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Regina v. George, 55 D.L.R. (2d) 386, Sigeareak EI-53 v. the Queen, 57 D.L.R. (2d) 536

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Commentary

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INDIANS

Regina v. George, 55 D.L.R. (2d) 386; *Sigeareak EI-53 v. The Queen*, 57 D.L.R. (2d) 536.

REGULATORY OFFENCES — GAME LAWS — WHETHER APPLICABLE TO INDIANS AND ESKIMOS — SECTION 87 OF THE INDIAN ACT — ABORIGINAL RIGHTS UNDER TREATIES AND UNDER THE PROCLAMATION OF 1763.

> THEREFORE, THE PROMISES WE HAVE MADE TO YOU ARE NOT FOR TODAY ONLY BUT FOR TOMORROW, NOT ONLY FOR YOU BUT FOR YOUR CHILDREN, BORN AND UNBORN, AND THE PROMISES WE MAKE WILL BE CARRIED OUT AS LONG AS THE SUN SHINES ABOVE AND THE WATER FLOWS IN THE OCEAN. (*From a speech by Lieutenant-Governor Morris to the Indians during the negotiation of the Qu'Appelle treaty.*[1])

I

Two recent Supreme Court of Canada judgments have brought a settlement to the hitherto much disputed question of the hunting rights of Canada's aboriginal peoples. Although the cases centred around the enforcement of game laws, the implications of the decisions are more far reaching. Taken together with the recent Supreme Court decision in *Regina v. Sikyea*[2] these cases represent a definitive statement on the present status of Indians and Eskimos in Canadian society.

In *Regina v. George* the accused was a Chippewa Indian and a registered member of his band under the Indian Act. He was charged with shooting two ducks out of season contrary to the provisions of the federal Migratory Birds Convention Act. The alleged offence took place on the Chippewa's Kettle Point reserve in western Ontario and the birds were shot for food and not for sale. Sigeareak E1-53 was an Eskimo living on the shores of Hudson's Bay within the Northwest Territories. He was charged with abandoning substantial parts of carcasses of three barren ground caribou,[3] contrary to the provisions of the Game Ordinances of the Northwest Territories (which prohibited abandonment of meat fit for human consumption).[4] In neither case was there substantial dispute on the facts.

George's defence was that the Migratory Birds Convention Act did not apply to him as an Indian hunting for food on his own reserve. Central to his argument was section 87 of the Indian Act:

> 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.

George claimed that he was given a right to hunt for food by the Royal Proclamation of 1763 and by his tribe's 1827 treaty with the

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1 See *Regina v. Sikyea*, 43 D.L.R. (2d) 150, at 155.

2 *Regina v. Sikyea*, 50 D.L.R. (2d) 80.

3 In fact fifteen caribou had been slaughtered and left to rot with little or no meat taken. Sigeareak could, however, be fixed with the death of only three. (I am indebted for this information to M. M. DeWeerdt, Esq., of Yellowknife, who sent me copies of the trial and appeal proceedings).

4 It might be noted that it is generally not difficult to preserve fresh meat in the north. Meat can be buried in the permafrost or, more conveniently (and this is a common native practice during the summer months), immersed in a cold stream or lake. In either case, it will remain edible for months.

Crown. He said that these rights superceded and in the circumstances supplanted the Act.

This defence succeeded in the Magistrate's Court, in the High Court of Ontario[5] and, by a majority, in the Court of Appeal. Roach J.A. summed up the majority view in this way . . .

> The Migratory Birds Convention Act is an Act of general application in this and other provinces but by virtue of s. 87 it is subject to the terms of any treaty.[6]

The application of the Migratory Birds Convention Act to Indians in the Northwest Territories was being tested almost contemporaneously[7] in *Regina v. Sikyea.*[8] Sikyea, an Indian under treaty and hunting for food, was charged with shooting two Mallard ducks out of season. He was convicted by a Police Magistrate but his appeal to Sissons J. was allowed, the learned judge holding that the Game Ordinances of the territories made pursuant to the Act were not applicable to Indians and Eskimos. The Territorial Court of Appeal reluctantly concluded that the legislation was valid and broad enough to limit native rights and restored the conviction. An appeal to the Supreme Court of Canada was dismissed just after the Ontario Court of Appeal's decision in *George* was handed down.

