SIGEAREAK E1-53 .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1966

*May 5
May 24

ON APPEAL FROM THE COURT OF APPEAL
FOR NORTHWEST TERRITORIES

Eskimos—Criminal law—Game suitable for human consumption abandoned—Northwest Territories Act, R.S.C. 1952, c. 331, s. 13—Game Ordinance O.N.W.T. 1960 (Second Sess.), c. 2, s. 15 (1)(a).

The appellant, an Eskimo, was charged with killing and abandoning game fit for human consumption contrary to s. 15(1)(*a*) of the *Game Ordinance, O.N.W.T.* 1960 (Second Sess.), c. 2. There is no dispute that the appellant had killed three caribou and had abandoned parts of them which were fit for human consumption. The charge was dismissed by the Magistrate on the ground that the *Game Ordinance* did not apply to an Eskimo. On an appeal by way of stated case, the dismissal was confirmed for the same reason. The Court of Appeal reversed this finding and convicted the appellant. The appellant was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

The Royal Proclamation of 1763, upon which the appellant relied, has no application in the region in which the alleged offence took place.

The *Game Ordinance,* which was in force and which was validly enacted by the Commissioner-in-Council pursuant to powers conferred upon him by the Parliament of Canada, applies to the Eskimos. The caribou which were killed in this case were game within the meaning of the *Game Ordinance* and the offence here was in abandoning parts

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

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thereof suitable for human consumption even if the appellant had the legal right to hunt them for food.

In so far as *Regina v. Kallooar* (1964), 50 W.W.R. 602, and *Regina v. Kogogolak* (1959), 28 W.W.R. 376, hold that the *Game Ordinance* does not apply to Indians or Eskimos in the Northwest Territories, they are not good law and must be taken as having been overruled.

Esquimaux—Droit criminel—Abadon de gibier apte à la consommation humaine—Loi sur les Territoires du Nord-Ouest, S.R.C. 1952, c. 331, art. 13—Ordonnance sur le Gibier, O.N.W.T. 1960 (2e Session), c. 2, art. 15(1)(a).

L'appelant, un Esquimau, a été accusé d'avoir tué et abandonné du gibier apte à la consommation humaine, le tout contrairement à l'art. 15(1)(*a*) de l'*Ordonnance sur le Gibier,* O.N.W.T. 1960 (2e Sess.), c. 2. Il n'est pas contesté que l'appelant avait tué trois caribous et avait abandonné des parties qui étaient aptes à la consommation humaine. L'acte d'accusation fut rejeté par le magistrat pour le motif que l'*Ordonnance sur le Gibier* ne s'appliquait pas à un Esquimau. Sur appel en vertu d'un dossier soumis, le rejet de l'accusation fut confirmé pour le même motif. La Cour d'appel a renversé cette décision et a trouvé l'appelant coupable. L'appelant a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

La Proclamation royale de 1763, sur laquelle l'appelant se basait, ne s'applique pas à la région où la présumée offense a été commise.

L'*Ordonnance sur le Gibier,* qui était en force et qui avait été validement édictée par le Commissaire-en-conseil en vertu des pouvoirs qui lui sont conférés par le Parlement du Canada, s'applique aux Esquimaux. Les caribous qui ont été tués dans le cas présent étaient du gibier dans le sens de l'*Ordonnance sur le Gibier* et l'offense dans l'espèce consistait dans l'abandon de certaines parties qui étaient aptes à la consommation humaine même si l'appelant avait le droit légal d'en faire la chasse en vue de se procurer de la nourriture.

En autant que les causes de *Regina v. Kallooar* (1964), 50 W.W.R. 602 et *Regina v. Kogogolak* (1959), 28 W.W.R. 376, décident que l'*Ordonnance sur le Gibier* ne s'applique pas aux Indiens ou aux Esquimaux dans les Territoires du Nord-Ouest, ces causes ne reflètent pas la loi et doivent être considérées comme ayant été cassées.

APPEL d'un jugement de la Cour d'appel des Territoires du Nord-Ouest[1], renversant un jugement du Juge Sissons. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for the Northwest Territories[1], reversing a judgment of Sissons J. Appeal dismissed.

[1] (1966), 55 W.W.R. 1, 55 D.L.R. (2d) 29.

