1964

*May 20, 21, 22 Oct. 6

MICHAEL SIKYEA .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Criminal law—Constitutional law—Indians—Game laws—Shooting duck out of season in Northwest Territories—Migratory Birds Convention Act, R.S.C. 1952, c. 179, s. 12(1).

The appellant, a treaty Indian, was found guilty by a magistrate at Yellowknife in the Northwest Territories of killing a migratory bird during the closed season in violation of Reg. 5(1)(*a*) of the Migratory Bird Regulations, contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. The appellant admitted that he shot the bird for food. His defence was that under Treaty No. 11 made in 1921 he was entitled to hunt and shoot ducks for food regardless of any regulations or legislation, whether in season or not. The bird was identified as a female mallard duck. The conviction was set aside by the Territorial Court, which also expressed a doubt as to whether the duck was wild or domestic. On appeal to the Court of Appeal, the conviction was restored on the grounds that the Act was valid legislation and abrogated any rights given to Indians by treaty. Leave was granted to appeal to this Court.

Held: The appeal should be dismissed.

The doubt expressed by the trial judge as to whether the duck in question was a wild duck was a question of law alone, since the validity of this conclusion was dependant upon the true meaning to be attached to the words "wild duck" as used in the statute and regulations. There was no room for doubt that a mallard is a species of wild duck within the meaning of the Act, and under the circumstances the doubts expressed by the trial judge were only consistent with his erroneous opinion that a wild duck which once has been tamed or confined and is later found at large is not then a wild duck within the meaning of

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Ritchie and Hall JJ.

the statute. *Hamps v. Darby*, [1948] 2 K.B. 311, referred to. Accordingly the Court of Appeal and this Court had jurisdiction to entertain the appeal. On the merits of the appeal, the reasons and conclusions of the Court of Appeal should be upheld.

APPEAL from a judgment of the Court of Appeal for the Northwest Territories[1], restoring the conviction of the appellant. Appeal dismissed.

W. G. Morrow, Q.C., and *Mrs. E. R. Hagel*, for the appellant.

D. H. Christie, Q.C., and *J. M. Bentley*, for the respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal, pursuant to leave, by Michael Sikyea from the judgment of the Court of Appeal for the Northwest Territories[1] allowing an appeal by the respondent from the judgment of Mr. Justice Sissons of the Territorial Court of the Northwest Territories who had allowed an appeal by the appellant by way of trial *de novo* from his conviction at Yellowknife, Northwest Territories, on May 7, 1962, by W. V. England, a Justice of the Peace in and for the Northwest Territories for an offence contrary to subs. (1) of s. 12 of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. The charge on which the appellant was convicted was that he—

on the 7th day of May AD 1962 at or near the Municipal District of Yellowknife in the Northwest Territories did unlawfully kill a migratory bird in an area described in Schedule A of the Migratory Bird Regulations at a time not during an open season for that bird in the area in the aforementioned schedule, in violation of Section 5(1)(*a*) of the Migratory Bird Regulations, thereby committing an offence contrary to Section 12(1) of the *Migratory Birds Convention Act*, Chapter 179, R.S.C. 1952.

The regulation mentioned provides that:

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 for that bird and that area in Schedule A,

Section 12(1) of the Act provides that every person who violates any regulation is, for each offence, liable upon summary conviction to a fine of not more than three hundred

[1] [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65.

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dollars and not less than ten dollars, or to imprisonment for a term not exceeding six months, or to both fine and imprisonment.

Part XI of Schedule A to the Regulations defines the open season for ducks in the Northwest Territories as being from September 1 to October 15 inclusive.

Under s. 3(*b*)(i) "migratory game birds" include "wild ducks".

The appellant testified at the trial *de novo* before Sissons J. and in his evidence admitted having shot the duck which was in evidence as part of the Crown's case as testified to by Constable Robin. The appellant also said that he had shot the duck for his own use as food when he saw it swimming on a pond. This pond, according to Constable Robin, was in the open country in the Northwest Territories six miles out of Yellowknife.

