HER MAJESTY THE QUEEN .....APPELLANT;

AND

CALVIN WILLIAM GEORGE .....RESPONDENT.

1965
*Nov. 12
1966
Jan. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Indians—Hunting for food on Reserve out of season—Treaty rights—Whether exempt from provisions of the Migratory Birds Convention Act, R.S.C. 1952, c. 179—Indian Act, R.S.C. 1952, c. 149, s. 87.

The respondent, an Indian, shot two migratory wild ducks on a Reserve at a time not during the open season for such birds. They were to be used for food and were not to be sold. He was acquitted at trial on a charge of unlawfully hunting laid pursuant to s. 12(1) of the

* PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.

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Migratory Birds Convention Act, R.S.C. 1952, c. 179, on the ground that the Act did not apply to him. On appeal by the Crown to the Supreme Court of Ontario, the dismissal of the charge was affirmed and a further appeal to the Court of Appeal was dismissed by a majority judgment. The Crown was granted leave to appeal to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed and a verdict of guilty should be entered.

Per Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.: The object and intent of s. 87 of the *Indian Act,* R.S.C. 1952, c. 149, is to make Indians, who are under the exclusive legislative jurisdiction of Parliament by virtue of s. 91(24) of the *B.N.A. Act,* 1867, subject to provincial laws of general application.

Section 87 was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation. The provisions of s. 87 do not prevent the application to Indians of the *Migratory Birds Convention Act.* There was no valid distinction between the present case and that of *Sikyea v. The Queen,* [1964] S.C.R. 642, which should be followed.

Per Cartwright J., *dissenting:* The Treaty of 1827 was a treaty within the meaning of that word as used in s. 87 of the *Indian Act.* That Treaty assured to the Indians the right to hunt and fish on the Reserve. That right has not been effectively destroyed by the *Migratory Birds Convention Act* and the Migratory Birds Regulations so far as wild ducks are concerned. The *Migratory Birds Convention Act* is a law of general application in force in Ontario and applicable to the respondent, but by s. 87 its application to him is made subject to the terms of the Treaty of 1827. Section 87 of the *Indian Act* shows that Parliament was careful to preserve the rights solemnly assured to the Indians by the Treaty of 1827. Section 87 makes the Indians subject to the laws of general application in force in the province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in a case of conflict between the provisions of the laws and the terms of the treaty the latter shall prevail. The question as to whether the right assured by the Treaty of 1827 has been destroyed by the *Migratory Birds Convention Act* has not been decided in favour of the Crown by the decision of this Court in *Sikyea v. The Queen, supra.*

Droit criminel—Indiens—Chasse pour nourriture dans la Réserve en temps prohibé—Droits en vertu des Traités—Sont-ils exempts des dispositions de la Loi sur la Convention concernant les oiseaux migrateurs, S.R.C. 1952, c. 179—Loi sur les Indiens, S.R.C. 1952, c. 149, art. 87.

L'intimé, un Indien, tira et tua deux canards sauvages migrateurs dans une Réserve alors que la chasse de ces oiseaux était prohibée. Les oiseaux devaient servir de nourriture et ne devaient pas être vendus. Lors de son procès, il fut acquitté d'avoir chassé illégalement, contrairement à l'art. 12(1) de la *Loi sur la Convention concernant les oiseaux*

migrateurs, S.R.C. 1952, c. 179, pour le motif que la loi ne s'appliquait pas à lui. Sur appel par la Couronne à la Cour suprême de l'Ontario, le renvoi de l'acte d'accusation fut confirmé et un appel subséquent à la Cour d'Appel fut rejeté par un jugement majoritaire. La Couronne a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être maintenu et une déclaration de culpabilité doit être enregistrée, le Juge Cartwright étant dissident.

Les Juges Fauteux, Abbott, Martland, Judson, Ritchie et Hall: L'article 87 de la *Loi sur les Indiens*, S.R.C. 1952, c. 149, a pour objet et but d'assujettir aux lois provinciales d'application générale les Indiens qui tombent sous la juridiction législative exclusive du Parlement en vertu de l'art. 91(24) de l'*Acte de l'Amérique du Nord britannique*, 1867.

