

CANADA / JUDGMENT

Kruger and al. v. The Queen

[1978] 1 SCR 104

COURT

Supreme Court of Canada

DECIDED

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Kruger and al. v. The Queen

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Date

1977-05-31

Report

[1978] 1 SCR 104

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

British Columbia

Subjects

Aboriginal law

Decision Content

SUPREME COURT OF CANADA

Kruger and al. v. The Queen, [1978] 1 S.C.R. 104

Date: 1977-05-31

Jacob Kruger and Robert Manuel Appellants; and

Her Majesty The Queen Respondent.

1976: October 19, 20; 1977: May 31.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Indians — Shooting deer during closed season — Applicability of provincial game laws to non-treaty Indians hunting off reserve on unoccupied Crown land — Wildlife Act, 1966 (B.C.), c. 55, s. 4(1)(c) — Indian Act, R.S.C. 1970, c. I-6, s. 88.

While hunting for food during the closed season, the appellants, members of the Penticton Indian Band, killed four deer. They lacked permits, available to them under the Wildlife Act, 1966 (B.C.), c. 55, for hunting during the closed season. The hunting took place upon unoccupied Crown land which is the traditional hunting ground of the Penticton Indian Band. Appellants were convicted before a provincial court judge on a charge laid under s. 4(1)(c) of the Wildlife Act of unlawfully killing big game during the closed season. Appeals to the County Court succeeded on the ground that Indian hunting rights fell within the protection of the Royal Proclamation, 1763, and thereby immunized Indians from the reach of the Wildlife Act while hunting for food on unoccupied Crown land. On further appeal to the British Columbia Court of Appeal the convictions were restored. Robertson J.A., who delivered the judgment of the Court, was of the view that s. 88 of the Indian Act, R.S.C. 1970, c. I-6, made provincial laws of general application, among which he numbered the Wildlife Act, applicable to Indians.

Held: The appeals should be dismissed.

The Court of Appeal was not asked to decide nor did it decide, whether aboriginal hunting rights were or could be expropriated without compensation. The argument that absence of compensation supported the proposition that there had been no loss or regulation of rights was not accepted. Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The Wildlife Act illustrates the point. It is aimed at wildlife management and to that end it regulates the time, place, and manner of hunting game. It is not directed to the acquisition of property. The constitutional issue as to the nature of aboriginal title, if any, in respect of lands in British Columbia, the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763 were not directly placed in issue by the appellants and accordingly were not determined in this appeal.

1. Laws of General Application. There are two indicia by which to discuss whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. The fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than of general application. The line is crossed when

an enactment impairs the status or capacity of a particular group.

Applying these criteria to the present case, there is no doubt that the Wildlife Act has a uniform territorial operation. Similarly it is clear that in object and purpose the Act is not aimed at Indians.

However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.

2. Referential Incorporation. There is in the legal literature a juridical controversy respecting whether s. 88 referentially incorporates provincial laws of general application or whether such laws apply to Indians *ex proprio vigore*. On either view of this issue the appellants must fail: (a) If the provisions of the Wildlife Act are referentially incorporated by s. 88 of the Indian Act, appellants, in order to succeed, would have the burden of demonstrating inconsistency or duplication with the Indian Act or any order, rule, regulation or by-law made thereunder. That burden had not been discharged and, having regard to the terms of the Wildlife Act, manifestly could not have been discharged. Accordingly, such provisions take effect as federal legislation in accordance with their terms. (b) If s. 88 does not referentially incorporate the Wildlife Act, the only question is whether the Act is a law of general application. Since that proposition has not been here negated, the enactment would apply to Indians *ex proprio vigore*. It was, therefore, immaterial to the present appeals whether s. 88 takes effect by way of referential incorporation or not. In either case, these appeals must fail.

R. v. George, [1966] S.C.R. 267; Cardinal v. The Attorney General of Alberta, [1974] S.C.R. 695; R. v. Martin (1917), 41 O.L.R. 79, applied; R. v. White and Bob (1965), 52 D.L.R. (2d) 481, distinguished.

