REX v. COMMANDA

(1939), 72 C.C.C. 246 (also reported: [1939] 3 D.L.R. 635, [1939] O.W.N. 466)

Ontario Supreme Court, Greene J., 11 September 1939

Constitutional Law I C--Game & Fisheries--Indians--Robinson Treaty, 1850--Cession of lands by Ojibway Indians--Privilege to hunt and fish thereon--Whether "trust or interest other than that of Province"--Game and Fisheries Act (Ont.)-- Closed seasons--Application of to Indians.

The provisions of the Game and Fisheries Act, R.S.O. 1937, c. 353 relating to closed seasons for hunting and fishing apply to the Ojibway Indians upon the lands ceded by them to the Province of Canada under the Robinson Treaty, 1850, which passed to the Province of Ontario upon Confederation, the privilege therein granted them to hunt and fish on such lands not being a "trust or interest in respect of such lands other than that of the Province of Ontario" within the meaning of s. 109 of the B.N.A Act. More- over, the legislation is valid, whatever the nature of the privilege granted the Indians, as being designed for the protection of game and fish within the Province and thus coming within s. 92(13) and (16) of the B.N.A. Act, its effect upon the Indians, over whom the Dominion Parliament has exclusive jurisdiction under s. 91(24) of the B.N.A. Act, being only incidental to its true object.

Cases Judicially Noted: St. Catherine's Milling & Lbr. Co. v. The Queen, 14 App. Cas. 46; A.-G. Can. v. A.-G. Ont., [1897] A.C. 199, apld. Statutes Considered: *Game and Fisheries Act*, R.S.O. 1937, c. 363; *B.N.A. Act*, 1867 (Imp.), c. 3, ss. 109, 91(24), 92(13) and (16); *Robin- son Treaty*, 1850: *Indian Treaties and Surrenders* (King's Printer, Ottawa, 1905), Vol. I, p. 149.

EDITORIAL NOTE: Although the meaning of the words "trust" and "interest" in s. 109 of the B.N.A. Act were considered in *A.-G. Can. v. A.-G. Ont., supra*, in relation to the Robinson Treaty, 1850, that action, it should be noted, was not concerned with the hunting and fishing privilege given the Indians by the Treaty, which was not even mentioned.

APPEAL by way of stated case from conviction of an Ojibway Indian under the Game and Fisheries Act, R.S.O. 1937, c. 353 for unlawful possession of game during closed season upon lands ceded by Robinson Treaty, 1850. Affirmed.

J. H. McDonald, for appellant.

C. R. Magone, K.C., for the Crown, respondent.

GREENE J.:--The appellant Joe Commanda was convicted by the Police Magistrate of having in his possession during closed season parts of two moose and a deer contrary to the provisions of the Ontario *Game and Fisheries Act*, R.S.O. 1937, c. 353. This Act specifically brings Indians within its scope by defining the word "person" as including Indians.

The appellant contends that the legislation is *ultra vires* of the Province in so far as it includes Indians referred to in the Robinson Treaty hunting within the territories defined by the said Robinson Treaty.

On September 9, 1850, the Honourable W. B. Robinson on behalf of Her Majesty the Queen, entered into an agreement with the Ojibway Indian tribes inhabiting and claiming certain portions of Ontario, mainly the eastern and northern shores of Lake Huron to a considerable

distance inland, by which in consideration of £ 2,000 paid down and certain annuities the Indians ceded and granted to Her Majesty all their right and title to the described territory, less certain defined areas reserved for occupation by the various tribes. The agreement then contains the following:

"And the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Prov- ince, hereby promises and agrees to make, or cause to be made, the payments as before mentioned; and further, 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 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." (Indian Treaties and Surrenders Vol. 1, p. 149--published by The King's Printer at Ottawa in 1905).

The appellant is a member of the Ojibway tribe referred to in the treaty and the alleged offence was committed on ceded territory not sold or leased by the Provincial Government.

In 1850 the lands were situate in the Province of Canada, formerly Upper Canada and Lower Canada, and in 1867 by the *B.N.A. Act*, returned to the previous division of Upper and Lower Canada, under the names Ontario and Quebec. The lands involved are now situated in the Province of Ontario.

By s. 109 of the *B.N.A. Act* the lands of the several Provinces entering the Union belong to the new Provinces "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

Legislative sanction was given the treaty or agreement under consideration by the appropriation by the Province of Canada of moneys to pay the annuities provided for until 1867 and thereafter by the Dominion of Canada.

