# REX v. WESLEY

## [1932] 4 D.L.R. 774 (also reported: [1932] 2 W.W.R. 337, 58 C.C.C. 269, 26 Alta. L.R. 433)

## Alberta Supreme Court, Appellate Division, Clarke, Mitchell, Lunney, McGillivray JJ., 6 June 1932

*Indians---Hunting game in unoccupied Crown lands in Alberta--Application of provincial Game Act--Whether right restricted by.*

By virtue of s. 12 of the Statutory Agreement between the Dominion and the Province of Alberta confirmed by the B.N.A. Act, 1930, and dealing with the transfer of the Public Domain to the Province Indians in the Province hunting for food may kill all kinds of wild animals regardless of age or size wherever found on unoccupied Crown lands or other lands to which they have a right of access at all seasons and may hunt such animals with dogs or otherwise as they see fit without having a provincial license. Assuming that such a construction involves an inconsistency between the first part or that section whereby provincial game laws are to apply to the Indians and the proviso thereto as to Indians hunting for food regardless of the restrictions in the provincial Game Act, R.S.A. 1922, c. 70, a consideration of the history and documents relative to the rights of Indians with respect to hunting the purpose of the proviso was to assure to the Indians covered by the section an unrestricted right to hunt for food in the places described in the section and that the apparent ambiguity should be determined accordingly.

APPEAL by way of stated case from the judgment of Sanders, P.M., acquitting the accused, a Stoney Indian of two charges and convicting him of another charge under the Game Act of Alberta. Affirmed as to acquittals. Reversed as to conviction.

*H. J. Wilson*, for the Crown; *M. B. Peacock*, for accused.

CLARKE and MITCHELL, JJ.A., concur with McGILLIVRAY, J.A.

LUNNEY, J.A.:--This appeal is by way of stated case from the judgment of Col. G. E. Sanders, P.M., in connection with a number of charges against a Stoney Indian, relating to alleged infraction of the Game Act, R.S.A. 1922, c. 70. The Indian, Wm. Wesley, was charged:--

(1) That he did on December 10, hunt and kill one male deer having horns or antlers less than 4" in length. On this charge he was convicted.

(2) That he did hunt the said deer without having a licence. On this charge he was acquitted.

(3) That he did hunt the said deer with dogs. On this charge he was acquitted, all of these alleged offences being in contravention of the provisions of the Game Act.

Admissions were made that the alleged offences took place on unoccupied Crown land, that the accused was an Indian and a member of the Stoney Band, whose reserve is at Morley, Alta., that he did not have a big game licence and that the carcase of the deer killed was used for food.

The general issue raised by this appeal is the question whether or not a treaty Indian is bound by the provisions of the Game Act of Alberta.

Special provisions have been made from time to time in regard to Indians, by way of direct treaty and by way of legisla- tion. The most recent legislation on the matter is found in the Alberta Natural Resources Act, 1930 (Alta.), c. 21, respecting the transfer of the natural resources of Alberta from the Dominion of Canada to the Province. Section 12 of the Memorandum of Agreement between the two Governments provides:--

"12. 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."

It is argued by counsel for the applicant that this Memorandum of Agreement does not alter the law applicable to Indians, and expressly provides that the game laws shall apply to Indians within the Province. I am of opinion that the Memor- andum did not, nor was there any intention that it should, alter the law applicable to Indians. It did emphasize the right of Indians, and provided for the continuance of that right "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 have a right of access."

Somewhat similar provision is made for residents of certain portions of the Province under the provisions of the Game Act. Section 37 of the Game Act, is:--

"Any person who is resident of that portion of the Province lying to the north of the fifty-fifth parallel of north latitude and who is exempt from the requirements of section 20 hereof, may, when necessary so to do to provide food for himself and family, hunt and kill big game (other than buffalo and elk) and scoters (commonly called 'black duck') in such portion of the Province.

"Provided, however, that any game so taken or killed shall not be sold or trafficked in."

