REX v. HILL

(1907), 15 O.L.R. 406 (also reported: 11 O.W.R. 20)

Ontario Court of Appeal, Moss C.J.O., Osler, Garrow, Maclaren and Meredith JJ.A., 23 December 1907

Indian--Conviction for Unlawfully Practising Medicine--Ontario Medical Act --Application to Unenfranchised Indians--Constitutional Law--Stated Case--R.S.0. 1897, ch. 91, sec. 5.

The defendant, an unenfranchised treaty Indian, residing on a reserve, was convicted for having practiced medicine for hire, in Ontario, but not upon the reserve, without being registered pursuant to the provisions of the Ontario Medical Act, R.S.O. 1897, ch. 176; and upon a case reserved by the convicting magistrate it was contended that that Act was *ultra vires* of the provincial Legislature, because Indians of the class or having the status of the defendant are wards of the Dominion, and subject in all relations of life only to federal legislation, under sec. 91 (24) of the British North America Act:--

Held, that the defendant was subject to the provisions of the Medical Act, and was properly convicted.

Per OSLER, J.A.:--Parliament may remove an Indian from the scope of the provincial laws, but, to the extent to which it has not done so, he must in his dealings outside the reserve govern himself by the general law which applies there.

Semble, also, *per* OSLER, J.A., that the question was not one proper to be raised by means of a special case stated under R.S.O. 1897, ch. 91, sec 5. The Medical Act does not in terms profess to be applicable to Indians, and the question was really whether it could be interpreted as applicable to them, not whether it was *ultra vires* if applicable to them.

THE defendant, George W. Hill, of the township of Tuscarora, in the county of Brant, was on the 17th September, 1907, convicted before John Telford, police magistrate for Hanover and justice of the peace for the county of Grey, for that he, the said George W. Hill, between the 26th January, 1907, and the 1st August, 1907, at the town of Hanover, in the county of Grey, did unlawfully practise medicine for hire, gain, or hope of reward, by attending upon and prescribing for Mr. John Collinson and one Miss Supernaugh, both of the township of Bentinck, in the county of Grey, without being registered pursuant to R.S.O. 1897, ch. 176, Charles Rose being the informant; and the defendant was adjudged for his offence to forfeit and pay the sum of $25, to be paid and applied according to law, and also to pay $16.45 for costs; and if the several sums were not paid on or before the 25th September, 1907, the defendant was adjudged to be imprisoned in the common gaol at Owen Sound, and there to be kept for ten days, unless these sums and costs should be sooner paid.

The police magistrate stated a case for the consideration of the Court of Appeal.

The case as stated set forth the conviction, and proceeded as follows:--

"It was admitted before me, on the part of the informant, that the defendant, George W. Hill, was an unenfranchised treaty Indian, residing on the Brant and Haldimand reserve, and drawing interest moneys, besides having no real or personal property subject to taxation under the provisions of the Indian Act, and that the informant was a white man.

"It was, on the other hand, admitted by the defendant that the fact of practising medicine as charged in the information was true.

"The question reserved then by me for the consideration of the Court is, whether I was right, under the circumstances, in convicting the defendant.

"The information, conviction, and admissions in writing made at the hearing to form part of this case."

In a prefatory statement appearing in what was called the "appeal book," containing the stated case, etc., it was said that the case was stated under R.S.O. 1897, ch. 91, sec. 4, and that it "raised for the consideration of the Court the constitutional validity of R.S.O. 1897, ch. 176, sec. 49."

The statute first referred to, ch. 91, is "An Act respecting Appeals to the Court of Appeal on Prosecutions to enforce Penalties and punish Offences under Provincial Acts."

Section 4 of the statute provides for the determination upon demurrer and appeal of an objection to a prosecution on the ground of the constitutional invalidity of the statute of the Province upon which the prosecution is based.

Section 5 of the statute is as follows: "(1) After the determination by a justice of any information or complaint which he has power to determine in a summary way, under the authority of a statute of this Province, either party to the proceeding, if dissatisfied with the determination as being erroneous in point of law, as regards the constitutional validity of the statute, may apply in writing, within ten days after the same, to the said justice, to state and sign a case setting forth the facts and the grounds of his determination, for the judgment thereon of the Court of Appeal.

