REX v. McLEOD

(1930), 54 C.C.C. 107 (also reported: [1930] 2 W.W.R. 37)

British Columbia County Court, Swanson C.C.J., 23 April 1930

Indians--Reserve--Application of provincial statutes to.

A provincial Game Act will apply to an offence committed by a non-Indian on an Indian reserve. Such reserves are not by reason of the Dominion jurisdiction thereover excluded from the application of provincial statutes which do not conflict with Dominion legislation.

APPEAL by the accused from his conviction on a charge of hunting out of season on an Indian reserve. Affirmed.

H.L. Morley, for appellant.

J.R. Archibald, for respondent.

SWANSON, Co.CT.J.:--This is an appeal from a conviction made by the stipendiary magistrate for the County of Yale on March 27, 1930, whereby the appellant Ewen McLeod, the Indian agent for the Kamloops Indian agency in this county was convicted on the charge that he did on November 2 last at the Kamloops Indian Reserve in this county unlawfully kill a pheasant contrary to s. 9 of the Game Act, R.S.B.C. 1924, c. 98. The facts in the case were all admitted before me, the sole ground of appeal being that the Game Act, a provincial Act, is *ultra vires* in so far as it seeks to legislate with respect to offences committed on an Indian reserve, the latter being alleged to be under the exclusive legislative jurisdiction of the Dominion parliament under s. 91(24) of the B.N.A., Act, 1867.

As this case is one *primae impressionis*, there being no record of the point having been previously raised in this Province as far as my knowledge goes, and as the case is one of general interest in the county I have seen fit to commit my reasons for judgment to writing. The B.N.A. Act, which is in main the written charter of our Canadian constitution, allocates to the provincial legislatures all legislative subjects outlined in s. 92, and to the Dominion parliament the subjects in s. 91.

Under s. 91(24) exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians" is conferred on the Dominion.

It is contended by the counsel for the appellant that s-s. (24) ousts the jurisdiction of the Province to enact a Game Act which shall be effective to penalize a person either Indian or white man for shooting game out of season on an Indian re- serve. The Game Act is an Act of general application, and does not in my opinion infringe upon any of the legislative powers of the Dominion. The only reference in the Game Act to Indians is in s. 6, "No Indian who is not a resident shall hunt or kill game in the Province at any time." The legislative validity of this section does not enter into the case now before me. Mr. Archibald submits that the legislation in

question is competent under the authority of s. 92(13) "Property and Civil Rights in the Province." It may be also justified under s-s. (16):--"Generally all Matters of a merely local or private Nature in the Province."

Lord Herschell in giving the judgment of the Privy Council in *A.-G. Can. v. A.-G. Ont., Quebec & N.S.*, [1898] A.C. 700, at p. 716, says that the terms and conditions upon which the fisheries the property of the Province may be granted are pro- per subjects for provincial legislation either under s. 92(5) "The Management and Sale of Public Lands . . . . " or under s-s. (13) "Property and Civil Rights . . . ." The general validity of the Game Act is not questioned. Stress was laid upon a decision of the late Hunter, C.J., in *Rex v. Jim* (1915), 26 Can. C.C. 236, 22 B.C.R. 106. It was there held that as the exclusive legislative authority over "Indians and Lands reserved for Indians" is vested in the Dominion parliament the Game Protection Act of British Columbia was not effective as regards an Indian reserve to prohibit an Indian there resident from hunting and killing a deer on the reservation for his own use. That decision is an authority for what it specifically decides namely that the Game Act does not apply to the case of an Indian resident on the reserve killing game for his own use and is no authority to exculpate others than Indians killing game out of season on an Indian reserve.

In *Quinn v. Leathem*, [1901] A.C. 495, at p. 506, Lord Hals- bury, L.C., said:--"There are two observations of a general character which I wish to make . . . . one is . . . . that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

Reference was made by Hunter, C.J., to the case in the Privy Council of *Madden v. Nelson & Ft. Sheppard R. Co.*, [1899] A.C. 626. In that case the provision of the Cattle Protection Act, 1891 (B.C.), c. 1, as amended by 1895 (B.C.), c. 7, to the effect that a Dominion railway company unless they erect fences on their railway shall be responsible for cattle injured or killed thereon is *ultra vires* of the provincial legislature, distinguishing the case of *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367. Halsbury, L.C., quoted the words of the preamble to the provincial Act and made this comment, [1899] A.C., at pp. 628-9:-- "In other words, the provincial legislature have pointed out by their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the provincial legislature, the Dominion Parliament ought to have made; and they thereupon proceed to do that which they recite the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the provincial parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them, and is, therefore, manifestly ultra vires.

