LOUIS WOLVERINE and ALBERT BERNARD (Appellants) V. THE QUEEN (Respondent)

[Indexed as: **R. V. Wolverine**]

Saskatchewan Court of Appeal, Talus, Vancise and Gerwing JJ.A., May 3, 1989

D.M. Brown, for the Crown
R. Cherkewich, for the appellants

The accused, both treaty Indians, were convicted of unlawfully hunting in a game preserve contrary to s.5(1)(a) of the Saskatchewan *Wildlife Regulations, 1981.* The trial judge found that there was a bona fide intent to create the game preserve and to enhance the big game population in the area and not to restrict Indian hunting rights as guaranteed by para. 12 of the Natural Resources Transfer Agreement. An appeal to the Court of Queen's Bench was dismissed. The Court of Queen's Bench held that even if access was permitted for trapping, this did not include access for hunting under para. 12 (see [1987] 3 C.N.L.R. 124). The accused appealed to the Court of Appeal.

Held: Appeal dismissed.

1. There was evidence to support the conclusion of the trial judge that the game preserve was created for a bona fide purpose. Game cannot be regarded as a limitless reserve. Conservation and management of fish and game are required if they are to be protected from extinction and preserved for the benefits of Indians and all Canadians.

2. Access for trapping does not provide a foundation for access for hunting. The phrase "right of access" in para. 12 is to be interpreted as if "hunting, trapping and fishing" are read disjunctively, otherwise to maintain game preserves it would be necessary to eliminate all trapping and fishing, in addition to hunting. Categorizing "hunting"' "trapping," and "fishing" as separate entities supports the interpretation of the trial judge.

3. "Trapping" does not in common parlance include the active mode of following or searching used in the definition of hunting.

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GERWING J.A. (for the Court): The two accused were convicted of unlawfully hunting in a game preserve contrary to s.5(1)(a) of the *Wildlife Regulations, 1981,* and that conviction was affirmed in the Court of Queen's Bench [[1987] 3 W.W.R. 475, [1987] 3 C.N.L.R. 124, 59 Sask.R. 22].

The material facts were largely agreed to below as follows:

> 1. Messrs. Wolverine and Bernard were hunting at the time, date and place stipulated in the Appendix to Regulation *25,* under the *Wildlife Act,* Part III thereof.
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> 2. Messrs. Wolverine and Bernard shot and killed a moose 317 feet from the centre line of Highway No.155, North, within the area scheduled as a Road Corridor Game Preserve.
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> 3. Highway No. 155 is defined by Regulation 25 of the *Wildlife Act* as a Road Corridor Game Preserve.
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> 4. Messrs. Wolverine and Bernard are Treaty Indians subject to Treaty #10 and at all times material were hunting for food.
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> *5.* There was no evidence to suggest that Messrs. Wolverine and Bernard were hunting in an unsafe manner.

The points raised by the appellants on this appeal are:

> 1. Is the Highway 155 Corridor Game Preserve as defined in Part III of the Regulations a bona fide game preserve? and
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> 2. Did the accused have the right of access to hunt in the game preserve?

The appellants were charged under s.5(1) of the Regulations which reads as follows:

> 5(1) No person shall, without a licence for the purpose:
>
> > (a) hunt, poison, molest or disturb any wildlife within...
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> a game preserve, wildlife refuge, wildlife management unit, regional park, provincial park, protected area or recreation site.

The appellants contend that the game preserve was not created in good faith, and much evidence before the trial judge centered on this question. The appellants argued that the preserve was created to limit the Indian hunting rights that are preserved in para. 12 of the Saskatchewan Natural Resources Transfer Agreement. That paragraph reads as follows:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

The trial judge found on this point that there was a *bona fide* intent to create a game preserve:

> It is clear from the evidence of the three Crown witnesses that the harvest of big game, especially moose, was high along the area of the highway which now adjoins the Corridor. Game Preserves of this nature have been successful in restoring moose populations in areas near them. There are other means of reducing the harvest of moose, but the biologist called by the Crown gave the opinion, and I accept it, that Road Corridor Game Preserves have advantages over other alternatives. He stated that especially in the wintertime moose are drawn to roadways because of enhanced feeding opportunities created by the roadway and at that time of the year they are particularly susceptible to hunting because of their docility. I am satisfied from the whole of the evidence that the enactment creating the Road Corridor Game Preserve is aimed at preserving and enhancing the big game population in the area and only incidently reduces the extent of Treaty Indian hunting for food.

