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NORTHWEST TERRITORIES

7TH COUNCIL, 49TH SESSION

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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN: HER MAJESTY THE QUEEN — INDIAN ACT

AND

JOSEPH DRYBONES

APPELLANT

REASONS FOR JUDGMENT

of the Honourable Mr. Justice W. G. Morrow

Reproduced:

Indian-Eskimo Association of Canada
277 Victoria Street
Toronto 2, Ontario

1969

The appellant was found guilty at Yellowknife, in the Northwest Territories, on April 10, 1967, and sentenced by John Anderson Thompson, a Justice of the Peace. The plea was guilty and the sentence was a fine of $10.00 and costs or three days on default. The appellant was not represented by counsel at the trial.

The charge to which the appellant plead guilty was that the appellant:

> "on or about the 8th day of April, A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94 (b) of the Indian Act."

Notice of appeal was filed April 27, 1967, and raised legal as well as factual grounds for interfering with the verdict of the Justice of the Peace.

At the opening of the appeal before me an application was made by counsel for the appellant to include the Canadian Bill of Rights as a further ground of appeal and to permit the plea of "Guilty" to be withdrawn.

When it became clear that the appellant did not understand English and that therefore there was some serious doubt as to whether he fully appreciated his plea in the lower court, he was allowed to withdraw his original plea and the appeal proceeded as a trial de novo with a plea of "Not Guilty". The Canadian Bill of Rights was allowed to become a ground of appeal.

Six witnesses in all were called by the Crown and none by the defence.

It would appear from Section 94 (b) of the Indian Act, R.S.C. 1952, c. 149, set out below that there are three elements of the offence charged, and it was common ground that failure to establish one or more could be fatal to the Crown's case (Regina v. Modeste (1959) 31 W.W.R. 84). Section 94 states:

"An Indian who

(a) has intoxicants in his possession,
(b) is intoxicated, or
(c) makes or manufactures intoxicants

"off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment."

The suggested three elements of the offence are: (1) 'he is an Indian, (2) he is intoxicated, and (3) he is off a reserve.

The events leading up to the laying of the charge took place shortly after 11:00 p.m. o'clock in the evening of April 8, 1967, on the premises of Old Stope Hotel in Yellowknife.

The evidence of R.C.M. Police Constables P.W. Pertson and J. Woll and of Hilda Rasche, wife of the hotel manager, satifies me that when the appellant was found by them on the floor of the hotel lobby he was intoxicated and I so found.

Brian Purdy, counsel for the appellant, asked me to hold that his client was not proven to be an Indian. His argument was based on the definition of an Indian contained in the Indian Act, namely Section 2 (g). This section defines an Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". He proceeded to argue that the Crown had failed to establish that the appellant was in a band (Section 2 (1) (a)), that no Indian Register (Section 5) was produced, and that the entitlement to be registered as an Indian (Section 6) was not proven with failure to produce a band list, and that there was no evidence before me of a declaration by the Governor in Council (Section 2 (1) (n) (iii)).

The Crown produced as a witness one Joe Sangris, who has held the position of Chief and leader of the Indian Village at Yellowknife for some sixteen years. He described how he had known the appellant from the time he was born, he knew his wife Madeline, and the father of the appellant. This witness described how the appellant moved from the previous Indian Settlement to the present village, how he had been raised there from infancy, and was in receipt of Treaty money once a year.

David George Greyeyes, a second Crown witness, was Regional Director of Indian Affairs, and the officer responsible to look after Indian records, contractual obligations, and otherwise represent his Department in its carrying out the various Treaties affecting the Indians. This witness produced the official record sheet showing that an Indian by the name of Dryborne was carried on the Department records as an Indian, that he was shown as having no children, and was married to a Madeline Crapeau. A photostat of this record was marked Exhibit 1. The record was used for payment of Treaty money. Under cross-examination by defence counsel this witness described how records such as Exhibit 1 are maintained for each Treaty and are made up from a master list.

I am satisfied from the above that the appellant is an Indian within the meaning of the Indian Act. R. v. Myers (1925) 2 W.W.R. 471 and R. v. Howson (1894) 1 Terr. L. R. 492, have been helpful to me under this heading.

This brings me to the third suggested element of the offence. Both Chief Joe Sanguis and David George Greyeyes testified that there are no Indian reserves in the Northwest Territories and I so find. There remains the problem of whether the Crown has proven its case by establishing that the appellant cannot in fact be on a reserve if there are not to be on, and therefore he is off a reserve, or whether it is possible for a person to be off a reserve in the language of the Indian Act if there is no reserve to be off of.

To me the question at this point resolves itself into a question of law and I must refer to what cases, if any, have already discussed this question.