"Their Lordships think it unnecessary to do more than to say that in this case the line seems to have been drawn with sufficient precision in the case of the *Canadian Pacific Ry. Co v. Corporation of the Parish of Notre Dame de Bonsecours*, where it was decided that although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the provincial legislature, the railway company (in that case a Dominion railway) were not exempted from the municipal state

of the law as it then existed--that all landowners, including the railway company; should clean out their ditches so as to prevent a nuisance. It is not necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company unless they create such and such works upon their roadway. This is manifestly and clearly beyond the jurisdiction of the provincial legislature."

With all respect these authorities do not seem to me to justify the contention that the Game Act must be held to be *ultra vires* in so far as it seeks to punish a white man who unlawfully kills game out of season simply because the place where such game is killed happens to be upon "Lands reserved for Indians."

Lord Watson in *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C., at pp. 372-3, said:--"The British North America Act, whilst it gives the legislative control of the appellants' railway qua railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has . . . . exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, inter alia, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes . . . . It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment . . . . the struc- ture of the ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its being choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec."

Reference was made by counsel on the argument before me to the case in the Privy Council of *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. The question in appeal in that case was whether certain Indian lands admittedly situated in Ontario belonged to that Province or to the Dominion. The appellants cut timber on the lands which are Crown lands without authority from the Province of Ontario which accordingly sued for an injunction and for damages. The appellants justified by setting up a licence from the Dominion Government. The Canadian Courts decided in favour of the Province, and the judgments were sustained by the Privy Council. The judgment of the Privy Council was given by Lord Watson. Some of the leading counsel of the day were engaged before the Privy Council, Sir Richard E. Webster, (afterwards Lord Alverstone), and Mr. Dalton McCarthy, appeared for the Dominion, sir Oliver Mowat (then A.-G. for Ontario and Premier), Hon. Edward Blake, Sir Horace Davey, (afterwards Lord Davey), and Mr. Haldane (afterwards Viscount Haldane) for the Province of Ontario. The lands in question were "lands reserved for the Indians." Lord Watson deals with the treaty negotiated in 1873 between commissioners representing the government of Canada and a tribe of the Ojibbewa Indians and alludes briefly to the historical statement of the rights of the Indians to certain lands in question in that case and makes reference to the terms of the capitulation of Montreal, September 8, 1760, by the Marquis de Vaudreuil representing the French Crown to Major-General Amherst and General Murray representing His Majesty The King.

Boyd, C., in a judgment in the lower Court (1885), 10 O.R. 196, at pp. 204-5, deals most exhaustively with the historical side of the case. He states:--"The legal and constitutional effect of the conquest of Quebec and the cession of Canada was to vest the soil and ownership of the public land in the Crown, and to subject the same to the Royal prerogative. The French and Indian populations that remained in the country became by the terms of capitulation, the subjects of the King. So far as the latter were concerned, it was stipulated in the articles of capitulation concluded at Montreal (on Sept. 8th, 1760) between Major-General Amherst and the Marquis de Vaudreuil as follows: 'Article XL: The Savages or Indian Allies of His Most Christian Majesty shall be maintained in the lands they inhabit if they choose to remain there: they shall not be molested on any pretense whatsoever, for having carried arms and served His Most Christian Majesty ; they shall have, as well as the French, liberty of religion, and shall keep their missionaries.' "

Lord Watson at p. 59 of the Privy Council report says:-- "Their Lordships are, however, unable to assent to the argu- ment for the Dominion founded on sect. 92(24). There can be no a priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Par- liament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title."

As Lord Herschell said in the above case of *A.-G. Can. v. A.-G. Ont.*, [1898] A.C., at p. 709:--"It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it."

The Court of Appeal of Ontario held in the case of *Rex v. Hill* (1908), 15 O.L.R. 406, that a treaty Indian residing on an Indian reserve was lawfully convicted for having practised medicine for hire in Ontario but not upon the Indian reserve without being registered pursuant to the provisions of the Ontario Medical Act, R.S.O. 1897, c. 176. It was held that the Indian was thus subject to the provincial Medical Act. Maclaren, J.A., at p. 411, says:--"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 40 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 . . . . Let us see where such an interpretation of the British North America Act would land us. By sub-sec. 7 of sec. 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."

The Judge at pp. 412-3 says:--"The question of legislation being passed as falling under one subject, and its being con- tended 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 . . . , 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-- seem 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 Do- minion legislation must prevail."