Ce n'était pas le but de l'art. 87 de déclarer la prééminence des traités sur la législation fédérale. La référence aux traités a été incorporée dans un article dont le but était de rendre les lois provinciales applicables aux Indiens, pour empêcher toute interférence avec les droits donnés par traités résultant d'une collision avec la législation provinciale. Les dispositions de l'art. 87 n'empêchent pas l'application aux Indiens de la *Loi sur la Convention concernant les oiseaux migrateurs*. On ne peut faire aucune distinction valide entre le cas présent et celui de *Sikyea v. The Queen*, [1964] S.C.R. 642, qui doit être suivi.

Le Juge Cartwright, *dissident:* Le Traité de 1827 était un traité dans le sens de ce mot tel qu'employé dans l'art. 87 de la *Loi sur les Indiens*. Ce Traité assurait aux Indiens le droit de chasser et de faire la pêche dans la Réserve. Ce droit n'a pas été effectivement détruit par la *Loi sur la Convention concernant les oiseaux migrateurs* et les règlements concernant les oiseaux migrateurs en autant que les canards sauvages sont concernés. La *Loi sur la Convention concernant les oiseaux migrateurs* est une loi d'application générale en vigueur dans l'Ontario et applicable à l'intimé, mais par le jeu de l'art. 87 l'application de cette loi à l'intimé est sujette aux dispositions du Traité de 1827. L'art. 87 de la *Loi sur les Indiens* démontre que le Parlement a pris soin de conserver les droits assurés solennellement aux Indiens par le Traité de 1827. L'art. 87 rend les Indiens sujets aux lois d'application générale en vigueur dans la province où ils résident, mais en même temps l'article conserve inviolés aux Indiens tous les droits qu'ils ont en vertu des dispositions de tout traité, de telle sorte qu'en cas de conflit entre la loi et le traité, ce dernier aura préséance. La question de savoir si le droit assuré par le Traité de 1827 a été détruit par la *Loi sur la Convention concernant les oiseaux migrateurs* n'a pas été décidée en faveur de la Couronne par la décision de cette Cour dans *Sikyea v. The Queen, supra.*

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], rejetant un appel de la Couronne. Appel maintenu, le Juge Cartwright étant dissident.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal by the Crown. Appeal allowed, Cartwright J. dissenting.

[1] [1964] 2 O.R. 429, 45 D.L.R. (2d) 709.

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D. H. Christie, Q.C., for the appellant.

B. J. MacKinnon, Q.C., and *Hugh D. Garrett, Q.C.*, for the respondent.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from an order of McRuer C.J.H.C. which dismissed an appeal from an order of Magistrate Dunlap acquitting the respondent on a charge that he did on the 5th day of September 1962, at Kettle Point Indian Reserve unlawfully hunt a migratory bird at a time not during the open season specified for that bird in violation of s. 5(1)(*a*) of the Migratory Bird Regulations thereby committing an offence contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. Gibson J.A., dissenting, would have allowed the appeal.

There is no dispute as to the facts. The respondent is an Indian within the meaning of the *Indian Act*, R.S.C. 1952, c. 149. He is a member of the Chippewa Band residing on the Kettle Point Reserve. On the date stated in the charge he shot two ducks, which were migratory birds, as defined in the *Migratory Birds Convention Act* and the Regulations made thereunder, in an area described in Schedule A of the Regulations at a time not during the open season for such birds. The ducks were to be used for food and were not to be sold.

On these facts it would appear that the respondent was guilty of the offence charged unless, because he is an Indian and shot the ducks for food on the reserve on which he resided, he is exempt from the provisions of the *Migratory Birds Convention Act* and *Migratory Bird Regulations* under which he was charged.

The learned Magistrate was of opinion that s. 87 of the *Indian Act* made laws of general application applicable to Indians, subject to the terms of any treaty, that the *Migratory Birds Convention Act* was such a law, that the treaty of July 10, 1827, with the Chippewa Indians to be referred to hereafter reserved to them the right to hunt at any time on the lands reserved in that treaty and, conse-

[1] [1964] 2 O.R. 429, 45 D.L.R. (2d) 709.

quently, that the *Migratory Birds Convention Act* did not apply to the respondent.

