Michael Sikyea v. Her Majesty the Queen

A. L. C. de Mestral *

Despite the fact that Canadian Indians have been the subject of treaties, Acts of Parliament and considerable litigation, their present status seems neither clear at law nor consonant with the norms of social justice which should prevail in this country. As it becomes increasingly impossible for them to live apart from white society it would appear that the "rights" and "privileges" of the Indians will have to be radically redefined or clarified if these rights are to survive at all. The recent decision of the Supreme Court of Canada in the case of *Michael Sikyea* v. *the Queen* [1] has done much to emphasize the uncertain legal status of the Treaty Indian.

In November of 1962 Michael Sikyea, a Treaty Indian, was acquitted in a trial *de novo* [2] by Mr. Justice Sissons of the Territorial Court of the Northwest Territories of a charge of unlawfully killing a migratory bird in violation of regulations issued under the *Migratory Birds Convention Act*.[3] However, this decision was reversed by the Court of Appeal of the Northwest Territories.[4] On October 6, 1964 the Supreme Court upheld the decision of the Court of Appeal, and, in a judgment delivered by the Honourable Mr. Justice Hall, accepted the finding of the Court of Appeal to the effect that the wording of the *Migratory Birds Convention Act* and of the Regulations issued under it permitted no exceptions to be made in favour of the appellant.

The charge which was brought by an R.C.M.P. officer who had found Sikyea hunting near Yellowknife was founded on Section 5 (1) of the Migratory Birds Regulation,[5] which prohibits the killing of migratory birds in the Northwest Territories except during the season, which lasts from September 1 to October 15. Mr. Justice Sissons noted that:

> "From time immemorial the Indians and Eskimos of the North and their wives and children have in the Spring taken migratory birds for food and

* Of the Junior Board of Editors, McGill Law Journal; second year law student.

1 [1964] S.C.R. 642.

2 (1962) 40 W.W.R. 494.

3 R.S.C. 1952, c. 179.

4 [1964] 2 C.C.C. 325.

5 P.C. 1958 - 1079 S.O.R./58-308.

> will continue to do so and this has been and is necessary for their survival and well-being."

The learned judge held that Sikyea, being a Treaty Indian, was not bound by this Regulation. He based his decision on the terms of Treaty 11 made in 1921 by the Federal Government with the Indians occupying the Northwest Territories, from the 60th parallel to the Arctic Ocean. The Treaty declared that:

> "His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may be made from time to time by the Government of the Country..."

The learned judge construed the final words of the citation as referring only to the practice of prohibiting the hunting of species in danger of extinction, and noted that in 1960 the *Northwest Territories Act* had been amended [6] to prohibit the Commissioner from restricting the right of Indians and Eskimos to hunt for food on unoccupied Crown lands, unless a species was in danger of extinction. He cited the leading case of *R.* v. *Wesley* [7] in which it was held that Indians hunting for food were not bound by the *Alberta Game Act*.[8] Reasoning from these authorities, Section 87 of the *Indian Act*,[9] and the *Canadian Bill of Rights*,[10] the learned judge concluded that the ancient right of the Indians to hunt for food on unoccupied Crown lands was one which could only be abrogated by "express words or necessary intendment or implication." He declared himself unable to find such words in the *Migratory Birds Convention Act*.

In reversing the decision of Sissons, J.T.C., the Court of Appeal based its judgment strictly on the words of the *Act* and Regulations. Section 5 (1) of the Regulations provides:

> (1) "Unless otherwise permitted under these Regulations to do so, no person shall
>
> (a) in any area described in Schedule A, kill, hunt, capture, injure, take or molest a migratory bird at any time except during an open season specified...
>
> (2) Indians and Eskimos may take auks, auklets, guillemots, murries, puffins and scoters at any time for human food..."

---

[6] S.C. 1960, c. 20, ss. 1, 2.

[7] 58 C.C.C. 269.

[8] R.S.A. 1922, c. 70.

[9] R.S.C. 1952, c. 147 s. 87: "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..."

[10] S.C. 1960, c. 44.

