REGINA v. SIKYEA

(1962), 39 C.R. 218 (also reported: 40 W.W.R. 494)

Northwest Territories Territorial Court, Sissons J.T.C., 8 November 1962

(Appealed to Northwest Territories Court of Appeal, **infra** p.583)

Indians and Eskimos-Hunting rights in Northwest Territories-Effect of Northwest Territories Act, R.S.C. 1952, c. 331, s. 14(3) (as enacted by 1960, c. 20, s. 1) - Non-applicability of Migratory Birds Convention Act, R.S.C. 1952, c. 179, to Indians.

Section 14(3) of the Northwest Territories Act recognizes and preserves the hunting rights of Indians and Eskimos unrestricted except as to game in danger of becoming extinct, which has the effect of nullifying any application of the Migratory Birds Convention Act to Indians and Eskimos.

APPEAL from a conviction of an offence under s. 12(1) of the Migratory Birds Convention Act.

Elizabeth R. Hagel, for accused.
M. M. deWeerdt, for the Crown.

8th November 1962. SISSONS J.T.C.:- This is an appeal against a certain conviction bearing date 7th May 1962, and made by W. V. England J.P., in and for the Northwest Territories, at Yellowknife in the Northwest Territories, whereby Michael Sikyea was convicted and fined $10 plus costs of $4 and in default three days' imprisonment, on the charge that he, the said Michael Sikyea, of Yellowknife in the Northwest Territories

"on the 7th day of May, A.D. 1962 at or near the Municipal District of Yellowknife in the Northwest Territories did unlawfully kill a migratory bird in an area described in Schedule A of the Migratory Bird Regulations at a time not during the open season for that bird in the area in the aforementioned schedule, in violation of Section 5(1) *(a)* of the Migratory Bird Regulations, thereby committing an offence contrary to Section 12(1) of the Migratory Birds Convention Act, Chapter 179, R.S.C., 1952."

The area referred to in the charge is described in Schedule A of the Migratory Bird Regulations as follows:

"Part XI
"Open Seasons in the Northwest Territories

Throughout the Northwest Territories	Ducks, Geese, (other than Ross' Goose) Rails, Coots. September 1 a

Section 5(1) (a) of the Migratory Bird Regulations reads as follows:

"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."

Section 12(1) of the Migratory Birds Convention Act, reads as follows:

"12. (1) Every person who violates any provision of this Act or any regulation is, for each offence, liable upon summary conviction to a fine of not more than three hundred dollars and not less than ten dollars, or to imprisonment for a term not exceeding six months, or to both fine and imprisonment."

This case brings before the Court an issue which has disturbed and aggrieved the Indians for some years. From time immemorial the Indians and Eskimos of the north and their wives and children have in the spring taken migratory birds for food and will continue to do so and this has been and is necessary for their survival and well-being. The effect on the bird population is negligible, particularly compared to the loss to predators, but it would not matter if it were otherwise.

It is notorious that a few years ago a Government official spoke to one of the local Indian chiefs and pointed out that shooting ducks in the spring was contrary to the Migratory Birds Convention. The chief asked what was this Convention and was told it was a treaty between Canada and the United States. He then queried, "Did the Indians sign the treaty?" The reply was, "No." "Then" the chief declared, "We shoot the ducks."

The Indians have their constitutional rights and their own treaty preserving their ancient hunting rights.

The old chief was on sound ground. There is or should be as much or more sanctity to a treaty between Canada and its Indians as to a treaty between Canada and the United States.

Several witnesses gave evidence for the prosecution at the trial *de novo.*

Miss Marion Bjornson, a radiographer, gave evidence that X-ray plates she took showed two small metal objects in the duck in this case.

Constable Paul Robin, of the R.C.M.P. stated that on 7th May 1962, he was driving along the highway some six miles from Yellowknife and saw the accused who was carrying a 16-gauge Stevens shotgun. The accused told him he had just shot a duck. He saw a duck in a small lake by the highway, wounded, and being driven by the wind toward the shore. He asked the accused if he was not aware he could not shoot ducks out of season. The accused told him he did not know this and that a game warden had told him it was all right for him to shoot ducks at any time of the year. He said this was about two years go.

The constable seized the duck and the shotgun. The duck was a female Mallard. The accused told him he always thought treaty Indians could shoot ducks at any time in any part of the Northwest Territories. He had been informed that the accused was a treaty Indian and he knew he was listed in the band list.

