reserves" as being the only lands to which Indians have a right of access. But it seems to me that if Parliament wished to restrict hunting rights of Indians to unoccupied Crown lands and Indians reserves, it would have said so.

I cannot call to mind any other lands to which an Indian would have the right of access for the purpose of hunting by reason of common law or statute. I have therefore come to the conclusion that the words "right of access" include a right to enter privately owned land with the consent of the owner or occupant of the land.

The appeal will be allowed and the conviction set aside. The fine, costs and deposit for security for costs will be returned to counsel for the appellant. The game under seizure will be returned to the appellant.

Appeal allowed.

persons and they are subject as all persons are, to the provisions of s. 69 of The Game Act."

At p. 436 Turgeon J.A. said: "For the purposes of the present inquiry we can confine ourselves to Crown lands (excluding lands owned by individuals as to which some other question might arise) because this game preserve is Crown land."

It should be noted that the decision of the Saskatchewan Court of Appeal has been incorporated into The Game Act of Alberta in s. 142 (4).

After reviewing the two cases decided by the Courts of Appeal of Alberta and Saskatchewan, it appears to me that the question to be decided in this case is as follows:

Did Little Bear have a right of access to the land on which he shot the deer?

If he did have a right of access, then he had the right to shoot the deer out of season.

Turgeon J.A. in *Rex v. Smith*, *supra*, said that some other question might arise where lands owned by individuals were concerned.

Little Bear was given permission to shoot by the owner of the land.

Did this permission give him a right of access to the owner's land within the meaning of s. 12 of The Alberta Natural Re- sources Act?

Did Canada and Alberta intend by the provisions of The Alberta Natural Resources Act to give to Indians greater hunting rights than the rights contained in the Treaties?

No one can shoot big game on occupied land in Alberta without first obtaining the consent of the owner or occupant of the land (The Game Act, as amended by 1956, c. 17, s. 3).

Once a person obtains the consent of an owner or occupant of land in Alberta, he has the right of access to hunt on that land. However as pointed out by McGillivray J.A. in *Rex v. Wesley*, *supra*, the provisions of The Game Act do not apply to an Indian when he is hunting big game for the purpose of food. If an Indian claims a right of access to land under the provisions of The Game Act for the purpose of hunting, then right of access must be subject to the other provisions of The Game Act and one of these provisions is that big game cannot be hunted in a closed season. Therefore under the provisions of The Game Act there is no right of access to occupied land for the purpose of hunting in a closed season.

There are certain rights of access at common law, *e.g.*, the right of access to a highway by the owner of abutting land; the right of access to the sea, lake or river by a riparian owner.

An example of a statute giving a right of access is The Law of Property Act, 1925 (Imp.), c. 20, s. 193, which gives the public a right to access to commons and waste lands for the purposes of air and exercise.

What did the Parliament of Canada mean when it gave Indians a right to hunt on other lands to which the said Indians may have a right of access ? What lands are referred to in addition to unoccupied Crown lands? There is a suggestion in the judgments of the members of the Court of Appeal in Saskatchewan in the case of *Rex v. Smith*, *supra*, that the wording referred to "Indian

"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 proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

And at p. 345: "It seems to me that the enacting of the section subjecting Indians to the game laws of the province in general terms is subject to a clear excepting and qualifying proviso in favour of Indians who are hunting for food to whom the game laws of the province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access."

And at p. 352: "This does not in any wise imply that The Game Act of this province is *ultra vires*. I herely hold that it has no application to Indians hunting for food in the places mentioned in this section. It is satisfactory to be able to come to this conclusion and not have to decide that 'the Queen's promises' have not been fulfilled."

In *Rex v. Smith*, [1935] 2 W.W.R. 433, 64 C.C.C. 131, [1935] 3 D.L.R. 703, 20 Can. Abr. 1157, an Indian was convicted on a charge of carrying fire-arms on Fort a La Corne game preserve in the province of Saskatchewan contrary to The Game Act, R.S.S., 1930, c. 208.