McRuer C.J.H.C. agreed with the view of the learned Magistrate and was further of opinion that the right of the respondent to hunt for food on Kettle Point Reserve was preserved not only by the treaty of 1827 but also by the proclamation of 1763 and that if it is within the power of Parliament to abrogate that right, a point which the learned Chief Justice left open, that power could be exercised only by legislation expressly and directly extinguishing the right and that it certainly could not be extinguished by order-in-council.

After discussing the case of *Dominion of Canada v. Province of Ontario*[1], the learned Chief Justice said:

> This case clearly recognizes that the 'overlying Indian interest' in the lands reserved to the Indians is not something to be disposed of by any general Act of Parliament applicable to all citizens.

He also said:

> I wish to make it quite clear that I am not called upon to decide, nor do I decide, whether the Parliament of Canada by legislation specifically applicable to Indians could take away their rights to hunt for food on the Kettle Point Reserve. There is much to support an argument that Parliament does not have such power. There may be cases where such legislation, properly framed, might be considered necessary in the public interest but a very strong case would have to be made out that would not be a breach of our national honour.

The judgment of the majority in the Court of Appeal was delivered by Roach J.A., with whom McLennan J.A. agreed. The learned Justice of Appeal construed the treaty of 1827, in the light of its historical background including the terms of the Proclamation of 1763, as preserving and confirming to the Indians their right to the use of the lands reserved including those in the Kettle Point Reserve as their "Hunting Grounds". He held that the *Migratory Birds Convention Act* is a law of general application in force in the Province within the meaning of s. 87 of the *Indian Act* so that its application to the respondent is subject to the terms of the treaty. The reasons of Roach J.A. conclude as follows:

> The treaty does not refer to the Proclamation in terms but historical implication impels the conclusion that what was surrendered and conveyed to the Crown by the treaty were the rights granted to them by the Proclamation to and in respect of the lands described in the treaty as

[1] [1910] A.C. 637, 103 L.T. 331.

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being intended to be thereby conveyed. What was preserved and confirmed to them were those same rights to and in respect of the lands reserved by the treaty and without any time limitation thereon.

Since the *Migratory Birds Convention Act* is subject to the treaty and since the treaty preserved and confirmed to the Indians the *use* of lands, including those in the Kettle Point Reserve, as their 'Hunting Grounds', giving to those words their wide historical significance, it follows that an Indian while hunting on those lands for food is not subject to the restrictions or prohibitions contained in that Act or the regulations.

The essential difference of opinion between Gibson J.A. and the majority was as to the construction of the treaty of 1827. As to this, after quoting s. 87 of the *Indian Act*, Gibson J.A. says:

> On behalf of the accused it is argued that the Treaty of 1827 reserved to the Indians the land of the reserve for their 'exclusive use and enjoyment', and that by implication that included the perpetual right to fish and hunt on the lands. As I have stated before, nothing contained in the Treaty indicates that questions of hunting and fishing were ever dealt with or considered when the Treaty was entered into.

With the greatest respect to Gibson J.A. I am unable to accept this view. For the reasons given by Roach J.A. I agree with his interpretation of the terms of the treaty. I find it impossible to suppose that any of the signatories to the treaty would have understood that what was reserved to the Indians and their posterity was the right merely to occupy the reserved lands and not the right to hunt and fish thereon which they had enjoyed from time immemorial.

The question to be decided is whether the right to hunt on the reserve assured by the treaty to the band of which the respondent is a member has been effectively destroyed by the *Migratory Birds Convention Act* and the *Migratory Bird Regulations* so far as wild ducks are concerned.

Counsel for the appellants submits that this question should be answered in the affirmative on three main grounds, (i) that the point has been decided in favour of the appellant by the decision of this Court in *Sikyea v. The Queen*[1], (ii) that the words "laws of general application from time to time in force in any province" in s. 87 of the *Indian Act* mean provincial laws and not federal laws and (iii) that the treaty of July 10, 1827, did not reserve to the Indians the right to hunt and fish on the reserve. I will deal with these three grounds in reverse order.