This court held in *R.* v. *Ross* (1986), 47 Sask. R. 317 at 318:

> The appellant contends that the Crown did not create the road corridor game preserve for bona fide purposes, but rather created it for the purpose of restricting Indian hunting. That contention does not conform to the evidence. The trial judge expressly found that the Crown acted bona fide. There is ample evidence to support such finding and we decline to interfere with it. This was not an attempt by the Crown to do indirectly what it could not do directly, that is, interfere with Indian hunting rights which are guaranteed by the game laws paragraph.

Similarly here I am of the view that an analysis of the evidence of the wildlife officers and the biologist amply support the conclusion of the trial judge with respect to the reason for the creation of the preserve.

In addressing the issue of Indian hunting rights it must be borne in mind that game cannot be regarded as a limitless reserve. Much has changed since the treaty was executed and if at that time game and fish were regarded as limitless resources such is no longer the case. Conservation and management of fish and game resources are required if they are to be protected from extinction or extirpation and preserved for the benefit of Indians as well as other Canadians. This principle was recognized by the Supreme Court of Canada in *Jack* v. *R.,* [1980] 1 S.C.R. 294, [1979] 5 W.W.R. 364, 100 D.L.R. (3d) 193, [1979] 2 C.N.L.R. 25 where Dickson J. said at p.313 [p.41 C.N.L.R.]: “Conservation is a valid.. . concern.” In the light of the trial judge's clear findings of fact that the conservation measures under attack were reasonably justified as necessary for the proper management and conservation of game -particularly moose in this case - the principles articulated in *R.* v. *Jack, supra; R.* v. *Eninew* (1983), 7 C.C.C. (3d) 443, 1 D.L.R. (4th) 595, [1984] 2 C.N.L.R. 122, 28 Sask. R. 168 (Q.B.); and *R.* v. *Agawa* (1988), 65 O.R. (2d) *505,* 53 D.L.R. (4th) 101, 43 C.C.C. (3d) 266, [1988] 3 C.N.L.R. 73 are apposite.

Turning to the second question, the Queen's Bench judge below followed *R.* v. *Masuskapoe* (1986), 47 Sask. R. 27, [1987] 1 C.N.L.R. 98 to conclude that, even if access were permitted for

trapping, this did not include access for hunting.

The appellants argued that based on the decision of this court in *R.* v. *Sanderson* (unreported) [reported [1987] 1 C.N.L.R. 113] and the judgment of Dickson J. (as he then was) in *R.* v. *Mousseau,* [1980] 2 5.CR. 89, 110 D.L.R. (3d) 443, [1980] 4 W.W.R. 24, [1980] 3 C.N.L.R. 63 the trial judge ought to have concluded that the term "hunting" included "trapping," and, thus, based on the probable evidence of trapping in the area, ought to have concluded that there was a right of access within para. 12 of the Transfer Agreement.

The findings of fact of the trial judge on this point are as follows:

> The two conservation officers who testified admitted that trapping and fishing are permitted in the Road Corridor Game Preserve. Neither knew for certain whether any trapping took place, however, there are four or five trapper's cabins within the Corridor, and it is probable that trapping occurs there.

In *R.* v. *Masuskapoe,* Halvorson J. after hearing similar argument based on the comment of Dickson J. in *R.* v. *Mousseau,* concluded that the term "right of access" was not to be construed so that right of access for trapping permitted the right of access for hunting. The quote of Dickson J. [p.69 C.N.L.R.] relied upon by the appellant in this case is as follows:

> Where a right of access to hunt is recognized in respect of any lands, that right is general for Indians and cannot be restricted by provincial legislation imposing seasonal restrictions, bag limits, licensing requirements, or other such considerations: the important criterion is hunting for food.

The appellants similarly rely on a quote from *R.* v. *Sanderson* in this court which held [at p.129 C.N.L.R.] that the proper definition of hunting is the definition adopted by the Supreme Court of Canada in *Prince and Myron* v. *The Queen,* [1964] S.C.R. 81 (at page 84):

> to follow or search for *game* for the purpose and with the means of capturing or killing [it.] [emphasis in original]

The appellants rely on these two comments to suggest that Halvorson J. was incorrect in *Masuskapoe* and the Queen's Bench judge here was wrong to follow him.