Section 20 is:--"No person, a resident of the Province, shall hunt, trap, take, shoot at, wound or kill any game bird without having in his possession a licence duly issued to him so to do, which shall be known as a resident's bird game licence:

"Provided, however, that the provisions of this section shall not apply to any farmer or member of his family residing with him upon his farm, nor to those residents of the Province residing to the north of the fifty-fifth parallel of north latitude."

The question came up squarely in 1890 in reference to a pro- posed Game Ordinance of the North-West Territories. The report of Sir John Thompson, then Minister of Justice, recommending that the Ordinance in question be disallowed is found in Correspondence Reports of the Minister of Justice and Orders in Council upon Dominion and provincial legislation, p. 1254. A portion of the report reads:--

"Prior to the acquisition of the North-West Territories by the Dominion of Canada the whole country with the exception of a small area, had never been surrendered by the Indians inhabiting the same. At the present time, however, almost all the territory south of the 52nd parallel of north latitude, has been divested of the Indian title by the operation of treaties known as Nos. 2, 4, 6

and 7. Each of these treaties, with the exception of No. 2, contains a provision guaranteeing to the Indians certain rights of fishing and hunting over the surrendered territory.

"Treaties Nos. 4 and 7 contain the following covenant:--

"And further Her Majesty agrees that her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, 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 excepting such tracts as may be required or taken up from time to time for settlement, mining, or other purposes, under grant or other right given by Her Majesty's said gov- ernment.

"Treaties Nos. 5 and 6 contain the following covenant:--

"Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as here- inbefore described, subject to such regulations as may from time to time be made by her government of the Dominion of Canada, and saving and excepting such treaties as may from time to time be required or taken up for settlement, mining, lumbering, or other purposes by her said government of the Dominion of Canada or by any of the subjects thereof, duly authorized therefor by the said government.

"It will be observed that in the treaties Nos. 4 and 7, the right of regulating the hunting and fishing is vested in 'the government of the country, acting under the authority of Her Majesty, whereas in Treaties Nos. 5 and 6 such regulations are to be made by the government of the Dominion of Canada.

"The undersigned is inclined to the opinion that the authority referred to in both cases is the Dominion government or parliament, but whatever doubts there may be as to the meaning of the phrase 'the government of the country acting under the authority of Her Majesty' there can be none as to the meaning of the phrase 'Her government of the Dominion of Canada,' and that the treaties contained in these words, purport to secure to the Indians the right to pursue their avocations of hunting and fishing, subject to any regulations made by your Excellency in Council.

"The ordinance now under review purports to regulate and control the avocations of hunting and fishing by the Indians, as well as by the other subjects of Her Majesty, and in so far as it relates to Indians, is a violation of the rights secured to them by the treaties referred to.

"The undersigned does not consider it necessary to discuss the propriety of these regulations, or whether the Indians should be exempt from the regulations. It is sufficient to observe that the utmost care must be taken, on the part of your Excellency's government, to see that none of the treaty rights of the Indians are infringed without their concurrence."

Counsel for the applicant argues that if the provisos in the Memorandum of Agreement between the Dominion and the Province is given the wide construction that Indians are entitled to hunt any animal at any season of the year, it renders nugatory the provision that they shall be subject to the game laws of the Province. As I have pointed out, the Legislature, in making special provisions for residents north of the fifty-fifth parallel, realized that there was a difference in

hunting from the viewpoint of a sportsman and from the viewpoint of a man seeking food which is necessary to his maintenance.

The treaties with the Indians and the subsequent legislation treat with the rights of Indians to hunt, and until definite legis- lation 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.

If it should be necessary or desirable to curtail the hunting rights of the Indian, provision has been made to that effect.

By s. 69 of the Indian Act, R.S.C. 1927, c. 98, provision is made that:--

"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." The Superintendent General is the Minister of the Interior.

