R. v. SANDERSON, SANDERSON, BURNS AND MOOSTOOS

Saskatchewan Court of Appeal, Cameron, Wakeling and Gerwing JJ.A., May 2, 1986

J. Ron Cherkewich, for the appellants
C. Snell, for the Crown

The appellants, treaty Indians, appealed from a decision of the Court of Queen's Bench upholding their convictions for unlawfully using a spotlight for the purpose of hunting, contrary to s.37 of the Wildlife Act, S.S. 1979, c. W-13.1. The four appellants were observed driving slowly along a road at night, shining a light along the ditches and onto the adjoining land, and, when stopped were found to have a number of deer in their possession.

It is a rule of the common law that public roads are occupied Crown land to which there is not, as a matter of general principle, a right of access for the purpose of hunting. However, hunting is permitted on certain other roads such as fireguard roads and summer bush roads.

The road upon which the accused were found hunting was an "extension of a grid road" or an "access road used by the public". It was neither a provincial highway nor a grid road. The trial judge found the appellants guilty of hunting on a road.

Held: Appeal allowed, convictions set aside and a new trial ordered.

1. The trial judge ignored evidence of a wildlife officer that hunting was permitted upon this road during open season. Where hunting is permitted during open season, treaty Indians may hunt for food during any season.

2. One does not necessarily have to set foot upon property to be found hunting thereon. The appellants had no access to the adjoining land for the purpose of hunting. It is a question of fact whether, in shining their light onto the adjoining land, the appellants were hunting. Neither the trial judge nor the Summary Conviction Appeal Court addressed this issue. Consequently, a new trial was ordered rather than an acquittal entered.

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CAMERON J.A.: This is an appeal from a decision of the Court of Queen's Bench upholding the convictions of the four appellants for unlawfully using a spotlight for the purpose of hunting, contrary to s.37 of the Wildlife Act, S.S. W-13.1.

The issue is whether, in the circumstances in which they were apprehended, the appellants, being Treaty Indians, were guilty of an offence. They were observed driving slowly along a road at night, shining a spotlight along the ditches and onto the adjoining land, and, when stopped were found to have a number of dead deer in their possession.

Treaty Indians are entitled to hunt for food on unoccupied Crown land as well as any other land to which they may have a tight of access for that purpose, and they may do so during all seasons of the year, at all times of day or night, and by any non-dangerous method, without regard for provincial game laws: R. v. Sutherland, [1980] 2 S.C.R. 451, 113 D.L.R. (3d) 374, [1980] 3 C.N.L.R. 71 (S.C.C.); R. v. Mousseau, [1980] 2 S.C.R. 89, [1980] 4 W.W.R. 24, [1980] 3 C.N.L.R. 63. This is their right under paragraph 12 of the Natural Resources Agreement of 1930 made by the Governments of Canada and Saskatchewan, and confirmed by the Saskatchewan Legislature (1930 (Sask.) c.87), as well as by the Parliaments of Canada (1930 (Can.) c.41) and the United Kingdom (British North America Act, 1930). Paragraph 12 reads thus:

> 12. In order to secure to the Indians of the Province 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 any other lands to which the said Indians may have a right of access. (Emphasis added)

This paragraph was considered by the Supreme Court of Canada in R. v. Moosehunter, [1981] 1 S.C.R. 282, 59 C.C.C. (2d) 193, [1981] 1 C.N.L.R. 61. Justice Dickson, as he then was, delivered judgment for the Court, saying [pp.62-63 C.N.L.R.]:

The reason or purpose underlying paragraph 12 was to secure to the Indians a supply of game and fish for their support and subsistence, and clearly to permit hunting, trapping, and fishing for food at all seasons of the year on all unoccupied Crown lands and lands to which the Indians had access. The Agreement had the effect of merging and consolidating the treaty rights of the Indians in the area and restricting the power of the provinces to regulate the Indians' right to hunt for food. The right of the Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not.