[1] [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80.

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As to the third ground, counsel for the appellant concedes that the document of July 10, 1827, is a treaty within the meaning of that word as used in s. 87 of the *Indian Act*. I think he was clearly right in making this concession. In my opinion it is the very sort of treaty contemplated by the section. On the question of the true construction of the treaty I have already indicated my agreement with the reasons and conclusion of Roach J.A. on this branch of the matter. It follows that I would reject this ground of appeal.

As to the second ground, s. 87 of the *Indian Act* reads as follows:

> 87. Subject to the terms of any treaty and any other Act of 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 provision is made by or under this Act.

The laws of general application in force in the Province of Ontario are made up of the common law, pre-confederation statutes which have not been repealed, Acts of Parliament and Acts of the Legislature. I can find nothing in the words of the section to permit the meaning of the phrase "laws of general application from time to time in force in any province" being restricted to provincial statutes or to laws in relation to matters coming within the classes of subjects assigned to the Legislature by s. 92 of the *British North America Act*. To determine whether any particular law is applicable to an Indian in Ontario only two questions need be answered, (i) is it a law of general application? and (ii) is it in force in the Province? If the answer to both of these questions is in the affirmative the source of the law is of no importance. In my opinion the *Migratory Birds Convention Act* is a law of general application in force in Ontario and applicable to the respondent but by s. 87 its application to him is made subject to the terms of the treaty of July 10, 1827. I would reject this ground of appeal.

The first ground presents more difficulty. In *Sikyea's* case, the judgment of Sissons J. acquitting Sikyea after a trial de novo was pronounced on November 1, 1962, and written reasons for that judgment were delivered on November 8, 1962. The unanimous judgment of the Court of

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Appeal of the Northwest Territories was delivered on January 24, 1964. The reasons of the Court were written by Johnson J.A. The unanimous judgment of this Court upholding that of the Court of Appeal was delivered on October 6, 1964.

In the case at bar the judgment of McRuer C.J.H.C. was delivered on May 29, 1963. The learned Chief Justice referred to the judgment of Sissons J., which had not then been reversed, as follows:

> In *Reg. v. Sikyea,* 40 W.W.R. 494, Sissons J.T.C. held that the *Migratory Birds Convention Act* did not apply to Indians hunting for food in the Northwest Territories. At page 504 he said:
>
> > There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act,* abrogating, abridging, or infringing upon the hunting rights of the Indians.
>
> With this I agree but I would go further. Since the Proclamation of 1763 has the force of a statute, I am satisfied that whatever power the Parliament of Canada may have to interfere with the treaty rights of the Indians, the rights conferred on them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an order-in-council passed under the *Migratory Birds Convention Act.*

The appeal to the Court of Appeal in the case at bar was argued on October 15, 1963, prior to the delivery of judgment by the Court of Appeal in *Sikyea's* case, but judgment was not delivered until June 24, 1964. The reasons delivered in the Court of Appeal contain no reference to the judgments in *Sikyea's* case.

In order to ascertain whether the question to be decided in the case at bar has been determined in *Sikyea's* case it is necessary to examine the reasons delivered in that case in some detail but before doing so it will be convenient to state in summary form the grounds on which Mr. Mackinnon submits that the cases are distinguishable. These are, (i) In *Sikyea* the question was as to the right of Indians to hunt on lands which they had surrendered while in the present case it is as to their right to hunt on lands which they reserved and have never surrendered, (ii) In *Sikyea* the treaty in question was entered into four years after the *Migratory Birds Convention Act* came into force while that in the present case was almost one hundred years earlier, and (iii) the reasons in *Sikyea* give no consideration to the effect of s. 87 of the *Indian Act* which in the

present case was held by the Court of Appeal to be decisive. It is to the last of these three grounds of distinction that Mr. Mackinnon attaches particular importance.