Ronald Hugh MacKay, an official of the Dominion wild life service, was called as an expert witness. He identified the bird as a female Mallard. He said it was hard to tell a wild duck from a domestic duck and he could not say whether the duck produced was a wild duck or not.

Constable Robin, recalled, testified that he knew of no one in the area keeping domestic ducks except himself. He had some at Rae.

Kenneth Kerr, superintendent of the Indian agency at Yellowknife, was called by the defence. He said the accused was registered as a treaty Indian. He contracted T.B. in 1959 and was sent to Camsell Hospital at Edmonton. He was returned in February 1961, as cured. While he was in hospital his wife and children were on relief. On his return, the accused was unable to work and was put on relief. Before going to hospital the accused was a good hunter and trapper. Mr. Kerr said it was the policy to encourage Indians to hunt and trap. The relief given covered basic needs, he believed. The accused had been issued welfare meat.

The accused, Michael Sikyea, gave evidence on his own behalf. He had not worked since he had T.B. and had not earned a cent. He tried to look after his family by fishing and hunting. On the day in question he was going to Mile 17 for rats, taking traps and a gun. He took no food with him, intending to live off the land from what he shot. He had left all the relief food and fish at home for the family. He needed food badly. This was the first time he had gone after rats since coming out of hospital. He shot a duck. The constable confiscated the duck and his gun. He could not go then and went home. He could not do anything without his gun. He said he was at Fort Resolution and was an interpreter when Treaty 11 was signed and the Indians were promised they would keep their hunting rights.

Article I of the Convention declares and enumerates the migratory birds included under the headings: (1) migratory game birds; (2) migratory insectivorous birds; (3) other migratory non-game birds.

Article II provides for close seasons.

Article II, para. 1, relating to migratory game birds, contains the following:

"Indians may take at any time scoters for food but not for sale."

It is puzzling that the hunting rights of the Indians be preserved as to "scoters" particularly. It is not conceding the Indians very much, as "scoters" are not a very edible bird and are hard to take.

Para. 3 relates to migratory non-game birds and provides that Eskimos and Indians may take them at any time and their eggs for food and their skins for clothing but the birds and eggs shall not be sold.

The word "scoters" does not appear in the list of migratory game birds in Art. I and there is nothing to indicate what is meant by the word. The word used is "scoters" not "scoter duck." Does it mean genus, family or subfamily?

The American College Dictionary gives the following definition of "scoter":

"Scoter - any of the large diving ducks constituting the genera Melanitta and Oedemia, found in northern parts of the Northern Hemisphere."

The Shorter Oxford English Dictionary gives:

"Scoter. 1674 (Origin obsc.) A duck of the genus *Oedemia,* cap. oe, *nigra*, a native of the Arctic regions and common in the seas of northern Europe and America. Also s. duck."

Funk & Wagnall's Standard Dictionary (Britannica World Language ed.) gives:

"Scoter. A sea duck (general Oedemia and Melanitta) of Northern regions, having the bill gibbous or swollen at the base, especially the American scoter also called coot, or scoter duck."

The American College Dictionary gives the following definition of "coot":

"Coot 1. Any of the acquatic birds constituting the genus Fulica, characterized by lobate toes and short wings and tail, as the common coot of Europe.

"2. Any of the various other swimming or diving birds, as the Scoter."

The Shorter Oxford:

"Coot 1. A name originally given vaguely to various swimming or diving birds, often to the Guillemot."

F. A. Taverner, the noted Canadian authority, in his Birds of Western Canada, groups elders and scoters with the sub. family -fuligulinae, bay, sea or diving ducks; the family -, anatidae, ducks, geese and swans; the order - anseres. He says as to "eider:"

"Though not forming a recognized subdivision of the Ducks, the Eiders are sufficiently similar to warrant special reference as a group in a popular work of this kind."

He says as to "scoters":

"The Scoters, comprising the genus Oedemia, are large, heavily-built birds, and with the Eiders the largest of our Ducks. Scoters are expert divers and feed largely on shells and crustaceans."

It is possible that the word "scoters" as used in the Convention means not only the genus but the subfamily or the family or the order. This would make sense and at least raises a reasonable doubt as to what ducks are included in the word "scoter," and whether the word as used here is synonymous with "ducks."

Section 5 (2) of the Migratory Bird Regulations reads as follows:

"5 (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."

It is noted that, unlike the Convention, the Regulations group scoters with migratory non-game birds, and that migratory non-game birds which Indians and Eskimos may take are not all those mentioned in the Convention and in the Migratory Birds Convention Act.