The appellant contends that the reservation in s. 109 as to existing Trusts and any Interest other than that of the Province (*i.e.* the Province of Canada) includes the right reserved to the Indians under the Robinson Treaty to hunt and fish over the ceded lands as before the treaty. It is common ground that there were no restrictions on their hunting and fishing in 1850. The appellant then cites s-s. (24) of s. 91 of the *B.N.A. Act* by which the Parliament of Canada is given exclusive legislative jurisdiction in relation to "Indians and Lands reserved for the Indians."

The appellant argues that in so far as there was an interest in lands reserved to the Indians at the time of the *B.N.A. Act*, or a trust created in respect thereof, then that interest or trust can only be interfered with or taken away by the Parliament of Canada.

The first question to be considered is as to whether within the meaning of s. 109 there is a Trust in favour of the Indians, or whether they have an interest in the lands other than that of the Province.

The rights of the Indians are dependent upon the royal proclamation of His Majesty King George the Third issued on October 7, 1763. In that connection Lord Watson in delivering the judgment of the Privy Council in *St. Catherine's Milling & Lbr. Co. v. The Queen* (1888), 14 App. Cas. 46

at pp. 54-5 said:

"Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never 'been ceded to or purchased by' the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories;' and it is declared to be the will and pleasure of the sovereign that, 'for the present,' they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

It was held in the *St. Catherine's* case that the Indian title was "an interest other than that of the Province in the same" within the meaning of s. 109. It must be borne in mind however in considering the *St. Catherine's* case and certain observations therein, that the Indian surrender therein under consideration was made in 1873, namely after the *B.N.A. Act* and not before it, as in the case of the Robinson treaty made in 1850.

"By an article of the treaty (*i.e.* 1873) it is stipulated that, subject to such regulations as may be made by the Dominion Government, the Indians are to have the right to pursue their avocations of hunting and fishing throughout the surrendered territory, with the exception of those portions of it which may, from time to time, be required or taken up for settlement, mining, lumbering, or other purposes." (Lord Watson, at p. 51).

In the case of the Robinson treaties of 1850 the surrender was made to the Crown in the right of the Province of Canada and passed in 1867 to the Province of Ontario without the Dominion of Canada ever having any beneficial interest therein. In the lands involved in the *St. Catherine's Milling* case the surrender was made to the Dominion.

The Robinson treaty under consideration in the case at bar, and a similar one made about the same time with other Indian tribes, were considered in *A.-G. Can. v. A.-G. Ont.*, [1897] A.C. 199. At p. 213 the judgment is as follows:

"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; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province,

whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities."

In view of the foregoing I am constrained to hold that in regard to the land ceded by the Indians there was no trust existing in respect thereof in their favour, nor did they have any interest other than that of the Province in the same.

Even if some trust existed or there was some interest other than that of the Province, I cannot agree that the *Game and Fisheries Act* is legislation "relating to" Indians or Lands reserved for the Indians, and consequently *ultra vires* of the Province. It is true the legislation does affect the Indians, but that does not make it legislation "relating to" Indians within the meaning of s. 91(24) of the *B.N.A. Act*.

The *Game and Fisheries Act* is general in its application to all persons within the Province, controlling even the land owner as to game on his private land. Its primary object is protection of game and fish within the Province and that is what it "relates" to and not to Indians because it happens to affect them. It seems to me that the jurisdiction of the Province is exclusive under s-ss. (13) and (16) of s. 92 of the *B.N.A. Act*.

"(13) Property and Civil Rights in the Province."

"(16) Generally all Matters of a merely local or private nature in the Province."

The legislative authority of the Province is ' "as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow:' " *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick,* [1892] A.C. 437 at p. 442.

The whole question involved in this case resolves itself down to the narrow issue as to whether the legislation is void as "relating to" Indians or Indian lands which I have already discussed. If I am right in holding that it is not, then it does not matter whether the Indians have any rights flowing from the reservation in the Robinson treaty or not. Such rights (if any) may be taken away by the Ontario Legislature without any compensation. We have no provision in our constitution as in that of the United States of America by which the Courts can declare confiscatory legislation to be *ultra vires* and void.

"In short, the Legislature within its jurisdiction can do every- thing that is not naturally impossible, and is restrained by no rule human or divine:" *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275 at p. 279.

So that even if the Indian had any rights within the reservation in s. 109, the destruction of the same by the Ontario *Game and Fisheries Act* is *intra vires* the provincial Legislature.

It is hardly necessary to state that I do not wish to be under- stood as criticizing the purpose or scope of the Ontario *Game and Fisheries Act*. That is not my function or my purpose.

Appeal dismissed.