Sissons J. in the course of his reasons reviewed the legislation which he regarded as applicable. He said in part:

By Sections 1 and 2 of Chapter 20 of the Statutes of Canada, 1960, assented to 9th June, 1960 the *Northwest Territories Act* was amended to provide that Ordinances by the Commissioner in Council in relation to the preservation of game in the Territories are applicable to and in respect of Indians and Eskimos; that this should not be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, other than game declared by the Governor in Council to be game in danger of becoming extinct, that from the day on which this Act comes into force the provisions of the various game ordinances including Chapter 42 R.O. 1956 and Chapter 2 of the Ordinances of 1960, Second Session, have the same force and effect in relations to Indians and Eskimos as if on that day they had been re-enacted in the same terms; that all laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.

Section 1(3) of Chapter 20 reads as follows:

> 1(3) Nothing in Subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

The following Order in Council, P.C. 1960-1256, was passed the 14th day of September, 1960:

> His Excellency the Governor General in Council, on the recommendation of the Minister of Northern Affairs and National Resources, pursuant to subsection (3) of Section 14 of the *Northwest Territories Act,* is pleased hereby to declare musk-ox, barren-ground caribou and polar bear as game in danger of becoming extinct.

It is only necessary for the Governor in Council to 'declare' that game is in danger of becoming extinct. This may be fact or fiction, and may well be fiction.

There is here a recognition and a preservation by Parliament of the hunting rights of Indians and Eskimos, unrestricted except as to game in danger of becoming extinct. There is no mention of the *Migratory Birds Convention Act* or migratory birds.

This has the effect of nullifying any application of the *Migratory Birds Convention Act* to Indians and Eskimos.

Section 2 of Chapter 20 reads:

> 17(2) All laws of general application in force in the Territories, are, except where otherwise provided applicable to and in respect of Eskimos in the Territories.

It is 'otherwise provided', so far as Indians are concerned, by Section 87 of the *Indian Act.*

> 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

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time in force in any province are applicable to and in respect of Indians in the province...

I dealt with these amendments to the *Northwest Territories Act* in the case of *Re Noah Estate,* (1961) 36 W.W.R. 577:

The learned Judge does not make any other reference to s. 87 of the *Indian Act* and does not appear to found his judgment on its terms. The true ratio of his decision is found later in the following passage with which his reasons conclude:

> The real defence and the important issue in this case is that the *Migratory Birds Convention Act* has no application to Indians engaged in the pursuit of their ancient right to hunt, trap and fish game and fish for food at all seasons of the year, on all unoccupied Crown lands.
>
> Reference was made to the Royal Proclamation of October 7, 1763, cited in the Revised Statutes of Canada, Vol. VI, 6127, as the first of Canada's Constitutional Acts and Documents, and commonly spoken of as the Charter of Indian Rights; and to Treaty No. 11, made and concluded in 1921 between His Most Gracious Majesty George V, and the Slave, Dogrib, Loucheux, Hare and other Indians, inhabitants of the Territory; and to *Rex v. Wesley,* (1932) 58 C.C.C. 269, *Regina v. Kogogoluk* (1959) 28 WWR 376 and other cases.
>
> Indians still have their ancient hunting rights unless, adopting the words used by the Honourable Mr. Justice Gwynne of the Supreme Court of Canada, in the *Ontario Mining Company v. Seybold,* (1902) 32 S.C.R. 1, 'unless the proclamation of 1763 and the pledge of the Crown therein are considered now to be a dead letter; and unless the grave and solemn proceedings which ever since the issue of the proclamation until the present time have been pursued in practice upon the Crown entering into treaties with the Indians are to be regarded now as a delusive mockery'.
>
> The solemn proceedings surrounding Treaty No. 11 and the pledge given by the Crown and incorporated in the Treaty would indeed be delusive mockeries and deceitful in the highest degree if the *Migratory Bird Convention,* made just five years previously, had curtailed the hunting rights of the Indians.
>
> There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging, or infringing upon the hunting rights of the Indians.
>
> The various references in the Convention and in the *Migratory Birds Convention Act* and in the Regulations to Indians and Eskimos and their hunting rights indicate recognition of these hunting rights.
>
> The fact that Indians and Eskimos are particularly entitled to take certain migratory game birds and migratory nongame birds does not indicate an intention to abrogate, abridge or infringe the hunting rights of these Indians and Eskimos.
>
> I find that the *Migratory Birds Convention Act* has no application to Indians hunting for food, and does not curtail their hunting rights.
>
> I find the accused Not Guilty. The Appeal is allowed.