"(2) Such party, hereinafter called 'the appellant,' shall, within three days after receiving such case, transmit the same to the Court of Appeal, first giving notice, in writing, of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called 'the respondent.' "

Section 49 of the Ontario Medical Act, R.S.O. 1897, ch. 176, provides: "It shall not be lawful for any person not registered to practice medicine, surgery or midwifery for hire, gain, or hope of reward; and if any person not registered pursuant to this Act, for hire, gain or hope of reward, practices or professes to practice medicine, surgery, or midwifery, or advertises to give advice in medicine, surgery, or midwifery, he shall upon a summary conviction thereof before any justice of the peace, for every such offence, pay a penalty not exceeding $100 nor less than $25."

The case was heard by Moss, C.J.O., OSLER, GARROW, MAC- LAREN, and MEREDITH, JJ.A., on the 25th November, 1907.

J. B. Mackenzie, for the defendant, contended that sec. 49 was *ultra vires* of the Ontario Legislature if it was to be regarded as applying to an Indian in the position of the defendant; that such an Indian is not a "person" within the meaning of that section; that he could not be registered under the Act. He referred to *Regina v. Wason* (1890), 17 A.R. 221; *Attorney-General for Ontario v. Hamilton Street R.W. Co.*, [1903] A.C. 524; *Re Metcalfe* (1889), 17 O.R. 357; *Regina v. College of Physicians and Surgeons of Ontario* (1879), 44 U.C.R. 564; *Tiorohiata v. Toriwaieri* (1891), Montreal L.R. 7 S.C. 304; *Attorney-General for the Dominion of Canada v.*

Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia, [1898] A.C. 715; *McKinnon v. Van Every* (1870), 5 P.R. 284; *Bryce v. Salt*(1885), 11 P.R. 112.

J. W. Curry, K.C., for the informant. There is nothing in the Indian Act, R.S.C. 1906, ch. 81, dealing with this matter. By sec.111 a doctor of medicine may be enfranchised. The Dominion Parliament has not legislated upon the subject. Under sec. 92 (15) of the British North America Act, this is within the jurisdiction of the Province: *Russell v. The Queen* (1882), 7 App. Cas. 829. There is no reason why an Indian should not be registered under the Medical Act, and defendant, not being registered, cannot practice. "Person" is not limited in the Provincial Act, and surely includes an Indian.

Mackenzie, in reply.

December 23. OSLER, J.A.:--The case purports to be stated under R.S.O. 1897, ch. 91, sec. 4. Section 5 is the section which should have been referred to. It purports to raise for the consideration of the Court the question of the constitutional validity of the Ontario Medical Act, R.S.O. 1897, ch. 176. It states that the defendant was connected for having, at the town of Hanover, in the county of Grey, practiced medicine for hire, etc., without being registered pursuant to the provisions of that Act, one Charles Rose being the informant, and that it was admitted by the informant that the accused was "an unenfranchised treaty Indian, residing on the Brant and Haldimand reserve, and drawing interest moneys, besides having no real or personal property subject to taxation under the provisions of the Indian Act, and that the informant was a white man."

The contention was that the Ontario Medical Act was unconstitutional and *ultra vires* the provincial Legislature, because Indians of the class or having the status of the defendant are wards of the Dominion, and subject in all relations of life only to federal legislation, under sec. 91 (24) of the British North America Act.

I am not satisfied that the question argued before us was one proper to be raised by means of a special case stated under R.S.O. 1897, ch. 91, sec. 5. No one doubts the constitutional validity of the Ontario Medical Act. It does not in terms profess to be applicable to Indians. The question is whether it can be interpreted as being applicable to them *(Monkhouse v. Grand Trunk R.W. Co.* (1883), 8 A.R. 637); and that would be more properly raised by appeal in the ordinary way from a conviction based on the assumption or holding that it was so applicable, or by a motion to quash the conviction, or by an appeal under sec. 3 of ch. 91, founded upon a certificate of the Attorney-General that the decision of the magistrate involved a question on the construction of the British North America Act.

I am, however, of opinion that the question submitted by the magistrate should be answered in the affirmative, and that the defendant was rightly convicted.

The Indian Act does not profess to deal with all the rights and obligations of an Indian. Nothing forbids him to acquire real and personal property outside of a reserve or special reserve, or to dispose of it, *inter vivos* at all events, as freely as persons who are not Indians.