In the result I would dismiss the appeals from the dismissals of the charges before the Magistrate, allow the appeal from the conviction by the Magistrate and quash the conviction. I would allow costs to the respondent, Wm. Wesley, in the two cases in which he was acquitted by the Magistrate and to the applicant, Wm. Wesley, in the case in which he was convicted by the Magistrate.

MCGILLIVRAY, J.A.:--The accused Wm. Wesley was charged before Sanders, P.M., with having committed three offences. First that he hunted and killed a deer without having a provincial license so to do, contrary to s. 17 of the Game Act; second that he used dogs to hunt big game contrary to s. 16 of the Game Act; and third that he hunted and killed one male deer having horns or antlers less than 4" in length, contrary to s. 4 (*e*) of the Game Act.

As to the first charge the Magistrate held that the accused was hunting for food when he killed this deer and so was not required to have a license. As to the second charge the Magistrate held that the accused was not hunting with dogs as alleged. On the third charge the Magistrate yielded to the argument of Crown counsel that "animals whose destruction is prohibited (by the provincial Game Act) cannot be classed as game, and are, therefore, immune from Indians as well as whites."

In the result on the two charges first mentioned the accused was acquitted. On the last mentioned charge he was convicted and a fine of $10 and costs was imposed, or in default of payment, 6 weeks' imprisonment.

These three cases come before this division on cases stated by the Police Magistrate.

All of these alleged violations of the Game Act relate to the killing of the one deer on December 10, 1931.

It is not in dispute that the accused killed the animal in question at the time and place mentioned

in the charges.

It is common ground that the accused is a Stoney Indian entitled to the benefits of the Articles of Treaty made between the Queen and the Black Feet, Stoney and other Indians on September 22, 1877.

This treaty and the proclamation and Order in Council with exhibits thereto to which I shall refer, were by consent made part of the case.

It is admitted that the land on which the accused was hunting when he killed the deer is unoccupied Crown land; that this land is a part of the lands granted to the Hudson's Bay Co. in the year 1670, and part of the lands covered by the Indian Treaty mentioned.

In my view this case falls to be decided upon the construction to be given to s. 12 of the Statutory Agreement set forth in the Alberta Natural Resources Act, 1930 (Alta.), c. 21.

This Agreement was approved by the Parliament of Canada and the provincial Legislature and confirmed by an Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland, *viz.*, the B.N.A. Act, 1930, in which last-mentioned Act this Agreement is declared to have the force of law not- withstanding anything in the B.N.A. Act, 1867, or any amending Act or any Act of the Parliament of Canada or any Order in Council or any terms or conditions of union made or approved under any such Act.

Section 12 reads as quoted *supra*.

Counsel for the Crown repeats the argument made before the Magistrate to which I have alluded and further contends that the Court should interpret this section so as to give to it the meaning that while Indians are not bound by seasonal restric- tions when hunting for food, with this exception, they are subject to all the prohibitions, restrictions and regulations which the Game Act provides. Counsel for the accused contends that having regard to the proviso at the end of this section an Indian is entitled to hunt any wild animal of any age at any season of the year in any manner that he sees fit provided always that he is hunting for food, on unoccupied Crown lands or other lands to which he has a right of access.

In applying the rule of construction that Acts of Parliament are to be construed according to the intent of the Parliament which passed the Act, one experiences little difficulty if the words of the statute under consideration are precise and un- ambiguous because the expounding of the words in their ordinary sense gives the intention of Parliament.

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 game 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 land to which they may have a right of access.

With respect it seems to me that Crown counsel gives a fantastic meaning to the word "game" and that he over emphasizes the words "all seasons" and underestimates the value of the words

"for food."

If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the Province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. 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 speak- ing 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.

In *Mullins v. Treasurer of Surrey* (1880), 5 Q.B.D. 170, at p. 173, Lush, J., said:--"When one finds a proviso to the section, the natural presumption is that but for the proviso the enacting part of the section would have included the subject- matter of the proviso."