On a consideration of the whole of the reasons of the learned Judge it appears to me that the ground of his decision is that the general words of the *Migratory Birds*

Convention Act and *Regulations* should not be construed to take away the special rights to hunt enjoyed by the Indians from time immemorial and assured to them by the Proclamation of 1763 and by treaty. He does not say that the provisions of the *Migratory Birds Convention Act* and *Regulations* are, by force of s. 87 of the *Indian Act,* in respect of Indians made subject to the terms of any treaty. In other words, the learned Judge did not find it necessary to deal with the argument based on s. 87 which was addressed to us in the case at bar.

In the Court of Appeal Johnson J.A. makes no reference to s. 87. He differs from Sissons J. as to the true construction of the *Migratory Birds Convention Act.* He says:

> Sissons J. in his reasons for judgment says:
>
> > There are no express words or necessary intendment or implication in the *Migratory Birds Convention Act* abrogating, abridging or infringing upon the hunting rights of the Indians.
>
> I have quoted section 5(1) of the regulations which says that 'no person shall...kill...a migratory bird at any time except during an open season...'. It is difficult to see how this language admits of any exceptions. When, however, we find that reference in both the Convention and in the regulations to what kind of birds an Indian and Eskimo may 'take' at any time for food, it is impossible for me to say that the hunting rights of the Indians as to these migratory birds, have not been abrogated, abridged or infringed upon.
>
> It is, I think, quite clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its regulations. How are we to explain this apparent breach of faith on the part of the government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked—a case of the left hand having forgotten what the right hand had done.
>
> * * *
>
> I can come to no other conclusion than that the Indians, notwithstanding the rights given to them by their treaties, are prohibited by this Act and its regulations from shooting migratory birds out of season.

The questions of law decided by Johnson J.A. (and therefore by this Court since it adopted his reasons as well as his conclusion) in so far as they are relevant to the case at bar were (i) that it is within the power of Parliament to abrogate the rights of Indians to hunt whether arising from treaty or under the Proclamation of 1763 or from user from time immemorial and (ii) that on its true construction the

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Migratory Birds Convention Act shews that it was the intention of Parliament to prohibit Indians from hunting during the closed seasons subject only to the exceptions in their favour set out in the Act as, for example, the right to take scoters for food. I think it clear from reading the whole of the reasons of Johnson J.A. that he did not direct his mind to the question, so fully argued before us in the case at bar, whether accepting his decision on these two questions the effect of s. 87 of the *Indian Act* was to preserve the Indian's right to hunt notwithstanding the provisions of the *Migratory Birds Convention Act* in so far as that right was assured to them by "any treaty". I think that if the view of the effect of s. 87 which appears to me to be decisive in the case at bar had been considered in the Court of Appeal or in this Court in *Sikyea's* case it would have been examined and dealt with in the reasons delivered. I do not propose to enter on the question, which since 1949 has been raised from time to time by authors, whether this Court now that it has become the final Court of Appeal for Canada is, as in the case of the House of Lords, bound by its own previous decisions on questions of law or whether, as in the case of the Judicial Committee or the Supreme Court of the United States, it is free under certain circumstance to reconsider them. I find it unnecessary to do this. Assuming for the purposes of this appeal that we are governed by the rule of *stare decisis*, it appears to me that the judgment in *Sikyea* falls within one of the exceptions to that rule in that it was given *per incuriam*.

In *Young v. Bristol Aeroplane Co. Ltd.*[1], Lord Greene M.R., giving the unanimous judgment of the full Court, said at pages 728 and 729:

> It remains to consider the recent case of *Lancaster Motor Co. (London) v. Bremith Ld.*, in which a court consisting of the present Master of the Rolls, Clauson L.J. and Goddard L.J. declined to follow an earlier decision of a court consisting of Slesser L.J. and Romer L.J. in *Gerard v. Worth of Paris Ld.* This was clearly a case where the earlier decision was given per incuriam. It depended on the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier

[1] [1944] K.B. 718, 2 All E.R. 293.

decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.