The Regulations do not contain any other reference to "scoters." The words "scoter ducks" do appear in Schedule A in the open season tables for Newfoundland, Nova Scotia, New Brunswick and Quebec.

Schedule B of the Regulations refers to "daily bag and possession limits." It provides:

"The words 'Ducks' and 'Geese' in this schedule include all species of ducks and geese respectively for which open seasons are provided, unless otherwise specified in footnotes."

There is a footnote reading as follows:

"(k) Except Indians, Eskimos, Metis and other persons living by trapping and hunting may take 25 daily with no possession limit."

Strangely "(k)" appears only in the column, "Rails, Coots and Gallinules."

Assurances were given to the Indians when Treaty 11 was entered into. Henry Anthony Conroy, Commissioner of His Majesty the King, reported:

"The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were advised by me that this would not be the case, and the Government will expect them to support themselves in their own way."

Treaty 11 itself provides:

"And His Majesty the King hereby agrees with the said Indians that they shall have the right to preserve 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 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."

McGillivray J.A. pointed out in *Rex v. Wesley, 26* Alta. L.R. 433 at 450, [1932] 2 W.W.R. 337 at 352, 58 C.C.C. 269, [1932] 4 D.L.R. 774, 20 Can. Abr. 1156.

"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."

There was in the Game Ordinance, R.O. N.W.T., 1956, c. 42, the following provision:

"3. (1) This Ordinance

" (a) does not apply in Wood Buffalo National Park, and

" (b) is subject to the provisions of the Migratory Birds Convention Act and the regulations thereunder.

" (2) Nothing in this Ordinance shall be deemed to prohibit an Indian, Eskimo, or the holder of a general hunting licence

" (a) from hunting non-migratory birds and big game other than musk-ox for food for himself and dependents at any time of the year on

"(1) all unoccupied Crown lands; or

"(2) all occupied Crown lands with the consent of the occupier thereof; or

"(b) from giving such food or part thereof to others."

There is nothing in Treaty 11 as to these limitations on the hunting rights of the Indians, and they are of no effect.

This Game Ordinance was repealed by N.W.T., 1960, 2nd sess., c. 2, which came into force 1st July 1961. The new Game Ordinance does not contain the above provisions.

By ss. 1 and 2 of 1960, c. 20, assented to 9th June 1960, the Northwest Territories Act was amended to provide that Ordinances made by the Commissioner in Council in relation to the preservation of game in the territories are applicable to and in respect of Indians and Eskimos; that this should not be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, other than game declared by the Governor in Council to be game in danger of becoming extinct; that from the day on which this Act comes into force the provisions of the various Game Ordinances, including R.O. N.W.T., 1956, c. 42, and N.W.T., 1960, 2nd sess., c. 2, have the same force and effect in relation to Indians and Eskimos as if on that day they had been re-enacted in the same terms: that all laws of general application in force in the territories are, except where otherwise provided, applicable to and in respect of Eskimos in the territories.

Section 1(3), c. 20, reads as follows:

"1. (3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct."

The following order in council, P.C. 1960/1256, was passed on 14th September 1960:

"His Excellency the Governor General in Council, on the recommendation of the Minister of Northern Affairs and National Resources, pursuant to subsection (3) of Section 14 of the *Northwest Territories Act,* is pleased hereby to declare muskox, barren-ground caribou and polar bear as game in danger of becoming extinct."

It is only necessary for the Governor in Council to "declare" that game is in danger of becoming extinct. This may be fact or fiction, and may well be fiction.

There is here a recognition and a preservation by Parliament of the hunting rights of Indians and Eskimos, unrestricted except as to game in danger of becoming extinct. There is no mention of the Migratory Birds Convention Act or migratory birds.

This has the effect of nullifying any application of the Migratory Birds Convention Act to Indians and Eskimos.

Section 2 of c. 20 reads:

"Section 17 of the said Act is amended by adding thereto the following subsection:

" (2) All laws of general application in force in the Territories are, except where otherwise provided applicable to and in respect of Eskimos in the Territories."

It is "otherwise provided," so far as Indians are concerned, by s. 87 of the Indian Act:

"87. 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. . . “

I dealt with these amendments to the Northwest Territories Act in *Re Noah Estate* (1961), 36 W.W.R. 577 at 600, 32 D.L.R. (2d) 185:

“The remedy which these amendments to the Northwest Territories Act intended to apply was to make legislation of the
Territorial Council of the Northwest Territories in relation to preservation of game into federal legislation relating to Indians and Eskimos and of general application.