Section 111 assumes that an Indian may become a member of any of the learned professions, and I find nothing in the Act to indicate that, except where provisions are made which expressly or by implication declare his obligations and the consequences which attach to their breach or

otherwise specially deal with him, the conduct and duty of an Indian in his relations with the public outside the reserve are not subject to the control of the provincial laws in the same manner as those of ordinary citizens. Parliament may, I suppose, remove him from their scope, but, to the extent to which it has not done so, he must in his dealings outside the reserve govern himself by the general law which applies there. He is no more free to infringe an Act of the Legislature than to disregard a municipal by-law, the general protection of both of which he enjoys when he does not limit the operations of his life to his reserve, but, though unenfranchised, seeks a wider sphere. If he may become a doctor of medicine, and take advantage of the Medical Act by registering under it, it certainly ought to follow that he cannot become a free lance and practise wherever be pleases without regard to its provisions.

MACLAREN, J. A.:--The defendant was convicted of practising medicine for gain in this Province in violation of R.S.O. 1897, ch. 176, sec. 49, without being registered. Appeal is taken on the ground that, being an unenfranchised Indian living on a reserve, the Act does not apply to him; that the word "person" in the section in question does not include an Indian, and the Legislature must be taken to have so intended it; and, if it did intend to include Indians, it would be *ultra vires*.

This claim is made on the broad ground that because sec. 91 of the British North America Act gives to the Dominion Parliament exclusive legislative authority over "Indians and lands reserved for the Indians," no provincial legislation can affect Indians or Indian lands. This is a somewhat startling discovery to make forty years after the passing of the Act, while the parties affected, the legal profession, and the Courts have been, during all these years, assuming the contrary to be the fact.

If the claim be well founded, not only will Indians be relieved from all prohibitions and restrictions imposed upon the people of this Dominion by the legislation of the respective Provinces, but they will not be able to claim any of the benefits or advantages conferred by such legislation, and will be relegated, save as to the few matters legislated upon by the Dominion, and any remnants of old legislation, to the condition and rights of their ancestors when this country was first discovered. They would also be shut out even from a large part of the old provincial legislation before Confederation, for it is well known that the Imperial Government retained in its own hands all matters relating to Indians and Indian lands long after it had transferred other local matters to the provincial authorities.

Let us see where such an interpretation of the British North America Act would land us. By sub-sec. 7 of sev. 91 the Dominion is given exclusive authority to legislate respecting the "Militia." It would be somewhat startling to hear it gravely argued that no legislation of the Province can apply to or affect militiamen. By sub-sec. 25 the subject of "Aliens" is assigned exclusively to the Dominion. According to the argument on this appeal no provincial legislation applies to an alien. A militiaman, or an alien, or a member of any of the other classes mentioned in sec. 91, may violate any provincial law without incurring any penalty, and cannot avail himself of any benefit or advantage conferred by provincial legislation. So with regard to banks, bills of exchange, and other matters assigned exclusively to the Dominion.

Perhaps the nearest approach to the present claim, and yet it falls far short of it, was the one against the Quebec tax upon banks, etc., that, because the Dominion Parliament had exclusive authority as to banks, the Province had no right to tax them, because they might impose a tax so

heavy as to crush them out of existence, and so nullify the Dominion legislation. This was disposed of in *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, where it was shewn how the Dominion and the Provinces could exercise the powers respectively conferred upon them, where they both affect the same subject matter, and the tax was upheld.

The practising of medicine in this case was not on an Indian reserve, but in another part of the Province, and the patients were not Indians, but white people, and it is not pretended that there is any Dominion legislation giving the defendant such a right or expressly exempting him from the operation of the provincial law. It is not argued that the subject of the practice of medicine does not belong to the provincial Legislature.

Assuming that the Legislature in enacting the clause of the Medical Act in question meant to include an Indian in the word "person," when it prohibited any unregistered person from practising medicine for gain--and Mr. Mackenzie admitted such intention, but argued that it was *ultra vires*, and that the word "person" in the section could not legally include an Indian, for the reason above given--assuming that such was the intention of the Legislature, the true way of determining whether the legislation is within its jurisdiction is to ascertain its true nature and character and the class to which it really belongs: *Russell v. The Queen*, 7 App. Cas. 829, at p. 839.

Applying this test, can any one say that the Act in question is anything else than what its title indicates, "An Act respecting the Profession of Medicine and Surgery?" No doubt, like other Acts, it incidentally affects persons and subjects that for certain purposes come within the jurisdiction of the Parliament of Canada, and it might be *uItra vires* if the principal matter of the Act could be brought within any of these classes of subjects, but it is admittedly within the scope of medicine and surgery, which are provincial subjects.