APPEALS from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Washington Co.Ct.J. allowing an appeal against conviction of an offence contrary to s. 4(1)(c) of the Wildlife Act, 1966 (B.C.), c. 55. Appeals dismissed.

D. Sanders, for the appellants.

C. C. Locke, Q.C., and N. J. Prelypchan, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—These appeals raise the question whether provincial game laws apply to non-treaty Indians hunting off a reserve on unoccupied Crown land. They fall to be decided upon a statement of agreed facts. The appellants, Jacob Kruger and Robert Manuel, are Indians living in British Columbia and are members of the Penticton Indian Band. Between September 5, and September 8, 1973, during the closed season for hunting, while hunting for food near Penticton, they killed four deer. The acts of hunting took place upon unoccupied Crown land which was and is the traditional hunting ground of the Penticton Indian Band. The accused did not have permits

issued under the Wildlife Act, 1966 (B.C.), c. 55, authorizing them to hunt and kill deer for food during the closed season. Such permits were readily obtainable by local native Indians and both appellants had obtained permits in the past.

Appellants were convicted before a provincial court judge on a charge laid under s. 4(1)(c) of the Wildlife Act of unlawfully killing big game during the closed season. Appeals to the County Court succeeded on the ground that Indian hunting rights fell within the protection of the Royal Proclamation, 1763, and thereby immunized Indians from the reach of the Wildlife Act while hunting for food on unoccupied Crown land. On further appeal to the British Columbia Court of Appeal the convictions were restored. Robertson J.A., who delivered the judgment of the Court, was of the view that s. 88 of the Indian Act, R.S.C. 1970, c. I-6, made provincial laws of general application, among which he numbered the Wildlife Act, applicable to Indians. The section reads:

88. 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.

He concluded on the authority of this Court's decision in *The Queen v. George*[2], that s. 4 of the Wildlife Act applied to the appellants unless they could bring themselves within the opening words of s. 88 or under the exceptions spelled out in the latter part of the section. With respect to the opening words of the section, Mr. Justice Robertson had this to say:

The Proclamation of 1763 was entirely unilateral and was not, and cannot be described as, a treaty. Assuming (without expressing any opinion) that the Proclamation has the force of a statute, it cannot be said to be an act of the Parliament of Canada: there was no Parliament of Canada before 1867 and by no stretch of the imagination can a proclamation made by the Sovereign in 1763 be said to be an act of a legislative body which was not created until more than a hundred years later.

As to the exceptions, the learned justice of appeal said:

There has not been brought to my attention, nor do I know of, any extent to which s. 4 of the Wildlife Act is inconsistent with the Indian Act, or with any order, rule, regulation or by-law made thereunder. Nor do I know of any provision made by or under the Indian Act with respect to the matters for which provision is made by s. 4 of the Wildlife Act.

It is contended on behalf of the appellants that the British Columbia Court of Appeal erred in three respects, namely,

1. In ruling that the Wildlife Act, S.B.C. 1966, Ch. 55, was a law of general application within the meaning of that phrase in s. 88 of the Indian Act.

2. In ruling, in effect, that s. 88 of the Indian Act constituted a federal incorporation by reference of certain provincial laws rather than a statement of the general principles relating to the application of provincial laws to Indians.
3. In ruling, in effect, that aboriginal hunting rights could be expropriated without compensation and without explicit federal legislation.

The third point can be disposed of shortly. The British Columbia Court of Appeal was not asked to decide, nor did it decide, as I read its judgment, whether aboriginal hunting rights were or could be expropriated without compensation. It is argued that absence of compensation supports the proposition that there has been no loss or regulation of rights. That does not follow. Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The Wildlife Act illustrates the point. It is aimed at wildlife management and to that end it regulates the time, place, and manner of hunting game. It is not directed to the acquisition of property.