In Craies' Hardcastle's Statute Law, 3rd ed., at pp. 194-5, the author says:--"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

It seems to me that the enacting part 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.

With reference to the argument that "animals whose destruction is prohibited cannot be classed as game," I need only say that there appears to be no authority for such a proposition and in my judgment there is no justification for assuming that the word game as used in s. 12 is intended to be read in any other than its ordinary and natural meaning. I cannot think that a deer with antlers of a certain length should be considered game while a deer with antlers of lesser length should be deemed not to be game. I cannot think that wild animals are to be considered game in one Province and not in another or game in one year and not another. At any rate in the absence of clear statutory direction I think that a Court should not so hold. Neither s. 12 nor the Game Act provide support for such a contention.

In Murray's New English Dictionary "Game" is defined as follows:--"Wild animals or birds such as are pursued, caught or killed in the chase."

In the result I hold that in turning over to Alberta the Public Domain of the Province the Dominion has sought and the Province has given an assurance which has been confirmed by the Imperial Parliament, that Indians hunting for food may kill all kinds of wild animals regardless of age or size wherever they may be found on unoccupied Crown lands or other lands to which they have a right of access, at all seasons of the year and that they may hunt such animals with dogs or otherwise as they see fit and that they need no license beyond the language of s. 12 to

entitle them so to do.

In the view I take of the case nothing more need be said to justify accepting the submissions of counsel for the accused before referred to in their entirety. But counsel for the Crown contends that to give to s. 12 the construction which I have done is to hold in effect that there is an inconsistency between the first part of the section and the proviso at the end, and in support of this view he urges that it cannot be said that the game laws of the Province apply to Indians if they may hunt for food regardless of the prohibitions and restrictions provided in the provincial Game Act.

From this premise he argues that the Court should accept his construction of the section because it is the duty of the Court so far as possible to construe every part of an enactment so as to be consistent with every other part which it does not in express terms modify or repeal.

This submission may be simply answered by saying that an exception out of an enactment does not necessarily provide in- consistency nor repugnancy. Assuming however that there is an apparent inconsistency and that the language of the section as a whole is capable of two meanings then it may be of some- thing more than historical interest to consider what have been the rights of Indians with respect to hunting in this Dominion prior to the statutory confirmation of the agreement in question of which this s. 12 is a part. *The Queen v. Bishop of London* (1889), 24 Q.B.D. 213; *Philipps v. Rees* (1889), 24 Q.B.D. 17; *A.-G. v. Metropolitan Electric Supply Co. Ltd.*, [1905] 1 Ch. 24, at p. 31; *Wear River Com'rs v. Adamson* (1877), 2 App. Cas. 743, at p. 763; *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339, at pp. 365, 369; *Re Section 24 of the B.N.A. Act*, [1930] 1 D.L.R. 98, at p. 105.

As a starting point it is interesting to notice that Art. 40 of the Articles of Capitulation signed at Montreal in 1760, reads as follows--

"The savages or Indian Allies of His Most Christian Majesty shall be maintained in the lands they inhabit, if they choose to reside there; they shall not be molested on any pretence 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."

We next come to the Treaty of Paris in 1763, under which Canada was ceded to Great Britain. In the same year a royal proclamation was issued dividing the British possessions in America into separate Governments and defining the powers of each. Under this proclamation which has been spoken of as the Charter of Indian Rights the hunting rights of the Indians are strictly conserved, as the following extracts therefrom will serve to show.

"And whereas it is Just and Reasonable and Essential to our Interests and the Security of our Colonies that the several Nations or Tribes of Indians with whom we are connected and who live under Our protection should not be molested or disturbed in the possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us are reserved to them or any of them as their hunting grounds."

Here follows a declaration that no Governor shall grant warrants of survey or patents to such lands and then we have the following:--

"And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to

reserve under our Sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company; as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatsoever, or taking possession of any of the lands above reserved, without our especial leave or license for that purpose first obtained . . . ."