The question of legislation being passed as falling under one subject, and its being contended that it really comes under another, has frequently come before the Courts. A very recent instance is the case of *Grand Trunk R.W. Co. v. Attorney-General of Canada*, in the Privy Council, reported in [1907] A.C. 65. At p. 67 it is said: "The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894--viz., *Attorney-General of Ontario v. Attorney-General of Canada*, [1894] A.C. 189, and *Tennant v. Union Bank of Canada*, [1894] A.C. 31--seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

In the present instance it is conceded that the field is clear, there being no Dominion legislation on the subject; it is also con- ceded that the legislation is, as it purports to be, really on the subject of medicine and surgery, which is a domain within the provincial jurisdiction.

For instances in the Indian Act where the field is not clear and the two domains meet, see sec. 26 of R.S.C. 1906, ch. 81, where one uniform law for the descent of property is enacted for the whole Dominion, differing from the provincial laws; sec. 44, providing a separate law for roads, bridges, etc.; and sec. 105, as to the exemption of the property of Indians from seizure under

execution.

Under the circumstances, I am of the opinion that the word "person" in sec. 49 of the Medical Act includes an Indian, and that the answer to the question reserved by the police magistrate should be that he was right in convicting the defendant.

MEREDITH J. A.:--It is difficult to take very seriously the contention made in the defendant's behalf upon this reserved case, for it amounts to this, that a Canadian Indian is superior to all provincial power, that he is not amenable to any provincial legislation, but may utterly disregard all provincial laws, and laugh at any attempts to bring him within them or enforce them against him, though they would be binding upon those of every other race, colour, or class. The contention bears upon its face its refutation; and the good sense of the Indian has hitherto, so far as I am aware, prevented the serious making of it; and he has always proved himself as respectful for, and obedient to, the laws of the Province, and the ordinances of the local municipalities authorized by such laws, as any other class of its inhabitants; and no one has, so far as I am aware, ever before suggested that he may treat them with contempt and defy those who are charged with their enforcement.

The very broad contention is based entirely upon the very much narrower provision contained in the Imperial legislation called the British North America Act, 1867, conferring upon Parliament exclusive legislative authority over "Indians and lands for the Indians," ignoring the exclusive legislative authority conferred upon provincial Legislatures, in the same enact- ment, which includes, among other subjects more or less applicable, the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within its exclusive authority therein conferred.

The defendant had been convicted of practising medicine contrary to the provisions of a provincial enactment clearly within the exclusive legislative authority of the Province; not practising it upon any lands reserved for the Indians, or on any other Indian; but away from any such reservation, and on those who are not Indians. That enactment is not one respecting Indians, or lands reserved for the Indians, but is in name and in fact "An Act respecting the Profession of Medicine and Surgery" in the Province; and, if it be considered inapplicable to Indian bands or Indian lands, it is difficult to perceive how it even overlaps the exclusive field of federal legislative authority. The right to legislate exclusively as to Indians and Indian lands cannot give the power to confer on Indians all or any provincial rights which are within the exclusive authority of the Province.

It is not needful to say what would have been the result if the defendant had confined his practice to the Indians, nor is such a question open to consideration in such a case as this, which can be stated in respect of the "constitutional validity" of a provincial statute only, not its construction; it is enough to say that he is clearly amenable to the provincial law in respect of that which he did.

The law of the United States of America in regard to legislation respecting Indians and Indian lands seems to be the same as it is here, yet I do not think it has ever been held, in any court there, that Indians, when off their reservations, are not subject to State, or Territory, Laws; some of the cases on the subject are collected in the article on Indians in the Am. & Eng. Encyc. of Law, 2nd ed., p. 223, note 1, and p. 224, note 3, and also in the Cyclop&aeligdia of Law and

Procedure, under the same title, vol. 22, p. 147, note 100.

The defendant has not heen convicted of a crime, in the sense of crimes within the exclusive legislative authority of Parliament; but punishment has been inflicted upon him for a breach of a law of the Province in relation to a matter within the exclusive legislative authority of the Province: see *Rex v. Horning* (1904), 8 O.L.R. 215.

The magistrate held that the defendant, although an unenfranchised treaty Indian, was a "person" within the meaning of that word as used in the section of the enactment under which he was convicted--R.S.O. 1897, ch. 176, sec. 49--and so he was obliged to consider the question as to the "constitutional validity" of the enactment; therefore that question is rightly before us, and, as I have before intimated, such questions only can be considered upon such a stated case as this.

MOSS, C.J.O., and GARROW, J.A., concurred.