"The obvious intent of these amendments to the Northwest Territories Act was to authorize the abrogation, abridgment or infringement of the hunting rights of the Eskimos and other rights of the Eskimos by the Territorial Government. The legislation is not effective. Eskimo rights could be extinguished by the Parliament of Canada. However, vested rights are not to be taken away without express words or necessary intendment or implication.

"The Canadian Bill of Rights, 1960, c. 44, also stands in the way:

" 'Every law of Canada shall, unless it is expressly declared by, an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.'

"If these amendments were to accomplish their purpose there should have been a provision that they would 'operate notwithstanding the Canadian Bill of Rights.'

"The argument submits that Parliament being the only body competent to legislate respecting Eskimos qua Eskimos has not legislated an exemption for them from laws of general application. That is not the point. The point is whether Parliament has legislated so as to abrogate, abridge or infringe the rights of the Eskimos. I find Parliament has not done so."

Mrs. Hagel raised the question as to the present federal powers to enact legislation implementing treaties which may conflict with any of the subjects over which the provinces have exclusive jurisdiction and that the Migratory Birds Convention Act could be held to infringe on the exclusive provincial jurisdiction as to property and civil rights and to require provincial ratification.

Mr. de Weerdt disputed this and cited a number of authorities as to the validity of the Act.

The point is interesting and intriguing and may have some merit but I do not think I need deal with it here. I can decide the case on other grounds.

It is clear that the evidence does not establish beyond a reasonable doubt that the female Mallard which was shot was a wild duck. In spite of the argument of the Crown, I cannot draw from the circumstantial evidence the inference that it was a wild duck. The rule in *Hodges Case* (1836), 2 Lew. C.C. 227, 168 E.R. 1136 is in the way. The accused therefore cannot be found guilty of the offence with which he is charged.

The real defence and the important issue in this case is that the Migratory Birds Convention Act has no application to Indians engaged in the pursuit of their ancient right to hunt, trap and fish for food at all seasons of the year, on all unoccupied Crown lands.

Reference was made to the Royal Proclamation of 7th October 1763, cited in R.S.C., 1952, vol. VI, at p. 6127, as the first of Canada's constitutional Acts and documents, and commonly spoken of as the "Charter of Indian Rights;" and to Treaty 11, made and concluded in 1921 between His Most Gracious Majesty George V, and the Slave, Dogrib, Loucheux, Hare and other Indians, inhabitants of the territory; and to *Rex v. Wesley, supra; Regina v. Kogogolak* (1959), 31 C.R. 12, 28 W.W.R. 376, 1959 Can. Abr. 347 and other cases.

Indians still have their ancient hunting rights unless, adopting the words used by Gwynne J. of the Supreme Court of Canada, in *Ontario Mining Co. and Atty.-Gen. of Can. v. Seybold* (1902), 32 S.C.R. 1 at 19, affirmed [1903] A.C. 73, 11 Can. Abr. 276:

“. . . the proclamation of 1763 and the pledge of the Crown therein ... are to be considered now to be a dead letter having no force or effect whatever; and unless the grave and solemn proceedings which ever since the issue of the proclamation until the present time have been pursued in practice upon the Crown entering into treaties with the Indians for the cession or purchase of their lands are to be regarded now as a delusive mockery; ..."

The solemn proceedings surrounding Treaty 11 and the pledge given by the Crown and incorporated in the treaty would indeed be delusive mockeries and deceitful in the highest degree if the Migratory Bird Convention, made just five years previously, had curtailed the hunting rights of the Indians.

There are no express words or necessary intendment or implication in the Migratory Birds Convention Act abrogating, abridging, or infringing upon the hunting rights of the Indians. The various references in the Convention and in the Migratory Birds Convention Act and in the regulations to Indians and Eskimos and their hunting rights indicate recognition of these hunting rights.

The fact that Indians and Eskimos are particularly entitled to take certain migratory game birds and migratory non-game birds does not indicate an intention to abrogate, abridge or infringe the hunting rights of these Indians and Eskimos.

I find that the Migratory Birds Convention Act has no application to Indians hunting for food, and does not curtail their hunting rights.

I find the accused not guilty. The appeal is allowed. The fine and costs paid by the accused shall be returned to him. The duck and the shotgun of the accused shall be handed back to him.

Appeal allowed.