The appeal against the conviction was dismissed by the Saskatchewan Court of Appeal on a stated case.

Section 12 of the agreement between Canada and Saskatchewan with reference to the transfer of natural resources in 1930 is in the exact wording of s. 12 of the agreement with Alberta.

Treaty No. 6 entered into at Fort Carlton on 23rd August 1876, between Her Majesty the Queen and the Plain and the Wood Cree Tribes of Indians contained the same provisions for hunting and fishing as were later contained in Treaty No. 7 (above referred to).

The Court of Appeal held that the game preserve was not "Unoccupied Crown land" and that the Indian did not have a right of access to it.

Turgeon J.A. said at p. 438: "So I take it that when the Crown, in the right of the province appropriates or sets aside certain areas for special purposes, as for game preserves, such areas can no longer be deemed to be 'unoccupied Crown lands' within the meaning of para. 12 of the agreement."But it is also urged that the land of this game preserve is land to which the Indians have a right of access and that they are authorized to shoot on it because of that right. Any so-called 'right' of access which the Indians may enjoy in respect to this preserve is, so far as we were shown, merely the privilege accorded to all persons to enter the preserve *without carrying fire-arms*. We were not told of any special, peculiar right of access to certain Crown lands, as, for instance, the reservations upon which they live and which are vested in the Crown, but it does not appear that they have any similar right of access to the land comprising this preserve."

Martin J.A. said at p. 441: "The Fort a La Corne game preserve is not therefore 'unoccupied Crown lands.' It was argued however, that the accused had a right of access to the game preserve. Indians undoubtedly have a right of access to certain reserves set apart for them and upon which they reside, but they have no right of access to game preserves beyond that accorded to all other

"(2) Where a big game animal is taken by an Indian the skin or hide of such animal shall not be sold or otherwise dis- posed of, until such skin or hide has been manufactured into articles of wearing apparel by the Indian or a member of his immediate family.

"(3) Subsection (2) shall not be construed as forbidding an Indian from selling, trading or bartering any such skin or hide to an Indian school engaged in the manufacture of wearing apparel or other Indian crafts.

"(4) For the purpose of this section, all lands set aside or designated as game preserves, Provincial parks, bird sanctuaries, registered trap-lines and fur rehabilitation blocks, shall be deemed to be occupied Crown lands and not lands to which an Indian has a right of access.

"(5) Subsection (4) shall not be construed as forbidding an Indian from hunting, taking or killing big game animals for food at all seasons of the year on lands set aside or designated as registered trap-lines."

A deer is a big game animal as defined in s. 2(*b*)(ii) of The Game Act.

The rights of Indians with reference to hunting have been considered by the Courts of Appeal in Alberta and Saskatchewan.

In *Rex v. Wesley*, [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, 58 C.C.C. 269, 20 Can. Abr. 1156, an Indian was convicted of shooting a deer having antlers less than four inches in length contrary to The Game Act of Alberta. It was agreed that the offence took place on unoccupied Crown land.

On appeal by stated case the court quashed the conviction. Lunney and McGillivray JJ.A., reviewed the history of the hunting rights of Indians.

Lunney J.A. said at p. 341:

"The treaties with the Indians and the subsequent legislation treat with the rights of Indians to hunt, and until definite legislation is passed by a competent body, the Indian is, in my opinion, entitled to hunt on 'all unoccupied Crown lands and on any other lands' to which he may have a right of access."

Lunney J.A. goes on to point out that at that time s. 69 of The Indian Act provided that the superintendent general might declare that the laws respecting game in force in Alberta shall apply to Indians. However this section is no longer in the Act. Its place is taken by s. 87 of the 1951 Indian Act which states that provincial laws applicable to Indians shall be subject to their treaty rights or rights given under any other Act of the Parliament of Canada.