The Privy Council has held in *Cunningham v. Tomey Homma*, [1903] A.C. 151, that while s. 91(25) reserves to the Dominion Parliament exclusive jurisdiction over "aliens and naturalization," that is a right to determine how naturalization shall be constituted, and the Provincial Legislature has the right to determine under s. 92(1) what privileges as distinguished from necessary consequences shall be attached to it. Accordingly the British Columbia Provincial Elections Act, 1897 (B.C.), c. 67, s. 8, which provides that no Japanese whether naturalized or not shall have the right to vote is not *ultra vires*.

It was held by Mathers, J. (afterwards C.J.), in *Sanderson v. Heap* (1909), 19 Man. L.R. 122, at p. 127; that the provincial Act of Manitoba called the Estoppel Act, R.S.M. 1902, c. 56, applies to an Indian. His Lordship says:--"The Estoppel Act cannot be said to be legislation concerning Indians. It relates to the property and civil rights of those who execute deeds containing certain covenants."

Lamont, J. (now a Justice of the Supreme Court of Canada) held in *Carter v. Nichol* (1911), 4 S.L.R. 382, that the defendant (an Indian agent in charge of an Indian reserve) who permitted a threshing outfit to be operated on an Indian reserve without the appliances required by the provincial Act, the Prairie Fires Act, R.S.S. 1909, c. 129, was responsible for damages for fire which broke out.

Rex v. Rodgers, [1923] 3 D.L.R. 414, 40 Can. C.C. 51, 33 Man. L.R. 139, is a decision of the Court of Appeal of Manitoba dealing with the effect of the Game Protection Act, 1916 (Man.), c. 44, as affecting treaty Indians killing fur-bearing animals on the Indian reserve. I wish to particularly direct attention to the words of Dennistoun, J.A., at p. 420, quoting the words of Riddell, J. (paraphrasing the language used by the Privy Council in the above case of *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C., at pp. 372-3).

I also refer to the judgment of the Appellate Division of Ontario in *Rex v. Martin* (1917), 29 Can. C.C. 189, 39 D.L.R. 635, in which it was held that an Indian is punishable as other persons are for offences committed outside a reservation against provincial laws, in that case for a violation of the Ontario Temperance Act, 1916 (Ont.), c. 50. However our own Court of Appeal has declined to follow the decision in *Rex v. Martin*. See the decision of our Court of Appeal in *Rex*

v. Cooper (1925), 44 Can. C.C. 314, 35 B.C.R. 457. The reason for the latter decision is put on the ground that where the field of legislation is covered effectively by Dominion legislation the provincial legislation on the same subject must give way to the Dominion. In the case above reference is made to s. 135 of the Indian Act, R.S.C. 1906, c. 81, which deals fully with the offence in question. In this and in a number of kindred sections the Indian Act deals fully with the offences of dealing in intoxicants with Indians.

It was submitted in the case at bar that the provincial Game Act should for the same reason be held not to apply, as the field is already covered by Dominion legislation, *viz.*, s. 34 of the Indian Act, now R.S.C. 1927, c. 98:--

"No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General, re- side or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band." This s. 34 and all sections down to and including 38 are preceded by the words in the heading of this portion of the Act, "Trespassing on Reserves." I am of the opinion that s. 34 is clearly confined to "trespassing" and cannot be called legislation on the part of the Dominion occupying the legislative field of the provincial Game Act. I refer to Maxwell on the Interpretation of Statutes, 6th ed., p. 92, as to the effect of a heading prefixed to a section in an Act:--"The headings pre- fixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections." Being such in effect they are part of the statute and perform the function of a pre- amble which "is to explain what is ambiguous in the enactment, and it may either restrain or extend it as best suits the intention." See also s. 69 of the Indian Act which deals with game laws in Manitoba, Saskatchewan and Alberta, but not British Columbia. I allude to an important decision of the U.S. Supreme Court in *U.S. v. McBratney* (1881), 104 U.S.R. 621, in which it was held that when a State was admitted to the Union and the enabling Act contained no exclusion of State jurisdiction as to crimes committed on an Indian reservation by others than Indians, or against Indians, the State Courts were vested with jurisdiction to try and punish such crimes, and that whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation or the sole or exclusion federal jurisdiction over that reservation it has done so by express words. See also *Draper v. U.S.* (1896), 164 U.S.R. 240.

I allude also to a ruling of McDonald, J., in *Rex v. Chan Lung Toy* (1924), 34 B.C.R. 194, which was decided before the ruling by our Courts of Appeal in *Rex v. Cooper*, 44 Can. C.C. 314.

In the light of the principles which I have endeavoured to extract from the above cases I have concluded that our provin- cial Game Act when dealing with an offence such as that in the case at bar is within the legislative competence of the pro- vincial legislature.

I accordingly affirm the conviction of the appellant and dismiss his appeal.

Appeal dismissed.