Halvorson J., in my view, correctly held that *Mousseau* was not intended to decide the issue before us here. He said at p.28 [pp.100-101 C.N.L.R.]:

> In support of this submission, the accused relies on the meaning attributed to "right of access" by Dickson J. (as he then was) in *R.* v. *Mousseau,* [1980] 2 S.C.R. 89, [1980] 4 W.W.R. 24, 31 N.R. 620, 3 Man. R. (2d) 338, 52 C.C.C. (2d) 140, [1980] 3 C.N.L.R. 63 and *R.* v. *Sutherland, Wilson and Wilson, supra.* In *Sutherland* he said at page 295 (C.C. C.):
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> > In reasons for judgment recently delivered in *R.* v *Mousseau* (May 6, 1980) [since reported 52 C.C.C. (2d) 140, [1980] 4 W.W.R. 24, 31 N.R. 620], I have expressed the view that "right of access" as used in para. 13 (identical to paragraph 12 in the Saskatchewan Agreement) means "access for the purpose of hunting, trapping and fishing game and fish."
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> According to the accused, this means if anyone has access to occupied Crown lands for the purpose of *any* of hunting, trapping, or fishing, then Indians can participate on those lands in *any* or all of the pursuits of hunting, trapping or fishing, without regard for provincial wildlife laws. That is, in the instant case, the access for trapping opens the door to permit hunting as well.
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> Not surprisingly, the Crown argues for a much more restrictive construction of the words of Dickson C.J. The Crown contends the phrase means simply that, if there is access for hunting, then the unlimited right of Indians to hunt for food is invoked, and if there is access for trapping, the Indians may trap, without compliance with wildlife regulations That is, access for trapping does not lay a foundation for hunting.
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> It is useful to look more extensively at the judgment of Dickson C.J. in *Mousseau, supra,* and to bear in mind in that case, the accused shot a deer from a public highway and then unsuccessfully argued that because he had access to a public highway, this right of access permitted him to hunt thereon. Dickson C.J. rejected this argument, saying at page 69:

> The position of the respondent Mousseau is simply put. It is his main submission that Indians in Manitoba have a right of access to public roads and road allowances and, therefore, the Indians may lawfully hunt thereon....
>
> The respondent's argument of a limited right of access generally, unrelated to hunting, giving rise to, and providing foundation for, an unlimited right of access to hunt under para. 13, is untenable. Paragraph 13 cannot be read as meaning that whenever an Indian can enter unto land for a purpose unrelated to hunting, say, for employment or recreation, he can also hunt..
>
> The meaning given to the word "access" in the proviso must be limited to the subject matter of the whole paragraph in which the proviso appears, namely, hunting by Indians. In my opinion, the Indians have the right to hunt, trap, and fish, game and fish, for food at all seasons of the year on:
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> (a) all unoccupied Crown lands; (b) any occupied Crown lands to which the Indians, or other persons, have right of access by virtue of statute or common law or otherwise, for the purpose of hunting, trapping and fishing; (c) any occupied private lands to which the Indians have right of access by custom, usage or consent of the owner or occupier, for the purpose of hunting, trapping, or fishing. See *R.* v. *Little Bear* (1958), 122 C.C.C. 173. Where a right of access to hunt is recognized in respect of any lands, that right is general for Indians and cannot be restricted by provincial legislation imposing seasonal restrictions, bag limits, licensing requirements, or other such considerations:

Both counsel find solace in these comments. The Crown maintains its argument is borne out by the use of the words "the meaning given to the word 'access' . . . must be limited to the subject matter... hunting." It is submitted that support for the position taken on behalf of the accused is to be found in the phrase A right of access, by virtue of statute or common law or otherwise, for the purpose of hunting, trapping *or* fishing."

In my opinion, it is futile to pursue this line of argument. The comments in *Mousseau* were never intended to fit the issue before me, and no amount of rationalization will make them fit.

Halvorson J. then said that the correct approach was to interpret s.12 liberally as mandated by Dickson C.J. in *R.* v. *Sutherland,* [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 53 C.C.C. (2d) 289, [1980] 3 C.N.L.R. 71.

This court adopted that approach in *R.* v. *Sanderson, supra* where this court said [pp.120-121 C.N.L.R.]:

> Mr. Justice Dickson [in *R.* v. *Sutherland],* as he then was, said this (in reasons for judgment concurred in by the remaining members of the Court) [p.76 C.N.L.R.]:

The Indian's right to hunt for food under paragraph [12] is paramount and overrides provincial game laws regulating hunting and fishing. The province may deny access for hunting to Indians and non-Indians alike but if, as in the case at bar, limited hunting is allowed, then under paragraph [12] nondangerous *(Myron* v. *R.,* [1976] 2 S.C.R. 137) hunting for food is permitted to the Indians, regardless of provincial curbs on season, method or limit: *R* v. *Wesley,* [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337; *Prince* v. *R.,* [1974] S.C.R. 81; *R.* v. *MacPherson,* [1971] 2 W.W.R. 640.

He went on to say that the proviso of paragraph 12 should be given a "broad and liberal construction," and.

> If there is any ambiguity in the phrase "right of access" in paragraph [12] of the memorandum of agreement, the phrase should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiary of the rights assured by the paragraph.