McGillivray J.A. in referring to The Alberta Natural Re- sources Act (1930, c. 21) said at p. 344:

"It seems to me that the language of s. 12 is unambiguous and the intention of Parliament to be gathered therefrom clearly is to assure to the Indians a supply of game in the future for their support and subsistence by requiring them to comply with the laws of the province, subject however to the express and dominant proviso that care for the future is not to deprive them of the right to satisfy their present need for food by hunting and trapping game, using the word 'game' in its broadest sense, at all seasons on unoccupied Crown lands or other lands to which they may have a right of access. . . .

On 22nd September, 1877, the last of the Indian Treaties between Canada and the Plain Indians was made at Blackfoot Crossing, near Calgary. This completed the series of treaties extending from Lake Superior to the slopes of the Rocky Mountains. This treaty, known as Treaty No. 7, covered the lands now situated in the southern part of the province of Alberta, and which were inhabited by the Blackfoot, Blood, Piegan, Sarcee and Stony Indians.

The Wellman land on which Little Bear shot the deer in this case is situated within the tract of land covered by Treaty No. 7

The treaty provided for hunting rights on behalf of the Indians as follows:

"And Her Majesty the Queen hereby agrees with her said Indians that they shall have right to pursue their vocations of hunting throughout the tract surrendered as heretofore de- scribed, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty; and saving and except such tracts as may be required and taken up from time to time for settlement, mining, trading, or other purposes by her Government of Canada, or by any of Her Majesty's subjects duly authorized therefor by the said Government"

It is clear that, without more, the treaty of 1877 did not give Little Bear the right to kill a deer on the Wellman land, because the Wellman land "had been taken up for settlement by one of Her Majesty's subjects duly authorized thereof by the said Government."

However s.87 further provided that the application of provincial laws to Indians is also subject to the terms of any other Act of the Parliament of Canada.

On 14th December 1929, an agreement between Canada and Alberta transferred the natural resources to the province. This agreement was ratified by the legislature of Alberta and by the Parliaments of Canada and the United Kingdom.

Section 12 of the agreement as found in The Alberta Natural Resources Act, 1930 (Can.), c. 21 (R.S.A., 1955, vol. 5, p. 5695) reads as follows:

"In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Section 142 of The Game Act of Alberta reads as follows:

"(1) Where a fur-bearing animal is taken by an Indian for food during the close season for such animal, the pelt shall

"(*a*) be the property of the Crown

"(*b*) not be sold or otherwise disposed of by the Indian, and

"(*c*) delivered by him forthwith on demand to a constable or game officer.

Provisions in The Indian Act dealing with hunting and fishing by Indians have been changed from time to time.

Section 69 of The Indian Act, R.S.C., 1927, c. 98, read as follows:

"The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories as the case may be, or to Indians in such parts thereof as to him seems expedient."

By s. 2, c. 20, 1936, s. 69 was repealed and the following substituted therefor:

"(1) The Superintendent General, subject to the approval of the Governor in Council, may, as in this section provided, make regulations which, upon publication thereof in the Canada Gazette, shall apply with the same force as if the terms of such regulations had been herein enacted. . . .

"(3) Without restricting the generality of the provisions of subsection one of this section, the regulations may provide, *inter alia*, for the incorporation by reference, as part of such regulations, of any specific and indicated law or regulation of and in force within any province of Canada, and in particular, and whether or not by way of the incorporation by reference of provincial laws or regulations, such regulations may pro- vide--

"(*a*) with relation to Indians within the province of Manitoba, Saskatchewan or Alberta, or within the Territories, as the case may be, or to Indians in such parts of such provinces and Territories as to him seems expedient, that laws either in the same terms as, or in like terms to, or in other terms than, those in force in such provinces and Territories respectively, with relation to game in general or to specific game, shall apply, upon publication thereof in the Canada Gazette, with the same force as if enacted in this Act, to such Indians as such regulations shall prescribe."