When *Regina v. George* came before the Supreme Court of Canada Cartwright J., dissenting, suggested that since the decision in *Sikyea* had been arrived at without a consideration of section 87 of the Indian Act it should be held to be *per incuriam.*[9] Cartwright J. favoured George's claim for exemption from the restrictions of the 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, (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.[10]

The majority of the court[11] concurred in the judgment of Martland J. who decided the case solely on the basis of a construction of section 87. In his words . . .

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[5] McRuer C.J.H.C. stated . . . "The Indian's rights to hunt for food on the lands reserved to them in the treaty of 1827 cannot now be taken away by the Parliament of Canada short of legislation which expressly and directly extinguishes those rights." 41 D.L.R. (2d) 31 at 36.

[6] The *Attorney General of Canada v. George,* 45 D.L.R. (2d) 709, at 711. Gibson J.A. dissented, principally on the question of whether the 1827 treaty did in fact reserve hunting rights. He held that it did not.

[7] Sikyea's offence was committed on May 7, 1962, George's on September 5, 1962.

[8] *Regina v. Sikyea,* 40 W.W.R. 494 (Territorial Court), 43 D.L.R. (2d) 150 (Territorial Court of Appeal), 50 D.L.R. (2d) 80 (Supreme Court of Canada).

[9] *Regina v. George,* 55 D.L.R. (2d) 386, at 396.

[10] *Ibid.* at 390-391.

[11] Fauteux, Abbott, Judson, Ritchie and Hall JJ. concurring.

> 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.[12]
>
> 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 the Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.[13]

Sigeareak's defence was, in substance, the same as that of George, even though he had no treaty to protect him. He was charged under an Ordinance passed by the Commissioner in Council of the Northwest Territories. The Ordinance was pursuant to the Federal Northwest Territories Act which, by a 1960 amendment, specifically empowered the Commissioner in Council to make regulations "in relation to the preservation of game in the territories" which would be "applicable to and in respect of Indians and Eskimos". The amendment added the proviso that "nothing . . . 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". In 1960 the Governor General declared barren ground caribou to be in danger of becoming extinct.[14]

Sissons J. had previously ruled in *Kallooar v. Reginam*[15] and *Regina v. Kogogolak*[16] (neither of which decisions had been appealed) that the Eskimos in the Territories could claim rights under the Proclamation of 1763 just as the Indians did and that these rights could be abrogated only by specific acts of the Federal Parliament. In his view the Commissioner in Council was not competent to limit Indian rights even when acting pursuant to federal legislation.

> The Game Ordinance of the Northwest Territories cannot and does not apply to the Eskimos.[17]

The Police Magistrate before whom Sigeareak initially appeared held himself bound by *Kallooar* and dismissed the charge. The Crown appeal to Sissons J. was, not surprisingly, unsuccessful.[18] The Court of Appeal of the Northwest Territories took the opposite view. The Proclamation of 1763 did not, on its face, apply to the lands held at that time by the Hudson's Bay Company, and the court could not sup-

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12 *Regina v. George*, 55 D.L.R. (2d) 386, at 397.

13 *Ibid.*, 398.

14 See generally, *Sigereak E1-53 v. The Queen*, 57 D.L.R. (2d) 536, at 540-541. The actual state of the barren ground caribou population is a matter of some dispute. Estimates of their numbers range from 200,000 to 700,000. N.W.T. councillor for the Western Arctic Duncan Pryde reported seeing a herd of caribou that took nine continuous days to pass Bathurst Inlet in May 1966. [See *The Norther* (Fort Smith) vol. 5, #5, December 12, 66]. Sissons J. in discussing the 1960 order in council in *Regina v. Sikyea* said "This [the declaration that caribou are in danger of becoming extinct] may be fact or fiction, and may well be fiction." *Regina v. Sikyea*, 40 W.W.R. 494, at 502.

15 *Kallooar v. Regina*, 50 W.W.R. 602.