Mr. Justice Johnson, who delivered the judgment of the Appeal Court, found himself unable to agree with Mr. Justice Sissons that section 5 (2), in particular, indicated no intention to abrogate Indian hunting rights. Thus, while describing the Regulations as an "apparent breach of faith on the part of the government," the learned judge concluded: "It is difficult to see how this language admits of any exceptions" [11]

The Supreme Court of Canada, in a unanimous judgment delivered by the Hon. Mr. Justice Hall, ruled that the mallard shot by Sikyea must be deemed a "wild duck" within the terms of the *Migratory Birds Convention Act*, and concurred fully with the reasons and the conclusion of Mr. Justice Johnson who, in its opinion, had dealt with the issues "fully and correctly."

When based on the terms of the *Migratory Birds Convention Act* and Regulations, this decision would seem to be the only one possible. However, to admit that the Act must be so construed is also to admit the possibility of two unfortunate hypotheses: either the government agents treated with the Indians in bad faith, or they treated in complete ignorance of the effects of the Act upon the hunting rights of the Indians. The first hypothesis may be entertained in the light of the fact that, fully three years before the signing of Treaty 11, the following Regulations had been issued under the *Migratory Birds Convention Act*,[12]

> "No person shall kill, capture, injure, take... any migratory game birds during the following periods :
>
> ...Northwest Territories and Yukon Territory; Dec. 15 - August 31 both days inclusive.
>
> Provided however that :
>
> Indians and Eskimos may take scoters or "Siwash Ducks" for food at any time..."[13]

These regulations differ from those presently in force only with respect to the length of the season. The second hypothesis may also be entertained in the light of the Report of Commissioner H.A. Conroy who was sent to negotiate the Treaty in 1921. At no point in the Report did he make reference to the *Act*, and the following passage would seem to indicate that he had no knowledge of it:

> "The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but they were assured by me

---

[11] *Op. cit.*, at p. 335.

[12] S.C. 1917, c. 18.

[13] Order-in-Council 23, April 1918, P.C. 871. While noting that the Act had been passed before Treaty 11, Mr. Justice Johnson made no mention of these regulations.

> that this would not be the case, and the Government will expect them to support themselves in their own way, and in fact, that more twine for nets and more ammunition were given under the terms of this Treaty than under any of the preceeding ones; this went a long way to calm their fears."[14]

This second hypothesis is also rendered plausible by the fact that there appear to have been no prosecutions of Indians for violations of the Act until very recently, and that it was the belief of Indians that they were free to hunt migratory birds.[15]

The leading cases in the field of Indian rights have, in large measure, treated the Indians with greater liberality than the present decision.[16] Thus we read, in the first Privy Council case involving the rights of Indians, the *St. Catherine Milling and Lumber Co. Case*,[17] that the lands given up by Treaty to the Crown were still subject to hunting rights. In the leading case *R.* v. *Wesley*[18] Mr. Justice McGillivray stated:

> "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 of *Regina* v. *Little Bear*,[19] it was held that the *Alberta Game Act* did not apply to Indians hunting for food; in *Regina* v *Kogogolak*[20] it was held that Northwest Territories game laws did not apply to Eskimos. In the recent case of *Regina* v. *Prince*[21] the Supreme Court held that Indians were not restricted as to their manner of hunting by the *Manitoba Game and Fisheries Act*, when hunting for food. In another very recent decision, *Regina* v. *George*,[22]

---

[14] This Report is appended to the Treaty.

[15] Perhaps the ultimate irony of this case is that Sikyea had been an interpreter at the Treaty negotiations.

[16] *St. Catherines Milling and Lumber Co.* v. *The Queen* [1889] A.C. 46; *Ontario* v. *Canada and Quebec* (1896) 25 S.C.R. 434; *Ontario Mining Co.* v. *Seybold* [1903] A.C. 73; *"Indian Annuities Case"* [1910] A.C. 637; *R.* v. *Lady McMaster* [1926] Ex. C.R. 68; *R.* v. *Syliboy* 50 C.C.C. 389; *R.* v. *Wesley* 58 C.C.C. 269; *R.* v. *Smith* [1935] 2 W.W.R. 433; *Francis* v. *R.* [1956] S.C.R. 622; *The Queen* v. *Little Bear* (1958) 26 W.W.R. 335; *The Queen* v. *Kogogolak* (1959) 28 W.W.R. 376; *Myron and Prince* v. *The Queen* [1964] 3 C.C.C. 2; *The Queen* v. *George* [1964] 1 O.R. 24; *A.G. Canada* v. *George* (1964) 45 D.L.R. 709.