It would appear that this question is peculiar to the Northwest Territories and the Yukon, where, unlike the rest of Canada, no reservations have been set aside or designated.

The problem appears to have been considered by Mr. Justice Sissons of this court in two cases, one of which is reported.

The reported decision, R. v. Modeste (supra), deals with the very same problem as is before me. At page 88 of the report the learned justice remarks on the fact that the lands granted to the Indians under their treaties had not yet been designated and reserves never established. He does state, however, "The accused must be intoxicated <u>off a reserve</u>. It seems implied that there is a reserve to which and on which the Indian belongs."

While at first blush it would seem that Sissons J. Has decided the question now before me, as I read the judgment he has treated the question as one of fact rather than law and although I must, and would in any event out of my respect for Justice Sissons, pay great deference to his ruling, nevertheless, if I am correct here, then he has not settled the legal point.

Again in his second decision, R. v. Gully (unreported), he treats it as a question of fact saying, "I am still firmly of the view that the prosecution has not established that he was intoxicated off a reserve."

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In so far as these two decisions go, therefore, they suggest that "off a reserve" is an element of the offence charged and that possibly had the learned Justice been required to settle the legal point he was inclined to the view that it was implicit in a charge of being "intoxicated off a reserve" that there be a reserve in existence to be off of.

The above two cases appear to be the only cases in which the Territorial Court of the Northwest Territories has been concerned with this problem.

The circumstance of these being "no reserve" appears to be found in the Yukon Territory as well, Regina, v. Peters (1967) 50 C. R. 68; 57 W. W. R 727.

In Regina v. Peters (supra) the Yukon Territory Court of Appeal was faced with the problem of whether an Indian within the meaning of The Indian Act could be prosecuted for a liquor offence under The Liquor Ordinance, R. O. Y. T. 1958, c. 67. The court held that the Ordinance was not applicabld to Indians because the Indian Act made provision for the use and possession of intoxicants by Indians. Although the judgment makes reference to the lack of reserves in the Yukon Territory there does not appear to be any direction by the court in that connection. An examination of the actual appeal book giving rise to the appeal indicates this point was not before the court.

In a second case, Regina v. Corbek (1966) 3 C. C. C. 323, Magistrate W. J. Trainor of the Yukon had occassion to discuss a charge involving an Indian found in "an intoxicated condition in a public place" also under the inapplicability of The Liquor Ordinance because of The Indian Act applying, the learned magistrate's reasons for judgment do contain the phrase: "There are no reserves in the Yukon Territory so anywhere in the Yukon Territory is off a reserve within the meaning of the Indian Act."

It would appear, therefore, that although there is a divergence of opinion to be found in the above mentioned decisions, nonotheless, the field is open and must be settled in the present case.

A review of the legislation relating to Indians and leading up to the present Section 94 therefore becomes desirable.

As early as 1886 references are found to "reserves" in the legislation, the Indian Act 1886, R. S. C. c. 43. In this statute prohibitions with respect to intoxicants and the supplying of same are found "Every one who sells...supplies...any Indian or non-treaty Indian, any intoxicant,..." (Sec. 94); "any constable may...arrest any Indian or non-treaty Indian whome he finds in a state of intoxication," (Sec. 104). The only reference (on or off) in these sections relates to a person who "opens on any reserve...a tavern house..." (Sec. 94).

Section 94 above was amended by Chapter 22, 1888, but retained the same essential language and meaning.

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In 1894, Chapter 32, a change takes place and Section 99 contains "may arrest . . . any person or Indian found gambling, or drunk . . . on any part of a reserve."

When the 1886 statute is carried forward in the 1906 Revised Statutes of Canada as Chapter 81, we find a greater area covered in respect of intoxicants, but little material change. Again it is an offence to: "sell . . . supply . . . to any Indian . . . any intoxicant" (Sec. 135 (c)); "Indian . . . has in his possession intoxicant" (Sec. 137). In this statute Section 135 (b) refers to "opens . . . on any reserve", Section 135 (c) refers to the wigwam "on reserve", and Section 139 again states: ". . . may arrest Indian found drunk . . . on any part of a reserve".

In 1914, Chapter 35, a new section 149 (2) is introduced. It has nothing to do with intoxication as such but is interesting in its reference to inciting Indians to partake in ceremonial dances and such. Part of the language is: "any Indian, in the province of Manitoba, Saskatchewan, Alberta, British Columbia, or the Territories who participates in any Indian dance outside the bounds of his own reserve".