16 *Regina v. Kogogolak*, 28 W.W.R. 376. See also *Regina v. Koonungnak*, 45 W.W.R. 283; *Regina v. Otokiak*, 28 W.W.R. 515.

17 *Regina v. Kogogolak*, 28 W.W.R. 376, at 384.

18 The judgment of Sissons J. is unreported.

port the general extension of its rights to all Eskimos regardless of geographic location that was advocated by Sissons J. The Court of Appeal further held that the Ordinance, validly made under the powers given to the Commissioner in Council by the Northwest Territories Act, was competent to bind Eskimos and that Sigeareak was guilty as charged. The Supreme Court of Canada upheld the appeal decision on both grounds and specifically overruled *Kallooar* and *Kogogolak*.[19]

In these decisions, then, the court has affirmed the right of the Federal Parliament not only to legislate for Indians and Eskimos, but also to render these peoples subject to the general legislation regardless of any previous undertakings that such legislation may abrogate. In effect, after *George* and *Sigeareak*, Indians and Eskimos are just another minority among the citizens of Canada.

II

THE COURT IS ENTITLED TO TAKE JUDICIAL NOTICE OF THE FACTS OF HISTORY WHETHER PAST OR CONTEMPORANEOUS . . . AND IT IS ENTITLED TO RELY ON ITS OWN HISTORICAL KNOWLEDGE AND RESEARCHES.[20]

Native rights are best assessed, and most often upheld by courts, after an analysis of their historic foundations.

The Proclamation of 1763

For reasons which will become apparent it is best to begin with the assumption that native hunting rights have always existed and were simply recognized, not created, by the Proclamation and the various treaties. Norris J.A. concluded in *Regina v. White and Bob* "That aboriginal hunting rights existed in favour of the Indian from time immemorial".[21] In *Kogogolak* Sissons J. stated "The hunting rights of the Eskimos existed at all times".[22] The significance of this approach can be seen when it is realized that the Proclamation (called the "Charter of Indian Rights" and "the Magna Carta of the Eskimos" by Sissons J.)[23] is lamentably inexplicit as to what rights it allows to natives. The operative clause in this respect is . . .

> 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 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. . . .[24]

Just what reservation as "Hunting Grounds" entailed is unclear, but courts, including the Ontario Court of Appeal in the *George* decision, seem to have adopted the view that restrictions on the right

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19 *Sigeareak E1-53 v. The Queen*, 57 D.L.R. (2d) 536, at 542.

20 *Regina v. White and Bob*, 50 D.L.R. (2d) 613, at 629 per Norris J.A. This case contains a recent and exhaustive study of Indian rights in British Columbia.

21 *Ibid.*, at 663.

22 *Regina v. Kogogolak*, 28 W.W.R. 376, at 378.

23 *Ibid.*, at 378.

24 R.S.C. 1952, vol. VI, 6130.

to take game were outside of anyone's contemplation two centuries ago.[25]

The Proclamation has a further and perhaps more serious weakness. By its own terms the "Hunting Grounds" were reserved outside of the land held by the Hudson's Bay Company and beyond the region of the "Quebec" government that the Proclamation created. The rather casual manner in which continents were divided up in the early Colonial era renders the Proclamation's present day application rather vague.[26] Furthermore, is all of the continent west of the Hudson's Bay Company and Quebec lands to be considered subject to the "Hunting Grounds" reservation or just that part known and explored at the time the Proclamation was made?[27] Of course Indians in eastern and maritime Canada cannot rely on the Proclamation as a foundation for any claim of right.[28] Sissons J., as was mentioned earlier, preferred to look on the Proclamation as a general statement of rights rather than a geographic division of Colonial administration. In *Kogogolak* he said . . .

> I do not think it matters if this was Hudson's Bay Company land. The hunting rights of the Eskimos existed at all times. The Hudson's Bay Company always respected these rights.[29]
>
> I think the Royal Proclamation of 1763 is still in full force and effect as to the lands of the Eskimos.[30]

The Supreme Court rejected this view decisively in *Sigeareak*.[31]

The Proclamation has been held to have the force of a statute. McRuer C.J.H.C., in his decision on *George*, quoted and approved of these words in *The King v. Lady McMaster*:

> The proclamation of 1763 . . . has the force of a statute, and so far therein as rights of the Indians are concerned, it has never been repealed.[32]

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[25] *A-G Canada v. George*, 45 D.L.R. (2d) 709, at pp. 712-713. c.f. *Regina v. White and Bob*, 50 D.L.R. (2d) 613, at 647.