"And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians, in order therefore to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined resolution to remove all reason- able cause of discontent, we do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name, in some public meeting or assembly of the said Indians to be held for that purpose by the Governor or Commander-in-Chief of our colony respectively within which they shall lie; and in case they shall lie within the limits of any proprietaries conformable to such directions and instructions as we or they think proper to give for that purpose."

This proclamation insofar as it deals with Indian rights was the subject of consideration in the case *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. I quote from Lord Watson's judgment in this case:--

"The tenure of the Indians was a personal and usufructuary right, depending upon the good will of the Sovereign . . . ." (p. 54).

"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... . " (p. 55).

"The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden . . . " (p. 58).

"The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament 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 when- ever the estate of the Crown is disencumbered of the Indian title." (p. 59).

In the case of *Canada v. Ontario* (Indian Annuities), [1910] A.C. 637, Lord Loreburn, L.C., giving the judgment of the Judicial Committee, in speaking of the effect of the surrender of lands by the Indians by the treaty there in question, said that the lands "are released from the overlying

Indian interest."

It is thus clear that whether it be called a title, an interest, or a burden on the Crown's title, the Indians are conceded to have obtained definite rights under this proclamation in the territories therein mentioned which certainly included the right to hunt and fish at will all over those lands in which they held such interest.

But it is to be noticed in a consideration of the Indian title under this proclamation of 1763 that excluded from the lands reserved for the use of Indians, is the territory granted to the Hudson's Bay Co. in 1670, which as before stated includes the land with which we are concerned in this case.

There is no material before the Court upon which we can base a judicial opinion as to the position of the Indians in- habiting that great section of country granted to the Hudson's Bay Co. in consideration of the company yielding and paying two elk, and two black beavers as often as the Sovereign, his heirs or successors happened to enter into the territory granted; but this we do find in the Order in Council of June 23, 1870, admitting Rupert's Land and the North-Western Territory into the union (which followed upon the Rupert's Land Act, 1868 (Can.), c. 3) amongst the terms and conditions remaining to be performed by the Parliament of Canada in consideration of the company's deed of surrender, there is the following:--

"Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government and the Company shall be relieved of all responsibility in re- spect of them."

We also find in the first address to Her Majesty from the Senate and the House of Commons of the Dominion, (which address is Schedule A to the Order in Council mentioned) with respect to the Hudson's Bay Company's deed of surrender, the following:--"And furthermore that upon the transference of the territories in question to the Canadian Government the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

In Schedule B the following resolution is to be found:-- "That upon the transference of the territories in question to the Canadian Government it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interest and well being are involved in the transfer."

Whatever the rights of the Stoney and other Indians were under the Hudson's Bay regime, it is clear that at the time of the making of the Treaty to which I shall next allude, the Indian inhabitants of these Western plains were deemed to have or at least treated by the Crown as having rights, titles and privileges of the same kind and character as those enjoyed by those Indians whose rights were considered in the *St. Catherine's Milling* case because it is a matter of common knowledge that the Dominion has made treaties with all of the Indian tribes of the North West within the fertile belt in each of which they have given recognition to and provided for the surrender and extinguishment of the Indian title.

The Treaty made with the once powerful nation of the Assiniboines or Stonies on September 22, 1877, reads in part as follows:--

"And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians inhabiting the district hereinafter more fully described and de- fined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges what- soever to the lands included within the following limits, that is to say . . . ."

"To have and to hold the same to Her Majesty the Queen and her successors forever: -- 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 sur- rendered as heretofore described, 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 excepting such tracts as may be required or 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 also agreed between Her Majesty and her said Indians that reserves shall be assigned them of sufficient area to allow one square mile for each family of five persons, or in that proportion for larger and smaller families and that said reserves shall be located as follows, that is to say:-- The next consideration which arises is as to the exact quality of the right of those Indians with whom a treaty was made."