It is to be noted that at this time the Government of Canada is referring to "outside the bounds of his own reserve" in respect to the Territories at a time when not only were there no reserves in the Territories but where there had not yet been a treaty with the Indians in the Territories (Treaty No. 11, Sikyea v. The Queen (1964) S.C.R. 642.

Chapter 26, 1918, introduces a new Section 122A in reference to enfranchisement of Indians and part of the wording is perhaps of some interest:: ss. (1) "If an Indian who holds no land in a reserve, does not reside on a reserve and does not follow the Indian mode of life, makes application to be enfranchised . . .", and ss. (3) "This section shall apply to the Indians in any part of Canada."

In respect to acquirement of land an amendment in 1922, Chapter 26, Section 196, makes reference to "may acquire for a settler who is an Indian, land as well without as within an Indian reserve".

When the 1927 Revision of Statutes, Chapter 98, came out, the old Section 137 of the 1906 Act, Chapter 81, became Section 126 but with no change in language.

The first serious "on or off" reference in the legislation appears to come in with the repeal of ss. (c) of Section 126 and substitution of a new subsection (c) as follows:

> "is found in possession of any intoxicant in the house, room, tent, wigwam, or place of abode of any Indian or non-treaty Indian whether on or off a reserve, or of any person on any reserve or special reserve, or on any other part of any reserve or special reserve;" (1936, c. 20, s. 6).

The legislation then remained unchanged until the new Act, 1951, Chapter 29 came in on September 4th, 1951. This new Indian Act which is now Chapter 149 of the R. S. C. 1952, contains the present section 94 and others.

Reading from Section 88 down to Section 96A, there is not one section that does not in some manner contain a reference to on or off or outside or from a reserve.

Nowhere in this statute is there any reference to or carry over of the phrase "who follows the Indian mode of life" contained as part of the definition of non-treaty Indian Section 2 (1), ch. 43, 1886, and carried forward in Section 135 (a), 1906, ch. 81 and in Section 122 A (1), 1918, ch. 26.

Chapter 40 of the Statutes of Canada 1956, by the repeal of Section 95 and insertion of a new Section 96A, introduces exceptions to the offences where provinces permit sales of liquor to Indians.

There can be no doubt but that The Indian Act applies throughout Canada, equally to the Northwest Territories as to the Yukon and to the provinces. Is one to say that an Indian who has always lived in the Northwest Territories where there have never been reserves is to be treated differently in the application of a section such as Section 94 than an Indian from an Alberta reserve who happens to be in the Northwest Territories on a visit—obviously off a reserve? "It is desirable that there should be uniformity of Dominion legislation." R. v. Irwin (1919) 2 W. W. R. 226 and R. v. Schmolke (1919) 3 W. W. R. 409. A court should normally put that construction on legislation that will produce the greatest harmony and the least inconsistency. City of Victoria v. MacKay (1918) 1 W. W. R. 863 and 56 S. C. R. 524.

Although normally full effect should be given to every word in a section or in a statute "yet if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eleminated." Maxwell on Statutes, Eleventh Edition, p. 228.

To apply the above basic rules of construction to Section 94 of The Indian Act it appears to me that I must read the Section as if "off a reserves" were not an essential element of the offence but rather an incidental, and so I do.

I cannot help but remark, in passing from this subject, that I find it difficult to understand how such confusion in legislation could be allowed for so long, particularly since the difficulty was clearly suggested in the judgments of Sissons, J. referred to above.

In respect to the first ground of appeal, therefore, I find against the appellant.

The second main ground of appeal is to the effect that Section 94 of the Indian Act offends the basic rights and freedoms guaranteed by

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the Canadian Bill of Rights, and particularly by Section 1 (b) . The argument presented on behalf of the Appellant is that the effect of Sections 94 and 96 taken together, by providing for a stiffer penalty (namely by a minimum penalty) and by its wider application (an offence to be intoxicated even in an Indian's own home) is placing an Indian because of his race or color in a different position to that of his fellow Canadians. The Liquor Ordinance, R. O. N. W. T. ch. 60, contains no minimum penalty and does not make it an offence to be drunk in one's own home. It is argued that this is discrimination based on race and color pure and simple.

Section 1 (a) and (b) provides:

> "1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely;
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (b) the rights of the individual to equality before the law and the protection of the law;

Again, Section 2 of the Canadian Bill of Rights provides:

> "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so contrued and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment of infringement of any of the rights or freedoms herein recognized and declared..."

The provisions contained in The Indian Act and directed to the problem of intoxiaction were all in effect before the passing of the Canadian Bill of Rights and so Section 2 above governs.