The Indian Act was completely revised in 1951 and the new Act, c. 29 (now R.S.C., 1952, c. 149) contains s. 87 which reads as follows:

"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 pro- vision is made by or under this Act."

It is to be noted that the references to game, fish, hunting and fishing contained in s. 69 of the 1927 Act as amended in 1936 are no longer contained in The Indian Act.

Judge (now Chief Judge) E. B. Feir pointed out in *Rex v. Shade* (1952), 14 C.R. 56, 4 W.W.R. (N.S.) 430, 102 C.C.C. 316, 5 Abr. Con. (2nd) 1230, that the cases dealing with fishing and hunting decided prior to 1951 must now be read with the changes made in the 1951 Act being kept in mind.

Section 87 of The Indian Act provides that the application of provincial laws to Indians is subject to the terms of any treaty,

REGINA v. LITTLE BEAR

(1958), 28 C.R. 333 (also reported: 25 W.W.R. 580)

Alberta District Court, Turcotte D.C.J., June 1958

(Appealed to Alberta Supreme Court, Appellate Division, infra p.429)

Indians -- Hunting game out of season off reserve -- Permission of land owner -- The Alberta Natural Resources Act, 1930 (Can.), c. 21, s. 12 -- "Right of access" -- Applicability of The Game Act, R.S.A. 1955, c. 126, s. 6.

Appellant, an Indian, shot a deer for food out of season on land belonging to a white man who had given the Indian permission to hunt thereon. He was convicted under s. 6 of The Game Act, R.S.A., 1955, c. 126, and appealed.

Held, the appeal should be allowed. The words "right of access" in s. 12 of The Alberta Natural Resources Act include a right in an Indian to enter privately owned land with the consent of the owner or occupant of the land for the purpose of hunting. The Indian Act, R.S.C., 1952, c. 149, s. 87; Treaty No. 7 (1877); The Game Act, R.S.A., 1955, c. 126, s. 142; *Rex v. Shade* (1952), 14 C.R. 56, 4 W.W.R. (N.S.) 430, 5 Abr. Con. (2nd) 1230; *Rex v. Wesley*, [1932] 2 W.W.R. 337, 20 Can. Abr. 1156; *Rex v. Smith*, [1935] 2 W.W.R. 433, 20 Can. Abr. 1157, considered.

APPEAL from a conviction under s. 6 of The Game Act, R.S.A. 1955, c. 126.

A. Beaumont, Q.C., for appellant.

D. V. Hartigan, for the Crown.

June 1958. TURCOTTE D.C.J.:--This is an appeal from a conviction made by W. A. Macleod P.M., whereby the appellant was convicted "for that he being a Treaty Indian on the Blood Indian Reserve, Alberta, at the Waterton Park District Alberta on or about the 26 day of April 1958 did unlawfully kill big game, to wit: a mule deer at a place within the Province other than in a place from time to time prescribed by the Lieutenant- Governor in Council contrary to s. 6 of The Game Act, 1948, R.S.A., 1955, and amendments thereto."

On the hearing of the appeal, counsel agreed that the evidence taken before the magistrate should be deemed to be the evidence given on the appeal and counsel further agreed that the evidence disclosed the following facts: (1) The appellant is an Indian within the definition set out in The Indian Act, R.S.C., 1952, c. 149; (2) The appellant shot a deer for food out of season; (3) The deer was shot on land owned by a white man named Wellman who lived on adjoining land with his father; (4) The owner of the land gave the appellant permission to hunt on the land.

Counsel for the appellant contends that if an Indian receives permission from a land owner in Alberta to hunt on the owner's land, an Indian can hunt and kill big game for food on the owner's land 365 days in the year without regard to closed seasons as provided for in The Game Act, R.S.A., 1955, c. 126.

Jurisdiction over laws affecting Indians is reserved to the government of Canada under the provisions of s. 91 (24) of The B.N.A. Act, 1867.