I. The Trial

The appellants were tried by Judge Gosselin who in clear and concise reasons for judgment found them guilty, saying:

> On September 27th, 1985, at approximately 10:30 p.m., the four accused were hunting in the Horseshoe Band area, approximately 19 miles north of Kinistino, Saskatchewan. They were travelling in a southerly direction on a road in a three quarter ton truck. They were scanning adjoining fields with a spotlight. When intercepted by wildlife officers, they refused to stop. After being chased across several fields, their truck broke down and they were caught.
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> There were five white tailed deer in the back of their truck. Three were dead, and two wounded but still alive. The accused also had in their possession two rifles, one shotgun, ammunition and a spotlight. I have no hesitation in finding that the four accused were hunting on a "road". They were not hunting on the private land beside the road. I do not find shining a spotlight on private property to constitute hunting on that property. For a further explanation see Her Majesty the Queen v. Cote et al., a decision of this Court, October 3, 1983 [[1984] 2 C.N.L.R. 113], upheld on appeal by Sirois J. (Sask.Q.B.) January 25, 1984.
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> The four accused are Treaty Indians. On the night in question they were hunting for food. Because they were Treaty Indians hunting for food, it was lawful for them to hunt at night with the use of a spotlight in any area to which they have a "right of access" to do so. (*The* Natural Resources Agreement, s.12).
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> In the present case the accused were hunting on a "roadway". The question before this Court is whether or not this was a road to which they had a right of access for the purpose of hunting.
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> They were hunting in an area where big game was likely to be found.
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> The road in question is the main arterial road running north of Kinistino, Saskatchewan. The first sixteen miles of this road north of Kinistino is described as a municipal "grid road". The portion of the road where the accused were hunting is not classified as a grid. It is however, described as a normal gravel road with gradually sloping ditches. It is basically an access road used by the public. It is an extension of a municipal grid road and as such it is a roadway to which the public have a right of access.
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> I find a marked distinction between this and a "dyke road" which I found could be used for hunting in the Cote case (supra). One of the prime purposes of the "dyke road" in the *Cote* case was that it was used for hunting.
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> I find a distinction between the roadway in the present case and the "fireguard road" in Regina v. Bruyere and Courchene, 135 D.L.R. (3d) 763 [[1982] 2 C.N.L.R. 166] (Man. C.A.) or the "summer bush road" in *Her Majesty the Queen v. John Kakakaway*, (June 3, 85 Sask. C.A.).
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> I find it to be a road similar to the road described in Her Majesty The Queen v. Eldon Bellegarde (June 3, 1985 Sask. C.A.). It is therefore not "occupied Crown land to which persons have a right of access for the purpose of hunting" and "does not fall within the exception exemplified by R. v. Bruyere (supra)".
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> It is therefore my opinion that the accused were hunting on a public roadway and did not have a right of access to hunt there. I find that the decision of the Saskatchewan Court of Appeal in the case of Her Majesty The Queen v. Joe Merasty (March 24, 1983) [[1984]

1 C.N.L.R. 153] where it held that Treaty Indians did not have a right to hunt on a public highway is directly applicable to this case.

I therefore find all four accused guilty as charged.

The learned trial judge reached two important conclusions of mixed fact and law:

1. The appellants were hunting on a roadway to which they had no right of access for that purpose.

2. They were not hunting on the adjoining privately owned lands.

II. The Appeal to the Queen's Bench

The appellants appealed their convictions to the Court of Queen's Bench pursuant to s.748 of the Criminal Code, R.S.C. 1970, c.C-34 contending they had a right of access to the roadway for the purpose of hunting, and, that being the case, should not have been convicted.

The Summary Conviction Appeal Court Judge dismissed the appeals, saying:

The learned trial judge found as a fact that the accused were hunting on a road and that the road was not "occupied Crown land to which persons have a right of access for the purpose of hunting". It cannot be said that the findings by the trial judge are not supported by the evidence, or that his conclusions are so clearly wrong as to make his decision unreasonable. The appellants [have] therefore failed to come within the provisions of s.613(1)(a)(i) of the Code: see R. v. Andres, [1983] 2 W.W.R. 249.

Given the trial judge's finding of fact, the appellant has not shown an error by the trial judge on a question of law as provided in His conclusions in law were based on R. v. Mousseau; R. v. Merasty; R. v. Bellegarde.

Applying the facts as he found them to the applicable law, he could have reached no conclusion other than that the accused were guilty as charged.

III. The Present Appeal

The appeal to this Court is taken pursuant to s.771 of Criminal Code on the ground the Summary Conviction Appeal Court Judge erred in law in two respects which may be summarized thus:

1. He applied the principle of R. v. Mousseau (there is no common law right of access to the roads for the purpose of hunting) rather than that of R. v. Bruyere and Courchene, R. v. Kakakaway, and R. v. Bellegarde (where hunting along a roadway is permitted, there is a right of access for that purpose).