Before considering the two other grounds of appeal, I should say that the important constitutional issue as to the nature of aboriginal title, if any, in respect of land in British Columbia, the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763—issues discussed in *Calder v. Attorney-General of British Columbia*[3]—will not be determined in the present appeal. They were not directly placed in issue by the appellants and a sound rule to follow is that questions of title should only be decided when title is directly in issue. Interested parties should be afforded an opportunity to adduce evidence in detail bearing upon the resolution of the particular dispute. Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis. Counsel were advised during argument, and indeed seemed to concede, that the issues raised in the present appeal could be resolved without determining the broader questions I have mentioned.

I

Laws of General Application

Argument was addressed to the Court that the Wildlife Act affects Indian people in a manner quite different than it affects non-Indian people and for that reason cannot be considered as a law of general application within the meaning of the Indian Act, s. 88. The first thing to notice in this respect is the precise terms of s. 88 itself. It subjects Indians to "all laws of general application from time to time in force in any province." There formerly existed a doubt as to whether s. 88 was restricted to provincially enacted laws but that question has been settled in the affirmative by this Court in *The Queen v. George*, *supra*. Mr. Justice Martland gave this interpretation to the relevant phrase in s. 88, at p. 281:

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. The emphasis throughout is mine.

There are two indicia by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account, alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacities of a federal company; see *Great West Saddlery Co. v. The King*[4]. Such an act is no "law of general application." See also *Cunningham v. Tomey Homma*[5].

Apply these criteria to the case at bar. There is no doubt that the Wildlife Act has a uniform territorial operation. Similarly it is clear that in object and purpose the Act is not aimed at Indians. Section 4 of the Wildlife Act under which the accused were charged commences: "No person shall" and so, on its face, applies to all persons. Subsections (1) (2) and (3) of the Wildlife Act impose licensing requirements on those wishing to hunt, trap or fish. Subsection (4) states that sub-sections (1) (2) and (3) do not apply to an Indian residing in the Province. From this, it is clear that the other sections are intended to apply to Indians, as well as all other persons within the Province. Provincial game laws, which have as their object the conservation and management of provincial wildlife resources, have been held by this Court not to relate to Indians qua Indians: *Cardinal v. The Attorney General of Alberta*[6], at p. 706; *The Queen v. George*, supra. It was long ago decided that provincial laws may affect Indians, insofar as the Act was not in relation to them.

In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them.

These words of Riddell J. in *R. v. Martin*[7], at p. 84 were cited with approval in this Court by Martland J. in *Cardinal v. The Attorney General of Alberta*, supra, at p. 706. Mr. Justice Martland continued at p. 707: "The point is that the provisions of s. 12 [of the Alberta Natural Resources Transfer Agreement] were not required to make Provincial game laws apply to Indians off the Reserve."

The Chief Justice of this Court, then Laskin J., wrote in dissent in *Cardinal*, but on the point of concern in the present inquiry, namely, the applicability of provincial game laws to Indians off reserves, his views seem to accord with those of Mr. Justice Martland. After referring to the exclusion of reserves from provincial control, he had this to say, p. 722:

They do not return to that control under s. 12 in respect of the application of provincial game laws. That section deals with a situation unrelated to Indian Reserves. It is concerned rather with Indians as such, and with guaranteeing to them a continuing right to hunt, trap and fish for food regardless of provincial game laws which would otherwise confine Indians in parts of the Province that are under provincial administration. Although inelegantly expressed, s. 12 does not expand provincial legislative power but contracts it.

However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.

Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former. If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter—to "preserve moose before Indians" in the words of Gordon J.A. in *R. v. Strongquill*[8]—it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians. But that has not been done here and in the absence of clear evidence the Court cannot so presume.