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W. G. Morrow, Q.C., and *A. E. Williams*, 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.:—The appellant, an Eskimo, residing at Whale Cove, a settlement on the west coast of Hudson Bay about midway between Churchill and Chesterfield Inlet, was charged under s. 15(1)(*a*) of the *Game Ordinance*, being c. 2 of the Ordinances of the Northwest Territories, (1960) Second Session, that he, between the 20th day of July, 1964 and the 31st day of July, 1964 at or near a point two miles from an abandoned cabin on the north shore at the mouth of the Wilson River, Northwest Territories, did kill and abandon game fit for human consumption contrary to s. 15(1)(*a*) of the *Game Ordinance.*

Section 15(1)(*a*) referred to reads as follows:

> 15.(1) No person who has killed, taken or acquired game shall
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> (*a*) abandon any part thereof that is suitable for human consumption;

The *Game Ordinance* was enacted by the Commissioner in Council pursuant to powers confered by s. 13 of the *Northwest Territories Act*, R.S.C. 1952, c. 331. The relevant parts of s. 13 read:

> 13. The Commissioner in Council may, subject to the provisions of this Act and any other Act of the Parliament of Canada, make ordinances for the government of the Territories in relation to the following classes of subjects, namely,
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> * * *
>
> (*q*) the preservation of game in the Territories;

By s. 1 of c. 20 of the Statutes of Canada 1960, s. 14 of the *Northwest Territories Act* was amended to read:

> (2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make Ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and Ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.
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> (3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting

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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.

and s. 17 was amended by adding thereto the following:

(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.

Acting under s. 14(3) above, the Governor in Council passed an Order in Council on September 14, 1960, reading as follows:

AT THE GOVERNMENT HOUSE AT OTTAWA

WEDNESDAY, the 14th day of SEPTEMBER, 1960.

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

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.

(*Seal*)

Certified to be a true copy.

(sgd.) D. F. Wall
Assistant Clerk of the Privy Council.

Counsel for the appellant made a point that this Order in Council was not referred to in the proceedings before the magistrate. Nothing, however, turns on that fact. The Order in Council was part of the relevant law applicable to the charge whether referred to or not.

The charge was heard by P. B. Parker, a police magistrate in and for the Northwest Territories under the provisions of s. 466(*b*) of the *Criminal Code* of Canada at Whale Cove aforesaid on February 26 and 27, 1965. Magistrate Parker, holding that he was bound by the decision of Sissons J. in *Regina v. Kallooar*[1], dismissed the charge on the ground that the *Game Ordinance* did not apply to an Eskimo.

The Attorney General of Canada applied to Magistrate Parker to state a case under s. 734 of the *Criminal Code* of Canada. The learned magistrate stated the case which concluded with asking the following question:

Was I right in holding that the Game Ordinance and particularly Section 15(1)(*a*) thereof does not apply to Eskimos?

[1] (1964), 50 W.W.R. 602.

The appeal, by way of stated case, was heard by Sissons J. who, adhering to the views expressed by him in *Regina v. Kogogolak*[1] and in *Kallooar* answered the question in the affirmative and upheld the dismissal of the charge. Sissons J. in *Regina v. Kogogolak* had held at p. 384:

> The *Game Ordinance* of the Northwest Territories cannot and does not apply to the Eskimos.

The Attorney General of Canada appealed by leave to the Court of Appeal for the Northwest Territories. The appeal was heard by the Chief Justice, Parker and McDermid JJ.A. The Court of Appeal[2] reversed Sissons J. and convicted the appellant, remitting the case to the Summary Conviction Court for the purpose of deciding what penalty should be imposed on the appellant. The appellant applied for and was given leave to appeal to this Court from the judgment of the Court of Appeal.

It was contended by the appellant that the Royal Proclamation of 1763 applied to Indians and Eskimos in the area in question here and was still in effect notwithstanding the *Northwest Territories Act* and the *Game Ordinance*. Sissons J. so held in *Kogogolak* and in *Kallooar*. Johnson J.A. in *Regina v. Sikyea*[3], whose judgment was adopted in this Court[4], expressed himself to the contrary. There is no need for any doubt on the point. The Proclamation, insofar as it related to Indians, declared:

> And whereas it is just and reasonable, and essential to our Interest, 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—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean

[1] (1959) 28 W.W.R. 376, 31 C.R. 12.
[2] (1966) 55 W.W. 1, 55 D.L.R. (2d) 29.
[3] (1964), 46 W.W.R. 65, 43 C.R. 83, 2 C.C.C. 325.
[4] [1964] S.C.R. 642, 49 W.W.R. 306, 50 D.L.R. (2d) 80.

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from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

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 Lands 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 North West as aforesaid;* (The italics are mine.)