[26] The western border of the 1763 Quebec ran in a line from the south end of Lake Nipissim [sic] "crossing the river St. Lawrence, and the Lake Champlain, in 45 Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence from those which fall into the sea." R.S.C. 1952, Vol. VI, p. 6127. The Hudson's Bay Company had roughly all the land drained by Hudson's Bay.

[27] Norris J.A. in *Regina v. White and Bob* suggested that the Proclamation would apply to all western lands on the basis of England's claim to such lands (50 D.L.R. (2d) at 644 and he held specifically that it applied to Vancouver Island (at 664). On the other hand, the Court of Appeal in *Regina v. Sikyea* doubted that the Proclamation could apply to Indians living in the western part of the Northwest Territories since that area was "terra incognita" in 1763 (43 D.L.R. (2d) 150, at 152).

[28] *Rex v. Syliboy*, [1929] 1 D.L.R. 307.

[29] *Regina v. Kogogolak*, 28 W.W.R. 376, at 378.

[30] *Ibid.*, 383.

[31] "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." *Sigeareak v. The Queen*, 57 D.L.R. (2d) 536, at 570.

[32] *The King v. Lady McMaster*, [1926] Ex. C.R. 68, at 72. See McRuer C.J.H.C. in 41 D.L.R. (2d) at 35-36. The provisions of the Proclamation given effect to in this case were those against the sale of Indian lands to private individuals and had nothing to do with game rights.

Gibson J.A., however, in his dissenting judgment in *George*, in the Court of Appeal, gave tacit approval to the Crown's submission that if the Proclamation was a statute it was, since the Statute of Westminster, subject to amendment or repeal by legislation of the federal Parliament.[33] The Supreme Court having been silent on the question this latter view seems to have prevailed.

The Treaties

One of the provisions of the Proclamation was that the lands reserved to the Indians could be sold only to the Crown.[34] It was as a result of these sales that the Indians obtained their treaties. Just what was being sold was for a time a vexed point but around the turn of the century the Privy Council ruled that in ceding lands to the Crown the Indians were releasing a "substantial and paramount estate" already vested in the Crown from its "overlying Indian interest".[35] In return for this release of interest there was usually a payment to the tribe in one form or another and, in many treaties, (especially the later ones) a guarantee of hunting rights. The standard clause on this matter ran as follows . . .

> And Her Majesty the Queen hereby agrees with her said Indians, that they shall have right to pursue their vocation of hunting throughout the tract surrendered as heretofore described, subject to such regulation as may from time to time be made by the government of the country acting under the authority of Her Majesty.[36]

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[33] *A-G Can. v. George*, 45 D.L.R. (2d) 709, at 717.

[34] Such sale could only be a public meeting of the band. R.S.C. 1952, Vol. VI, 6131. In what capacity did the Indians treat? Chief Joseph Brank liked to maintain that the Indians were allies, not subjects, of the Crown. John Beverley Robinson, while Attorney General for Upper Canada, and Riddel J., one hundred years later, both ridiculed this idea. (See *Sero v. Gault*, 64 D.L.R. 327, at 330). Indians in the United States, however, generally did sign treaties as nations.

> "Implicit in the negotiation of treaties, which during the early history of the country were entered into with nearly every tribe within the United States, was the notion that the tribes were sovereign. The use of treaties rather than statutes created an international rather than national relationship. Moreover, the subject matter of the treaties, i.e. was powers, boundary and frontier regulations, and extradition contributed to this notion." In Clinger, W. F. Jr., *The Constitutional Rights of The American Tribal Indian*. (1965) 51 VA. L. REV. 121, at 126.

[35] In *St. Catherines Milling and Lumber Co. v. The Queen*, (1889) 14 A.C. 46 the Privy Council commented on this matter, at 54-55.