The judgment of this Court in *Regina v. White and Bob*[9] is of no assistance to appellants in the present case. In *White and Bob* the accused were charged with having game in their possession during the closed season without having a valid and subsisting permit under the Game Act, R.S.B.C. 1960, c. 160. The accused raised the defence that an agreement between their ancestors, members of the Saalequun tribe and Governor Douglas, dated December 23, 1854, gave them the

right to hunt for food over the land in question and, alternatively, that as native Indians they possessed the aboriginal right to hunt for food over unoccupied land lying within their ancient tribal hunting grounds. The position of the Crown was that the agreement in question conferred no hunting rights and, if it did, these rights were extinguished by s. 87 (now s. 88) of the Indian Act, which the Crown said extended the provisions of the Game Act (the forerunner of the Wildlife Act) to Indians. Mr. Justice Davey (with whom Mr. Justice Sullivan concurred) was of the opinion that Parliament intended the word "treaty" in s. 87 to include agreements such as the one in question and to except their provisions from the operative part of the section. He held that, that being so, s. 87 did not extend the general provisions of the Game Act to the respondents in the exercise of their hunting rights under the agreement over the lands in question. The following passage of his judgment is important, p. 198:

Secs. 8 and 15 of the Caine Act specifically exempt Indians from the operation of certain provisions of the Act, and from that I think it clear that the other provisions are intended to be of general application and to include Indians. If these general sections are sufficiently clear to show an intention to abrogate or qualify the contractual rights of hunting notoriously reserved to Indians by agreements such as Ex. 8, they would, in my opinion, fail in that purpose because that would be legislation in relation to Indians that falls within parliament's exclusive legislative authority under sec. 91 (24) of the B.N.A. Act, 1867, 30 & 31 Viet., ch. 3, and also because that would conflict with sec. 87 of the Indian Act passed under that authority.

He concluded, p. 199:

In the result, the right of the respondents to hunt over the lands in question reserved to them by Ex. 8 are preserved by sec. 87, and remain unimpaired by the Game Act, and it follows that the respondents were rightfully in possession of the carcasses. It becomes unnecessary to consider other aspects of a far reaching argument addressed to us by respondents' counsel.

Mr. Justice Sheppard (with whom Mr. Justice Lord concurred) dissented. He considered that the agreement was not a treaty and was therefore not within the opening words of s. 87. He said that the section of the Game Act in question was within the legislative jurisdiction of the Province and was applicable to Indians not on their Reserve. Mr. Justice Norris wrote separate reasons in which he agreed, substantially for the reasons given by Mr. Justice Davey, that the agreement was a treaty within the meaning of s. 87 of the Indian Act. He then dealt at length with the matter of aboriginal rights in general and the applicability of the Royal Proclamation of 1763.

As I read the judgments in the Court of Appeal for British Columbia four of the five judges accepted that the section of the Game Act under which the accused were charged would apply to the accused unless the agreement of 1854 could be said to be a treaty within the opening words of s. 87 of the Indian Act. When the case reached this Court, the only question decided was whether or not the agreement constituted such a treaty. At the conclusion of argument for the appellant the Court rendered the following oral judgment:

Mr. Berger, Mr. Manders and Mr. Christie, we do not find it necessary to hear you. We are all of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, Exhibit 8, was a "treaty" within the meaning of that term as used in s. 87 of the Indian Act. We therefore think that in the circumstances of the case, the operation of s. 25 of the Game Act was excluded by reason of the existence of that treaty. The appeal is accordingly dismissed with costs throughout.

The operation of s. 25 of the Game Act was excluded because the agreement was a "treaty."

It has been urged in argument that Indians having historic hunting rights which they have not surrendered should not be placed in a more invidious position than those who entered into treaties, the terms of which preserved those rights. However receptive one may be to such an argument on compassionate grounds, the plain fact is that s. 88 of the Indian Act, enacted by the Parliament of Canada, provides that "subject to the terms of any treaty" 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 as stated. The terms of the treaty are paramount; in the absence of a treaty provincial laws of general application apply.