The term "Indians" includes Eskimos: *Reference as to whether the term "Indians" in Head 24 of Section 91 of the British North America Act, 1867, includes Eskimo inhabitants of the Province of Quebec*[1].

The Letters Patent granted in 1670 to the Governor and Company of Adventurers of England, trading into Hudson's Bay, gave:

> . . . unto the said company and their successors the sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks and sounds in whatsoever latitude they should be, that lay within the entrance of the straits commonly called Hudson's Straits together with all the lands and territories upon the countries, coasts, and confines of the seas, bays, lakes, rivers, creeks, and sounds aforesaid . . . . .

The Proclamation specifically excludes territory granted to the Hudson's Bay Company and there can be no question that the region in question was within the area granted to Hudson's Bay Company. Accordingly the Proclamation does not and never did apply in the region in question and the judgments to the contrary are not good law.

The substantive question which was fully and ably argued by counsel was whether the *Game Ordinance* and particularly s. 15(1)(*a*) thereof apply to Eskimos. In summary, the learned magistrate found as follows as set out in more detail in the stated case:

> (1) That the appellant, an Eskimo, on the 20th day of July and the 31st day of July, 1964, killed three caribou being game within the meaning of the *Game Ordinance* and he took possession of them and removed the skin and rear parts of two caribou and the tongue of the third.
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> (2) That he showed intention to abandon and did abandon the parts of the three caribou he had killed and

[1] [1939] S.C.R. 104, 2 D.L.R. 417.

which he did not take, and that the meat abandoned was at that time fit for human consumption.

It was not questioned that the Whale Cove settlement is in the Barren Land region of the Northwest Territories, being a part of Canada under the legislative jurisdiction of the Parliament of Canada. Parliament, by s. 13 of the *Northwest Territories Act*, conferred legislative powers upon the Commissioner in Council to enact laws for the preservation of game in the Territories. The Commissioner in Council enacted the *Game Ordinance*. Parliament, by c. 20 of the Statutes of Canada, 1960, enacted by s. 2 thereof as follows:

> From the day on which this Act comes into force, the provisions of the Ordinances entitled
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> (*a*) "An Ordinance respecting the Preservation of Game in the Northwest Territories", being chapter 42 of the Revised Ordinances of the Northwest Territories, 1956;
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> (*b*) "An Ordinance to amend the Game Ordinance", being chapter 2 of the Ordinances of the Northwest Territories, 1956, 2nd Session;
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> (*c*) "An Ordinance to amend the Game Ordinance", being chapter 1 of the Ordinances of the Northwest Territories, 1957, 1st Session;
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> (*d*) "An Ordinance to amend the Game Ordinance", being chapter 1 of the Ordinances of the Northwest Territories, 1958, 1st Session; and
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> (*e*) "An Ordinance to amend the Game Ordinance", being chapter 4 of the Ordinances of the Northwest Territories, 1959, 1st Session,
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> have the same force and effect in relation to Indians and Eskimos as if on that day they had been re-enacted in the same terms.

and also provided that:

> (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 Governor in Council then passed the Order in Council of September 14, 1960 previously quoted, declaring barren-ground caribou as game in danger of becoming extinct.

The power of Parliament to enact the Northwest Territories Act and the amendments thereto is not questioned nor is the power of the Commissioner in Council to enact the *Game Ordinance*. It is not in dispute that the appellant abandoned parts of game as defined in s. 2 of the *Game Ordinance* then suitable for human consumption. The only factual issue pressed by the appellant was that it had not

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been shown that the three caribou which he killed and abandoned in part were barren-ground caribou. I have no doubt that this Court can and should take judicial notice of the fact that the caribou in question here were barren-ground caribou. The Whale Cove region is deep in the Barren Lands of Northern Canada and no suggestion is made in any of the literature to which the Court was referred that any caribou other than barren-ground caribou are to be found that far north. In any event, the caribou he killed were game within the meaning of the *Game Ordinance* and the offence here was in abandoning parts thereof suitable for human consumption even if he had the legal right to hunt them for food.

I am of opinion that the question put by Magistrate Parker in the case stated by him must be answered in the negative, the conviction of the appellant by the Court of Appeal affirmed and the direction remitting the case to the Summary Conviction Court upheld.

I think it desirable to say specifically that insofar as *Regina v. Kallooar* and *Regina v. Kogogolak* hold that the *Game Ordinance* does not apply to Indians or Eskimos in the Northwest Territories, they are not good law and must be taken as having been overruled.

The appeal should, accordingly, be dismissed. The Attorney General states in his factum that he does not ask for costs. There will, therefore, be no Order as to costs.

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.