> "The tenure of the Indians was a personal and usufructary right, dependent upon the goodwill of the Sovereign. The lands reserved are expressly stated to be "parts of our Dominions and territories", and it is to be declared the will and pleasure of the Sovereign that "for the present" they shall be preserved for the use of the Indians as their hunting grounds under His protection and dominion. . . . It appears to [their Lordships] . . . that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominion whenever that title or otherwise extinguished."

This view was employed again twenty years later when, in *Dominion of Canada v. Province of Ontario* [1910] A.C. 637, Lord Loreburn spoke of land gained from the Indians by treaty as having been "released from the overlying Indian interest".

[36] *Rex v. Wesley*, [1932] 2 W.W.R. 337, at 350. See also *Regina v. Sikyea*, 40 W.W.R. 494, at 500.

These rights applied to the land ceded: the rights on the lands reserved should, presumably, be even more extensive, if not absolute. It was just such a presumption that allowed some treaties, such as the one in *George* to be completely silent on the matter of game rights.[37] This deficiency in terms led Cartwright J. to say . . .

> 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.[38]

The treaties then, like the Proclamation, have often afforded protection that is more apparent than real. Cases in which an Indian has succeeded in claiming rights on the basis of a treaty alone, unsupported by the Proclamation or by statute, if they exist at all are exceedingly rare. When, as in *George*, treaty rights are not even held to merit specific mention in the federal legislation that abrogates them the treaties may well be considered dead letters.

The Role of the Government.

Whether as a cause or effect of the impotence of the Proclamation and the treaties, the federal government has always been the dominant force in the determination of aboriginal rights. Under section 91(24) of the British North America Act, "Indians and lands reserved for Indians" are under the exclusive control of the Federal Government. Though the extent of this jurisdiction has been disputed, numerous cases[39] have held that only federal legislation or provincial regulations made pursuant to federal legislation[40] are competent to limit such rights as natives may claim. Aside from such claims, section 87 of the Indian Act (quoted *supra*) makes laws of general application in the province applicable to Indians.

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[37] The Kettle Point Reservation treaty was, in effect, a bill of sale which transferred 2,200,000 acres to the Government for an annuity of £11,000 saving, nevertheless, and expressly reserving to the said nations of Indians and their posterity at all times hereafter for their own exclusive use and enjoyment about 23,000 acres. See Canada, Indian Treaties and Surrenders, 1680-1890. Ottawa: The Queen's Printer, 1891.
Provisional Surrender Treaty #27½, p. 65.
Confirmatory Surrender Treaty #29, p. 71.
Quotation is from page 72.

[38] *Regina v. George*, 55 D.L.R. (2d) 386, at 389. Even where explicit a treaty may not be inviolable. A 1752 treaty with the Mick Mack Indians of Nova Scotia held that the tribe "shall have free liberty of hunting and fishing as usual". In 1958 a claimant to the treaty rights and a member of the Micmac tribe lost his case when the court asked him to prove decent "by blood or otherwise" from the Indians with whom the treaty had been signed. See *Regina v. Simon*, 124 C.C.C. 110. (This test is the result of a perhaps unwarranted extention of the ratio of *Rex v. Syliboy*, [1929] 1 D.L.R. 307.)

[39] The latest and most authoritative decision on this point is *Regina v. White and Bob*, 50 D.L.R. (2d) 618. An appeal on this decision to the Supreme Court of Canada was dismissed in 52 D.L.R. 2d 481. See also *Rex v. Wesley*, [1932] 2 W.W.R. 337; *Rex v. Jim*, 26 C.C.C. 236; *Rex v. Hill*, [1951] O.W.N. 824. *Regina v. Otokiak*, 28 W.W.R. 515. Lysyk K., *Indian Hunting Rights: Constitutional Consideration and the Role of Indian Treaties in British Columbia*, (1966) 2 U.B.C.L. Rev. 401.

[40] *Sero v. Gault*, 64 D.L.R. 327.