Halvorson J. then went on to apply this standard as follows at p.30 [pp.102-103 C.N.L.R.]:

> What interpretation of "right of access" would be most beneficial to the Indians in the instant case?
>
> At first blush, it would seem that it would favour the Indians to construe the phrase so that the right of access to hunt could be derived from a right of access to trap, as this might

> increase the areas where Indians could hunt for food. Further consideration leads me to the conclusion the opposite would be true.
>
> If access for trapping can provide a foundation for hunting, then it seems to me it would follow that access for fishing would likewise open the gate for hunting. It is not difficult to foresee, from this interpretation, consequences detrimental to Indian hunting rights. To maintain game preserves, it would be necessary to eliminate all trapping and fishing therein, in addition to hunting. In my opinion, this has great potential for unanticipated, adverse ramifications not only to Indian hunting rights but also to their trapping and fishing privileges.
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> Unfortunately, this was an unsatisfactory case in which to test the argument that access for trapping supports access for hunting. The evidence regarding trapping in the corridor game preserve was skimpy because the main thrust before the trial judge was to establish whether or not the corridor was a *bona fide* game preserve. There was no evidence as to who operates the traplines in the corridor, or how they came into effect, or whether the trapping is for food or commerce, or both, or whether it makes any difference in the result.
>
> I would interpret the phrase "right of access" in paragraph 12 as if "hunting, trapping and fishing" were compartmentalized or read disjunctively. Hunting for food therefore, is permitted only where there is a right of access for the purpose of hunting, and hunting is not permitted where the right of access is only for the purpose of trapping or fishing. I am satisfied this interpretation resolves in favour of the Indians the doubt arising from the ambiguity in the phrase "right of access."

In my view, Halvorson J. was correct in saying *Mousseau* was not directed to the point before him. Similarly in my view *Sutherland,* cited by the appellant, is not on point here, dealing in ratio with the question of the right of public access. The definition of hunting given, and cited by the appellant as noted above, was peripheral and was not intended to decide if "hunting" included trapping or fishing.

The real question here in my view is that posed by Halvorson J. in *Masuskapoe.*

The clear wording of para. 12 of the Agreement in categorizing "hunting," "trapping," and "fishing" as separate entities supports the interpretation of the trial judge.

Also trapping does not in common parlance include the active mode of "following" or "searching" used in the definition of hunting in *R.* v. *Prince,* [1964] S.C.R. 81, 46 W.W.R. 121, [1964] 3 C.C.C. 1, which was approved in *Sutherland, supra.*

The dictionary used by the Supreme Court of Canada in *Prince* v. *R.* to define "hunting" defines "trap" as follows:

> ... to catch or take in or as if in a trap or snare by skill, craft, or trickery.

In *R* v. *McKinney,* [1979] 2 W.W.R. 545, 46 C.C.C. (2d) 566, 98 D.L.R. (3d) 369, 2 Man. R. (2d) 403, [1979] 2 C.N.L.R. 87, the Manitoba Court of Appeal said [at p.90 C.N.L.R.], referring to comments of Dickson J. in obiter in *Myran et al.* v. *The Queen,* [1976] 2 S.C.R. 137, [1976] 1 W.W.R. 196, 58 D.L.R. (3d) 1:

> It should be noted that the dicta of Dickson J. affords helpful guidance in the "normal" case when he says the question of access will have to be decided in each particular case as a question of fact and not one of law. No doubt that is so where a right of access depends on the casual permission of an occupant. There may, of course, be other cases where the issues involve law as well as fact. One may think of cases where a right of access depends on a title such as that of a shooting tenant. Since the right to hunt at common law is normally a profit ~ prendre, permission to hunt over land may in some cases be more than a mere licence, but a licence coupled with an interest. Moreover, rights of access based on custom or user may well raise important questions of law as well as fact.

The Supreme Court of Canada adopted the reasons of the Manitoba Court of Appeal, [1980] 1 S.C.R. 401, [1981] 1 W.W.R. 488, 50 C.C.C. (2d) 576, 106 D.L.R. (3d) 494n, [1984] 2 C.N.L.R. 113, 2 Man. R. (2d) 400, 31 N.R. 564.

The general interpretation of the terms suggests that, contrary to the appellant's submission, the term "hunting" in s.12 does not include the term "trapping."

Further if one were to proceed beyond this ordinary principle of interpretation and apply the liberal construction, beneficial to Indians, mandated in *R.* v. *Sutherland, supra,* I am of the view that the reasoning of Halvorson J. is correct.

Accordingly, I am of the view that the Queen's Bench judge below was correct in following the decision of *R.* v. *Masuskapoe.*

For these reasons the appeal is dismissed.