Until the year 1871 the United States conceded to the Indian tribes the right to treat upon terms of national equality and numbers of treaties were entered into which were deemed to have the same dignity and effect as a treaty with a foreign nation. In the year 1871 this was changed by statute. In Canada the Indian treaties appear to have been judicially inter- preted as being mere promises and agreements. See *A.-G. Can. v. A.-G. Ont.* (Indian Annuities case), [1897] A.C. 199, at p. 213.

Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles which the Senate and the House of Commons declared in addressing Her Majesty in 1867, uniformly governed the British Crown in its dealings with the aborigines.

At the time of the making of this Indian Treaty it was of first class importance to Canada that the Indians who had be- come restless after the sway of the Hudson's Bay Co. had come to an end, should become content and that such title or interest in land as they had should be peacefully surrendered to permit of settlement without hindrance of any kind. On the other hand it goes without saying that the Indians were greatly concerned with "their vocations of hunting" upon which they depended for their living.

In this connection it is of historical interest although of no assistance in the interpretation of the treaty, that Governor Laird who with Colonel Macleod negotiated this treaty, said to the Chiefs of the Indian tribes:--

"I expect to listen to what you have to say today, but first, I would explain that it is your

privilege to hunt all over the prairies, and that should you desire to sell any portion of your land, or any coal or timber from off your reserves, the Government will see that you receive just and fair prices, and that you can rely on all the Queen's promises being fulfilled."

And again he said:--"The reserve will be given to you with- out depriving you of the privilege to hunt over the plains until the land be taken up."

It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land.

In the case *A.-G. v. Metropolitan Electric Supply Co.*, 74 L.J. Ch. 145, at p. 150, Farwell, J., said:--

"I think it is germane to the subject to consider what the Legislature had in view in making the provisions which I find in the Act of Parliament itself. As Lord Halsbury said in *Eastman Photographic Materials Co. v. Comptroller General of Patents, Designs, and Trade Marks*, [1898] [A.C. 571] referring to *Heydon's Case* (1584), [3 Co. Rep. 7*a*] 'We are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy.' That is a very general way of stating it, but no doubt one is entitled to put one's self in the position in which the Legislature was at the time the Act was passed in order to see what was the state of knowledge as far as all the circumstances brought before the Legislature are concerned, for the purpose of seeing what it was the Legislature was aiming at."

If as Crown counsel contends, s. 12 taken as a whole gives rise to apparent inconsistency and is capable of two meanings then I still have no hesitation in saying in the light of all the external circumstances relative to Indian rights in this Do- minion to which I have alluded, that the law makers in 1930 were in the making of this proviso, aiming at assuring to the Indians covered by the section, an unrestricted right to hunt for food in those unsettled places where game may be found, described in s. 12.

This does not in any wise imply that the Game Act of this Province is *ultra vires*. I merely 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 to have to decide that "the Queen's promises" have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be "convinced of our justice and determined resolution to remove all reasonable cause of discontent."

The two acquittals by the Magistrate are confirmed and the conviction by the Magistrate is set aside. The accused will have the costs of the appeals.

In the course of argument other questions were mooted as to the rights of Indians on the Indian Reserves. I decline the invitation of counsel for the accused to write a treatise upon this subject. This judgment must be treated as deciding noth- ing more than the points involved in the consideration of the three cases with which we are now concerned. In taking this attitude I have the comfort of knowing that the legal rights of the Stoney Indians will be watched with great zeal

and ad- vanced with great enthusiasm so long as Mr. Peacock, one of His Majesty's counsel learned in the law, continues to be a chief of that tribe, bearing the proud name of Chief Walking Bear. Whilst it might convenience him to have the Court at this time decide all questions affecting Indians, to attempt to forestall points that may depend upon entirely different cir- cumstances when they come up for decision, is, in my opinion, unwise.

*Appeal dismissed as to acquittals. Allowed as to conviction.*