In considering this ground of appeal, which incidentally was also raised in Regina v. Peters (supra) , two cases must be considered, namely Regina v. Gonzales (1962) 37 C. R. 56; 37 W.W. R. 257; 132 C. C. C. 237; 32 D. L. R. (2d) 290, and Rovertson et al v. The Queen (1963) S. C. R. 651.

In Regina v. Gonzales (supra), the Court of Appeal of British Columbia was faced with essentially the same problem as is found in the present case, namely, the effect of possession under Section 94 of The Indian Act. Davey, J. A. , without discussing the meaning of Section 1

of the Canadian Bill of Rights, got over the problem by treating thestatute as a general Act and The Indian Act as a special Act which, in his opinion, overrode it. Tysoe J. A. (concurred in by Bird J. A.) took the position that Section 1 (b) of the Canadian Bill of Rights did not mean that every person "should have the same rights, the same duties and the same liabilities as everyone else" and further on in his judgment takes the postion that Section 1 (b) "means in a general sense that there has existed and there shall continue to exist in Canada a right in every person to whom a particular law relates or extends, no matter what may be a person's race, national origin, color, religion or sex to stand on an equal footing with every other person to whom that particular law relates or extends....".

In Attorney General of British Columbia v. McDonald (1961) 181 C.C.C. 126, the same problem was resolved by holding that Section 94 (a) of the Indian Act was not in conflict with the Canadian Bill of Rights.

It seems clear to me that if this was all then I would be bound to follow, and indeed should follow, the reasoning of the learned appeal justices above mentioned. However, there are further factors that must be taked into consideration by me in this respect.

Since the Gonzales case, however, the Supreme Court of Canada has had occasion to consider the Canadian Bill of Rights, and although the problem involved the freedom of religion, namely Section 1 (c) , the remarks of the court in that decision lead me to believe that the Gonzales case can no longer be considered as completely governing on the subject. The Supreme Court decision is Robertson et al v. The Queen (1963) S. C. R. 651.

clearly intended to protect the Indian as an aborigine but surely the force of this argument was spent when Eskimos were excluded. As it stands, therefore, this portion of the Indian Act is to me a case of discrimination of sufficient seriousness that, despite my respect for the opinions of the learned Justices of the Appeal Court of British Columbia in the Gonzales case above, I feel I must differ from them, and hold that the intoxication sections of The Indian Act "abrogate, abridge or infringe" the Canadian Bill of Rights.

When considering "effect" here I restrict the application to only those sections of The Indian Act dealing with intoxicants, the statute in large part being not discriminatory but merely providing for such things as protection of property and other rights.

Again, in the same report at page 661, Mr. Justice Cartwright, admittedly dissenting, in referring to the statement of Davey J.A. in the Gonzales case found at page 239 of the C.C.C. reports, disagrees with the learned Justice of Appeal's view. He states:

> "With the greatest of respect, I find myself unable to agree with this view. The imperative words of s. 2 of the Canadian Bill of Rights, quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the Canadian Bill of Rights. As already pointed out s. 5 (2), quoted above, makes it plain that the Canadian Bill of Rights is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is inconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail."

Under this heading of argument, counsel for the Crown, respondent, referred to the Order-in-Council No. 12 found at page 4150 of the Canada Gazette, Vol. 93, declaring that ss. (3) of Section 95 of the Indian Act should be brought into force. I cannot see how this event can assist in the present case except perhaps to show an awareness in the Government of the need to relax at least one of the Act's liquor provisions.

In the end result, therefore, the appeal is allowed and I direct that the fine and costs including security for costs for this appeal already paid, be refunded to the appellant.

I wish to thank counsel for both the appellant and the respondent for their assistance in this case.

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Among the many authorities cited to me, I should perhaps mention the following: R. v. Otokiak (1959) 30 C.R. 401; R. v. Mellon (1900) 5 Terr. L.R. 301; Rogers-Majestic Corp. Ltd. v. Toronto (1943) S.C.R. 440; R. v. Williams (1958) 12 C.C.C. 34; R. v. Shade (1951-52) 4 W.W.R. 430; R. v. Johns (1962) 133 C.C.C. 43; R. v. Cooper (1925) 2 W.W.R. 778; Lankin's Canadian Constitutional Law, 3rd Ed., p. 976; (1964) 42 C.B.R. p. 147 - 156; and Tornopolsky on The Canadian Bill of Rights, comm. p. 208.

Since an appeal from this decision is almost inevitable, it is my hope that Crown Counsel's generous undertaking to remand all further prosecutions under the Indian Act will be continued until the appeal can be heard.

W.G. Morrow

June 5, 1967.
Yellowknife, N.W.T.

O. J. T. Troy, Esq.,
Counsel for the respondent.

Brian Purdy, Esq.,
Counsel for the appellant.