Federal regulation of Indian affairs has always been allowed, (indeed most treaties made provision for it), but until the decisions in *Sigeareak* and *George* the question remained unsettled as to the breadth and form that such regulations could or should take. In *George*, McRuer C.J.H.C. suggested that, although the federal government had the power to take away Indian rights without regard to treaties, to do so would be "a breach of our national honour".[41] In *Regina v. Sikyea* the Territorial Court of Appeal concluded that the government had done just what McRuer had feared it could do, and called the action "a breach of faith [with the Indians] on the part of the government".[42]

Those decisions that defended Indian rights generally held that though the government could take such rights away, it could do so only by means of specific legislation which made unequivocal reference to those rights. This was the position taken by McRuer C.J.H.C. in *George* as well as by Sissons J. in *Sikyea*.

> Eskimo rights could be extinguished by the Parliament of Canada. However, vested rights are not to be taken away without express words as necessary intendment or implication.[43]

The Supreme Court evidently thought differently.

The Eskimos

The legal position of the Eskimos is different from that of the Indians. In 1939 the Supreme Court reference *Re Eskimos*[44] decided that exclusive legislative jurisdiction over Eskimos fell to the Federal Government under section 91(24) of the British North America Act. Section 4(1) of the Indian Act, however, denies that act any application to Eskimos and as yet no comparable and exclusively Eskimo legislation has been drafted. As is seen in *Sigeareak*, the application of the proclamation of 1763 to Eskimos is at best problematical. Furthermore, with the exception of some bands in Labrador, the Eskimos have no treaties with the Crown. Sissons J. has argued that as a consequence of this Eskimo aboriginal rights continue to exist in full force and that Eskimos without treaties are in a stronger position than Indians with them.[45] The Carrothers commission, how-

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41 *Regina v. George*, 41 D.L.R. (2d) 31, at 37.

42 *Regina v. Sikyea*, 43 D.L.R. (2d) 150, at 158. The court gave effect to the treaty abrogating regulations with great and evident reluctance and suggested that it was a case of "the left hand having forgotten what the right hand had done" (at 158).

43 *Regina v. Sikyea*, 40 W.W.R. 494, at 503. See the words of McRuer C.J.H.C. to the same effect quoted in footnote 4. This would seem to be the legal position of the American Indian.

> Tribal Indians are subject to state law to only a limited degree since, in the absence of congressional authorization, state courts have neither criminal nor civil jurisdiction over the activities of tribal Indians on reservations. Moreover, with certain exceptions, tribal Indians are subject to federal law only to the extent that it specifically applies to them. Clinger, W.F. Jr. *Op Cit.*, footnote 34, at p. 122.

44 *Re Eskimos*, [1939] 2 D.L.R. 417.

45 *Regina v. Kogogolak*, 28 W.W.R. 376, at 381. c.f. *Regina v. Koonungnak*, 45 W.W.R. 283.

ever, in its recent study of northern problems, came to a different conclusion.

> The rights of the Eskimos with whom no treaty has been signed . . . are those of Canadian citizens.[46]

This view may be less useful to the Eskimos than that of Sissons J. but in the light of the decision in *Sigeareak* it is perhaps the more accurate of the two.

III

There is no easy conclusion to be reached on the validity of these decisions. The *George* and *Sigereak* judgments can be examined from both a judicial and a social point of view and advantages and disadvantages present themselves in either aspect.

Judicially speaking, the prevailing view in the Supreme Court seems to have been that the matter was purely one of statutory interpretation. Did or did not the Proclamation of 1763 apply: how is section 87 of the Indian Act to be construed? The conclusions arrived at on these questions were in many ways determined by the assumptions begun with. It seems to have been taken for granted by the majority of judges that Parliament could legislate to the derogation of what had been assumed to be native rights. The question that these judges asked themselves, was whether Parliament had done so in these particular circumstances. Implicit in this approach to the problem is the assumption that native rights are, or were, an extraordinary and perhaps archaic privilege which aboriginal peoples should be taught to outgrow. The statutory interpretations agreed upon—i.e. that the Migratory Birds Convention Act and the Game Ordinances of the Northwest Territories were competent to bind native peoples as well as other Canadians—are justifiable when founded on these premises.