[17] *Op. cit.*, at p. 52.

[18] *Op. cit.*, at p. 284.

[19] *Op. cit.*

[20] *Op. cit.*

[21] *Op. cit.* A judgment rendered by the Honourable Mr. Justice Hall.

[22] *Op. cit.* Judgment rendered on June 24, 1964. This decision was not commented upon in the judgment of the Supreme Court, although it had the effect of contradicting the judgment of the Court of Appeal in *Regina* v. *Sikyea*.

the Supreme Court of Ontario upheld the ruling of the High Court, to the effect that an Indian hunting for food on the Kettle Point Reservation was not bound by the Migratory Birds Regulations. The basis of this decision was that by virtue of section 87 of the *Indian Act* all laws of general application applied to Indians, but were subject to the terms of any existing Treaties. This judgment would seem to have been overruled by the present case.

Although it would appear from these decisions that Indian rights have been protected by the Courts, closer examination reveals that this protection has only gone half-way; Indian rights have been protected in individual cases only and no general philosophy of their rights has been propounded by the Courts. Thus it is impossible to find a definitive statement of the status of Indian Treaties or a consistent philosophy of their interpretation. Even the original rights of the Indians in the lands they ceded by Treaty have not been properly defined, and the Courts have continued to accept the definition of "a personal and usufructuary interest" found in the *St. Catherines Milling and Lumber Case.* Resting on this weak foundation, it is not surprising to find that judicial *dicta* on the effects of the Proclamation of 1763 on the rights of Indians are many and varied. The judgment in *R.* v. *Syliboy* [23] cast grave doubts on the propriety of calling such "agreements" treaties, and in *R.* v. *Wesley* [24] Mr. Justice McGillivray stated:

> "In Canada the Indian Treaties appear to have been judicially interpretcd as being mere promises or agreements."

It is interesting to compare the status and interpretation of Indian Trcaties in the United States with that in Canada, for although American decisions have no authority in Canada they have dealt with problems similar to those existing in this country. In 1871 an Act was passed by Congress declaring that Indian Tribes would not be considered capable of making treaties with the U.S. Government in future, but that all existing Treaties were to be upheld by the Courts.[25] It has been held that Indian Nations were capable of making treatics with the Federal Government before the date of this act.[26] On the question of the interpretation of such treaties, the Supreme Court held in *U.S.* v. *Payne* [27] that the intention to abrogate an Indian Treaty would not be lightly attributed to Congress and that the Court would consider the intention of the Act carefully before coming to

[23] *Op. cit.*
[24] *Op cit.*, at p. 283.
[25] March 3, 1871, Rev. St. 2079, 25 U.S.C.A. ‡71.
[26] *U.S.* v. *Fourty-Three Gallons of Whiskey*, 93 U.S. 188.
[27] 264 U.S. 446, 68 L.Ed. 782.

that conclusion. In the subsequent case of the *Choctaw Nation of Indians* v. *U.S.*[28] the same Court held that Indian Treaties were to be liberally interpreted in favour of the Indians. Thus, it would seem that the Federal Courts of the U.S.A. have attempted to protect the special rights of the Indians, which would seem to be the logical course of action as long as these special rights are not abrogated by the legislative body which sanctioned them. Is it too much to submit that a different decision might have been rendered in the present case if Canadian Courts had developed a similar approach to Indian Treaties ?

In reply to the last submission it might well be said it has never been the practice of the Supreme Court of Canada to legislate, and that if the law needs to be changed Parliament must do so. It is unfortunate, however, that the lot of the Indians will continue to deteriorate until this debate is settled. Clearly, the present law governing Canadian Indians suffers from a curious ambivalence, for it both sets Indians apart from society and at the same time declares them subject to many general laws. Two courses of action suggest themselves therefore; either the existing laws and treaties should be reinforced to permit the Indians to live apart from white society, or these laws and treaties should be abrogated and a serious attempt should be made to integrate the Indians into Canadian society. Of the two alternatives, it appears to the present writer that only the latter is consonant with the norms of social equality to which a liberal democracy ought to aspire.[29]

---

[28] 318 U.S. 423, 87 L.Ed. 492.

[29] See the excellent article by Howard E. Staats, *Some Aspects of the Legal Status of Canadian Indians* [1964] Osgoode Hall L.J. 36.