

REX v. PADJENA AND QUESAWA

(1930), previously unreported

Ontario Division Court, McKay J., 10 April 1930

McKay J.: In the matter of the conviction of Joe Padjena and Paul Quesawa for unlawfully having in their possession thirty raw beaver pelts contrary to the Ontario *Game and Fisheries Act* [R.S.O. 1927, c. 318] and Regulations. (Order in Council dated the 26th day of April, 1928.)

Under Treaty Number 60 known as the Robinson Treaty, on the 7th day of September 1850 the Province of Canada agreed with the Principal Men of the Ojibewa Indians inhabiting the northern shore of Lake Superior, in the said Province of Canada, from Batchewana Bay to Pigeon River, at the western extremity of said lake, and inland throughout that extent to the height of land which separates the territory covered by the -- charter of the Honourable the Hudson's Bay Company from the said tract. And also the islands in the said Lake within the boundaries of the British possessions therein, that they, the said Chiefs and their tribes would be allowed the full and free privilege to hunt over the said territory, then ceded by them to the said Province of Canada and also to fish in the waters thereof as they had theretofore been in the habit of doing, saving and excepting only such portions of the said territory as might from time to time be sold or leased to individuals or companies of individuals (see Indian Treaties, Volume 1-2 page 147) [*Indian Treaties and Surrenders from 1680-1902*, 3 vol. (Reprint ed., Toronto: Coles Publishing Co., 1971), vol. 1:147].

Under the *British North America Act* the Dominion Parliament was given authority to legislate in relation to the Indians, and lands reserved for Indians. Under the said Treaty the Crown agreed to pay to the Chiefs and Indians a perpetual annuity of five hundred pounds. In respect of that obligation, the Government of Canada, is obliged to pay same by virtue of the *British North America Act, 1867*. The Crown, as represented by the Government of Canada, under the Treaty is a debtor, and the right of the Indians to such annuity cannot be impaired, without their consent [(1904-05) 9 Ex. C.R. 417, at 418 and 446].

Under section 109 of the *British North America Act, 1867* the said Treaty became the property of the Crown as represented by the Province of Ontario but subject to the rights and privileges of the said Indians, reserved by the said Robinson Treaty (*The Canadian Constitution* by A.H.F. Lefroy page 298). (72 Privy Council cases, pages 6 and 14, Appeal Cases pages 52, 58 and 60.)

The said Robinson Treaty is binding on both the Dominion of Canada and on the Province of Ontario. The said Treaty was made with the Province of Canada, which then included, Ontario and Quebec, and the Province of Ontario cannot abrogate the said Treaty. Treaties made by the United States with the Indian tribes are laws of the United States, and constitute a part of the supreme law of the land, and acts of a state legislature in conflict therewith are therefore void. Treaties with the Indian tribes are to be construed liberally in favour of the Indians.

(*American and English Encyclopedia of Law* Volume 16, pages 218 and 219.)

The right of an Indian to hunt or fish on his reserve without restraint or interference is often essential to the well-being of himself and of those dependent upon him. Under section 91 of the *British North America Act* the Dominion Parliament has exclusive authority to legislate in respect of "Indians, and Lands reserved for the Indians". The *Game and Fisheries Act* would not apply to Indian reserves ([1923] 3 D.L.R. 414, at 423). In the action *Rex v. Rodgers*, [1923] 3 D.L.R. 414, at 423 it was held as follows:

Provincial statutes, even of general application do not, as a rule, expressly state the territory to which they are meant to apply. They are generally worded as if they applied to all the territory comprised within the boundaries of the Province. But everyone understands that they cannot apply to regions in the Province (in any) over which the Legislature has no jurisdiction in the particular matter, and that, however broad the terms, these regions were meant to be exempt.

On the same reasoning I hold that the appellants are entitled under the terms of the said Treaty to hunt on the lands belonging to the Crown within the said territory, and that the said *Game and Fisheries Act* and regulations thereunder do not apply to them and that the conviction herein should be quashed.

Section 6 of an Order-in-Council approved by the Honourable the Lieutenant-Governor dated the 26th day of April A.D. 1928, expressly legislating in respect of Indians, would appear to be ultra vires, as that authority belongs to the Parliament of Canada, [1899] App. Cas. 367 and 41 O.L.R. 79, at 84. In 41 O.L.R. page 84 it is held "no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective."

The information and complaint against the said Joe Padjena and Paul Quesawa is that they had unlawfully in their possession thirty raw beaver pelts contrary to the Ontario *Game and Fisheries Act* and Regulations, Order-in-Council dated the 26th day of April A.D. 1928. Section 6 of the said Regulations provides that:

(6) It shall be unlawful for any Indian residing outside of the territory lying north of the main line of the Canadian National Railway (formerly the Grand Trunk Pacific Railway), to have the raw pelts of beaver and otter or any part thereof in possession at any time except under special license or permit issued by the Department of Game and Fisheries.

If the said section applies to the said appellants, then in effect it abrogates their rights under the said Treaty, and would be ultra vires (65 D.L.R. 577 at 600, [1923] 4 D.L.R. 698).

The appeal is allowed and the conviction quashed with costs fixed at \$25.00.