It is well to remember, however, that another judicial approach is possible. Cartwright, McRuer and Sissions J.J., among others, can be taken to have begun with the assumption that the aboriginal peoples of Canada had been accorded distinct and substantive rights by the men and governments to whom they ceded their lands. To these learned judges the Proclamation of 1763 and the various treaties were undertakings binding in honour; promises of a scope that would be subverted by an overly nice interpretation of their fine print. This view does not deny Parliament's right to vary, or even end, unilaterally these rights, but it does demand that such changes be made expressly, with unequivocal intention and clear contemplation of the covenants to be struck down.

The social and practical consequences of these decisions are equally ambiguous. The legislation in question was intended primarily for the preservation of game and it is obvious that no Canadians have

[46] CARROTHERS, A.W.R., REPORT OF THE ADVISORY COMMISSION ON THE DEVELOPMENT OF GOVERNMENT IN THE NORTHWEST TERRITORIES (Ottawa: Queen's Printer, 1966), 63.

more to gain from an intelligent conservation policy than Indians and Eskimos. It is worth noting that the *Sigeareak* prosecution was begun on the complaint of another Eskimo who disapproved of the pointless caribou slaughter. Moreover the Crown's appeal to the Territorial Court of Appeal was argued on the ground, *inter alia,* that only by strict enforcement of the conservation laws with respect to caribou could Eskimos be saved from a disastrous famine such as the one which overtook the plains Indians a century ago after the buffalo herds had been decimated.[47]

On the other hand, however, is it wise to legislate for Indians and Eskimos in the same terms (or with only minor exemptions and variations) as for all other citizens? These native peoples form a very distinct element in Canadian society and for the most part live under quite unusual conditions. The precise nature of their unique status is as difficult to define as it is impossible to deny, but historically and culturally they are more than simply an ethnic minority.

The Eskimos to this day gain much of their food by hunting and fishing; should not special laws recognize the right to take game as a fundamental element in their existence and not as simply a privilege to be bestowed or denied by their white administrators?

Indians in the more southerly parts of Canada are generally less dependent on game, but they have a different claim for special consideration. Indians on reservations are under the "protection" of the Indian Act. As a corollary to this protected status, a treaty Indian is denied many of the normal rights and duties of citizenship.[48] When this paternalistic policy is unredeemed by any vestige of his ancient rights and status the treaty Indian becomes for all purposes a second class citizen, severed from his past and barred from an effective participation in the present.

In the concluding passages of its report the Carrothers commission made this comment:

> The vital question [is] whether the indigenous peoples should be subject to the same laws as the white population, particularly the criminal law. Is there a fundamental difference in the value systems of the indigenous peoples from the values that have shaped the white man's law so as to justify two legal systems, and is it feasible or politically acceptable that there be two sets of laws?[49]

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[47] I am indebted to M. M. DeWeerdt, Esq., of Yellowknife, for this information.

[48] The Indian Act, R.S.C. 1952, c. 149. For example: Land on the reserve is not owned by individuals in the usual sense and cannot be sold or mortgaged to other than an Indian without the special permission of the Minister (Sec. 20, 37, 88, 89).

Indians are subject to special provisions with respect to wills. Sec. 45 et. seq. The notorious "Indian Laws" regarding liquor are found in sections 93, 94, 95, 96. Indians are eligible for a number of special payments from the government (Section 15, 61 et. seq.), can get special government loans (Sec. 69), and are normally not subject to property taxes (Sec. 82, 86).

[49] THE CARROTHERS COMMISSION, *supra,* note 46, 201. The Commission suggested that the answer to this question was in the negative and that two systems of substantive law would be unworkable and a bad precedent for other ethnic groups.

If the legislation here considered and interpreted represents an honest grappling with this question and a conscious and informed statement on the nature of aboriginal rights, there is little complaint to be made. If, as seems more likely, it is through ignorance or inadvertence that these laws have broken some very old promises, the court might better have served its function by calling on the legislators for a more precise definition of their intentions. If, as Cartwright, McRuer and Sissons JJ. seemed to believe, the court's duty to interpret legislation includes the power to shape ambiguous legislation to the contours of social justice, perhaps the assumptions that those learned judges brought to the question of native rights were the preferable ones.

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