I do not suggest that in *Sikyea's* case either the Court of Appeal or this Court was ignorant of the existence of s. 87 of the *Indian Act* but, to use the words of Lord Greene, I am satisfied that that section was not present to the mind of either Court when rendering judgment, although it does appear to have been dealt with in the argument of counsel.

Having reached this conclusion it is not necessary for me to consider the other grounds on which Mr. Mackinnon argued that *Sikyea's* case could be distinguished.

In *St. Saviour's Southwark (Churchwardens)*[1] case, Lord Coke said:

> If two constructions may be made of the King's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may according to the rule of law be adjudged good, and by another it shall by law be adjudged bad; then for the King's honour, and for the benefit of the subject, such construction shall be made that the King's charter shall take effect, for it was not the King's intent to make a void grant, and therewith agrees *Sir J. Moleyn's* case in the sixth part of my reports.

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty. Johnson J.A., with obvious regret, felt bound to hold that Parliament had taken away those rights, but I am now satisfied that on its true construction s. 87 of the *Indian Act* shews that Parliament was careful to preserve them. At the risk of repetition I think it clear that the effect of s. 87 is two-fold. It makes Indians subject to the laws of general application in force in the province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in a case of conflict between the provisions of the laws and the terms of the treaty the latter shall prevail.

[1] (1613), 10 Co. Rep. 366 at 66b and 67b, 77 E.R. 1025 at 1027.

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For the reasons given by Roach J.A. and those stated above I would dismiss this appeal with costs.

The judgment of Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ. was delivered by

MARTLAND J.:—I have had the opportunity to read the reasons stated by my brother Cartwright. The facts giving rise to this appeal are there reviewed and it is unnecessary to repeat them here. With great respect, I am unable to agree with his interpretation of s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, which provides as follows:

> 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, 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 provision is made by or under this Act.

I cannot construe this section as making the provisions of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179, subordinate to the treaty of July 10, 1827. In my opinion, it was not the purpose of s. 87 to make any legislation of the Parliament of Canada subject to the terms of any treaty. I understand the object and intent of that section is to make Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *British North America Act, 1867*, subject to provincial laws of general application.

The application of provincial laws to Indians was, however, made subject to "the terms of any treaty *and any other Act of the Parliament of Canada*" (the italics are mine). In addition, provincial laws inconsistent with the *Indian Act*, or any order, rule, regulation or by-law made thereunder, or making provision for any matter for which provision is made under that *Act*, do not apply.

The incorporation in the section of the words italicized to me makes it clear that when the section refers to "laws of general application from time to time in force in any province" it did not include in that expression the statute law of Canada. If it did, the section, in so far as federal legislation is concerned, would provide that the statute law of Canada applies to Indians, subject to the terms of any *Act* of the Parliament of Canada, other than the *Indian*

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Act. This would be a rather unusual provision, particularly in view of the fact that it did not require any express provision in the *Indian Act* to make Indians subject to the provisions of federal statutes. In my view the expression refers only to those rules of law in a province which are provincial in scope, and would include provincial legislation and any laws which were made a part of the law of a province, as, for example, in the provinces of Alberta and Saskatchewan, the laws of England as they existed on July 15, 1870.

This section was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.

Accordingly, in my opinion, the provisions of s. 87 do not prevent the application to Indians of the provisions of the *Migratory Birds Convention Act*. I can see no valid distinction between the present case and that of *Sikyea v. The Queen*[1] and, for the reasons given in that case, I think that this appeal should be allowed. The judgment of the learned magistrate should be reversed and a fine of ten dollars be imposed upon the respondent. The Attorney-General of Canada does not ask for costs, and accordingly there should be no costs in this Court or in the Courts below.

Appeal allowed, CARTWRIGHT J. *dissenting; no order as to costs.*

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitor for the respondent: H. D. Garrett, Sarnia.

[1] [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80.