The appellant's defence was in effect that he was a Treaty Indian, a member of the Yellowknife Band and that under Treaty No. 11 made in 1921 he was entitled to hunt and shoot ducks for food regardless of any regulations or legislation, whether in season or not.

Sissons J. made the following findings:

(1) THAT the appellant was a Treaty Indian and one of the Band included under Treaty No. 11;

(2) THAT on May 7, 1962 the appellant shot the duck for which he was being prosecuted;

(3) THAT the duck was a female mallard.

Sissons J. then dealt at length with the contention that the appellant as a Treaty Indian was lawfully entitled to shoot ducks for food at any time of the year. He concluded his judgment by saying:

I find that the Migratory Birds Convention Act has no application to Indians hunting for food, and does not curtail their hunting rights.

He had, however, preceded that finding with this statment:

It is clear that the evidence does not establish beyond a reasonable doubt that the female Mallard which was shot was a wild duck. In spite of the argument of the Crown, I cannot draw from the circumstantial evidence the inference that it was a wild duck. The Rule in Hodge's case is in the way. The accused therefore cannot be found Guilty of the offence with which he is charged.

but having said that, he immediately added:

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.

The substantial question argued on the hearing of this appeal was whether the provisions of the *Migratory Birds Convention Act, supra,* and the Regulations made thereunder apply to Treaty Indians in the Northwest Territories hunting and killing ducks for food at any time of the year.

But the point is validly made that an appeal to this Court in a case of this kind can be on a question of law alone and that if the statement of Sissons J. above quoted is a finding of mixed fact and law, no appeal lay to the Court of Appeal or lies to this Court. What the learned judge was deciding in the passage above quoted was that there was some doubt on the evidence as to whether the duck in question was a "wild duck" within the meaning of the *Migratory Birds Convention Act*. The validity of his conclusion is dependent upon the true meaning to be attached to the words "wild duck" as used in the statute and regulations, and this is, in my view, "a question of law alone". See *Vail v. The Queen*[1]. A mallard duck is defined in the Shorter Oxford Dictionary as a "wild duck". It is also referred to in Canadian Water Birds, Game Birds: Birds of Prey, by P. A. Taverner as "perhaps the choice duck of the wild-fowler" and in the Catalogue of Canadian Birds by J. Macoun and J. M. Macoun, published by the Geological Survey of Canada as "the most abundant duck in the Northwest Territories and British Columbia, breeding near ponds and lakes from lat. 49° to the borders of the Barren Lands." Mallards are also referred to as wild birds in the publication Canadian Bird Names, published by the Canadian Wild Life Service, 1962.

The facts are not in dispute; the duck in question was a mallard which was shot on a pond some six miles from Yellowknife in the Northwest Territories in the month of May at which time such a bird found in this region would be in the nesting grounds area and would probably be starting to nest.

There is evidence that if such a bird were tamed it would be very difficult to distinguish it from one which was wild, and in fact an expert called on behalf of the Crown was unable to say whether the dead duck, which was an exhibit

[1] [1960] S.C.R. 913 at 920, 129 C.C.C. 145, 33 W.W.R. 325.

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in this case, had been tamed during its lifetime, and it is this evidence which seems to have caused Sissons J. the doubts he expressed.

There appears to me to be no room for doubt that a mallard is a species of wild duck within the meaning of the *Migratory Birds Convention Act* and under the circumstances the doubts expressed by Sissons J. are only consistent with his having erroneously formed the opinion that a wild duck which has once been tamed or confined and is later found at large in the nesting area at a time when it would be likely to nest is not then a "wild duck" within the meaning of the statute. The contrary is the case. A wild duck which has once been tamed or confined reverts, on escaping, to being a wild duck in the eyes of the law. See *Hamps v. Darby*[1]. Accordingly, the Court of Appeal had jurisdiction and this Court has jurisdiction to entertain the appeal.

On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal[2]. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

The appeal must, therefore, be dismissed. There will be no order as to costs, counsel having stated that costs were not being asked for by either party, regardless of the result.

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitor for the respondent: D. H. Christie, Ottawa.

[1] [1948] 2 K.B. 311 at 321, 2 All E.R. 474.
[2] [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65.