II

Referential Incorporation

There is in the legal literature a juridical controversy respecting whether s. 88 referentially incorporates provincial laws of general application or whether such laws apply to Indians *ex proprio vigore*. The issue was considered by this Court in *Natural Parents v. Superintendent of Child Welfare*[10]. The question in that appeal concerned the validity of an adoption order made in respect of a male Indian child in favour of a non-Indian couple. The Chief Justice (Judson, Spence and Dickson JJ. concurring, de Grandpré J. concurring in the result) rejected the submission that the Adoption Act R.S.B.C. 1960, c. 4, applied *ex proprio vigore* to the adoption of Indian children and, treating the Adoption Act as referentially incorporated, considered whether and to what extent that Act was inconsistent with the Indian Act. Mr. Justice Martland (with whom Pigeon J. concurred) was of the opinion that the ambit of authority conferred on the Parliament of Canada by s. 91(24) to legislate on the subject of "Indians and Lands reserved for the Indians" was not such that Parliament alone could enact legislation which might affect Indians; it was not such that Indians were totally exempted from the application of provincial laws. After referring to the *Cardinal* case, Mr. Justice Martland said, p. 163:

The extent to which provincial legislation could apply to Indians was stated to be that the legislation must be within the authority of s. 92 of the British North America Act, 1867 and that the legislation must not be enacted in relation to Indians. Such legislation, generally applicable throughout the Province, could affect Indians.

Mr. Justice Ritchie, considering s. 88, said, p. 170:

In my view, when the Parliament of Canada passed the Indian Act it was concerned with the preservation of the special status of Indians and with their right to Indian lands, but it was made plain by s. 88 that Indians were to be governed by the laws of their Province of residence except to the extent that such laws are inconsistent with the Indian Act or relate to any matter for which provision is made under that Act.

Mr. Justice Beetz did not find it necessary to express an opinion on the purview of s. 88 of the Indian Act. In the result four members of the Court, less than a majority, adopted the position that the section is a referential incorporation of provincial legislation which takes effect under the section as federal legislation.

On either view of this issue present appellants must fail. If the provisions of the Wildlife Act are referentially incorporated by s. 88 of the Indian Act, appellants, in order to succeed, would have the burden of demonstrating inconsistency or duplication with the Indian Act or any order, rule, regulation or by-law made thereunder. That burden has not been discharged and, having regard to the terms of the Wildlife Act, manifestly could not have been discharged. Accordingly, such provisions take effect as federal legislation in accordance with their terms. Assuming, without deciding, that the theory of aboriginal title as elaborated by Hall J. in *Calder v. The Attorney-General of British Columbia*[11] is available in respect of present appellants it has been conclusively decided that such title, as any other, is subject to regulations imposed by validly enacted federal laws: *Derriksan v. The Queen* (a recent decision of this Court not yet reported). That was also the result in *The Queen v. George*, supra, *Daniels v. White and The Queen*[12], and *Sikyey v. The Queen*[13]. The latter two cases are instructive as the hunting rights there stood on stronger ground in that they were protected, in the case of *Sikyey*, by treaty, and in *Daniels*' case by the Manitoba Natural Resources Agreement. In neither case did the protection prevail against the federal Migratory Birds Convention Act, R.S.C. 1952, c. 179. If s. 88 does not referentially incorporate the Wildlife Act, the only question at issue is whether the Act is a law of general application. Since that proposition has not been here negated, the enactment would apply to Indians *ex proprio vigore*. It is, therefore, immaterial to the present appeals whether s. 88 takes effect by way of referential incorporation or not. In either case, these appeals must fail.

I would dismiss the appeals.

Appeals dismissed.

Solicitor for the appellants: Douglas Sanders, Victoria.

Solicitor for the respondent: Attorney-General of British Columbia.

[1] [1975] 5 W.W.R. 167, 60 D.L.R. (3d) 144.

[2] [1966] S.C.R. 267.

[3] [1973] S.C.R. 313.

[4] [1921] 2 A.C. 91.

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- [5] [1903] A.C. 151.
- [6] [1974] S.C.R. 695.
- [7] (1917), 41 O.L.R. 79.
- [8] (1953), 8 W.W.R. (N.S.) 247.
- [9] (1965), 52 D.L.R. (2d) 481, aff. 52 W.W.R. 193.
- [10] (1975), 60 D.L.R. (3d) 148, [1976] 2 S.C.R. 751.
- [11] [1973] S.C.R. 313.
- [12] [1968] S.C.R. 517.
- [13] [1964] S.C.R. 642.
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