to the federal legislative scheme dealing with Indians. In such case the section would be merely a statement of the law as it otherwise exists. There is judicial support for this interpretation of s.88, *R. v. Shade* (1952), 102 C.C.C. 316, 14 C.R., 56, W.W.R. (N.S.) 430, and *Re Adoption Act* (1974), 44 D.L.R. (3d) 718, [1974] 3 W.W.R. 363, 14 R.F.L. 396, *sub nom. Re Birth Registration No. 67-09-022272*.

It might further be argued that legislation restricting or regulating rights of Indians to hunt for food is legislation in respect of Indian lands and is, therefore, not covered by s.88 of the *Indian Act*. In view of the conclusion I have reached, I do not find it necessary to deal with this point.

In summary I conclude as follows:

1. The defendants are not affected by treaty No. 8.
2. There are aboriginal hunting rights vested in the defendants.
3. These rights have not been extinguished.
4. The British Columbia *Wildlife Act*, in so far as it extinguishes or restricts native hunting rights, is not competent provincial legislation under the *British North America Act, 1867*.
5. Section 88 of the *Indian Act* does not operate to make such legislation applicable to the defendants.

The charge is, therefore, dismissed against both defendants.

*Accused acquitted.*