2. In determining whether the verdict was reasonable or could be supported by the evidence, as he was required to do pursuant to s.613(1)(a)(i) of the Criminal Code, the summary conviction appeal court judge failed to have regard for critical testimony of a wildlife officer to the effect the public had access to the road in issue for the purpose of hunting.

1. The evidence of access

The evidence which is said to have been overlooked on the appeal to the Court of Queen's Bench is that of Mr. John Debrun, a wildlife officer. In cross-examination, he testified as follows:

Q. And you are aware that the roadways in this particular area where you met Mr. Moostoos are used for the purpose of looking for game?

A. Yes.

Q. And hunters during the various hunting seasons, including the time of year when these individuals were stopped, September 27th, would be entitled to use the roadways to look for wildlife in the area?

A. Yes.

Q. And if you saw, for instance, a hunter, a non Indian hunter. a licensed hunter, in this particular area on the roadway, obviously looking for something to kill, would any enforcement proceedings be taken with respect to that individual cruising up and down the roads?

A. The individual would more than likely be checked, and then depending on the time of day, he is entitled to hunt during the hours specified in the game synposis. Yes.

Q. And let's say he was within the proper hours, then it would be quite permissible for him to continue on up and down this road looking for wildlife?

A. Yes.

Q. And let's say he saw some wildlife in the ditch of the road that you first observed Mr. Moostoos' vehicle on and you saw the same hunter stop his vehicle, get out of his vehicle and either with his bow or with his rifle shoot a deer in the ditch of that particular road, would you take any enforcement proceedings?

A. If he is shooting from the roadway?

Q. No. He is off the roadway standing on the shoulder in the ditch, shooting the deer in the ditch.

A. No, there would be no proceedings taken.

This evidence, coupled with the fact the province has, by law, prohibited certain aspects of hunting in relation to certain public roads but left other aspects and other roads alone (including those of this case), is said to demonstrate that the public had access to the road in issue during open hunting season for the purpose of hunting. And once any hunting is permitted then all hunting by Indians is permissible as long as they are hunting for food. In support of this submission counsel for the appellants referred us to R. v. Sutherland (S.C.C.) and R. v. Bruyere and Courchene (Man.C.A.) as well as two recent decisions of this Court: R. v. Kakakaway and R. v. Bellegarde (June 3, 1985). These and other cases, along with R. v. Mousseau, require careful consideration.

2. The principles governing access

(a) The general position

R. v. Sutherland arose as a result of two Treaty Indians having been apprehended in a Manitoba wildlife management area while hunting for food with the aid of spotlights. They were charged with unlawfully hunting at night, using a light for that purpose, but were eventually acquitted. Their acquittal was based on a finding that, pursuant to the Natural Resources Agreement 1930, they had a "right of access" to the lands in question for the purposes of hunting, trapping, and fishing, and, that being the case, were not subject to provincial game laws. They were held to have that right of access essentially because the public was permitted, by law, to hunt in the area from time to time. Mr. Justice Dickson, 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] non-dangerous (Myran 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 (Man.C.A.).

He went on to say that the proviso of paragraph 12 should be given a "broad and liberal construction", and [at p.80 C.N.L.R.]:

> 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.

(b) The right of access re roads: R. v. Mousseau

The Supreme Court again considered the hunting rights of Indians -- this time in relation specifically to roads -- in R. v. Mousseau, a case much like the one before us. There a Treaty Indian was charged under the Wildlife Act of Manitoba with (i) unlawfully hunting deer during closed season, and (ii) hunting at night using a light. He was driving along a provincial road after dark and out of season when he spotted a deer crossing the road. He stopped the car, and, with the aid of a handlight, located the deer. and shot it in the ditch. As he was dressing the animal the police came by and charged him. He was later convicted, buy the Manitoba Court of Appeal, in a split decision, set aside the convictions. On further appeal to the Supreme Court the convictions were restored. Mr. Justice Dickson again delivered judgment for the Court. After first noting that there was nothing in the agreed statement of facts upon which the case was tried enabling the Court to determine whether the public had a right of access to roads in Manitoba to hunt in open season, and that the Court was "thrown back, then, upon the common law", he said [p.70 C.N.L.R.]:

> In my view, hunting is not one of the purposes for which to ads are made available and accessible for the use of the public. I agree with Mr. Justice Monnin when he stated in the instant case:
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> > A public road in Manitoba is occupied Crown land. Citizens, including Indians, have a right of access to public roads and road allowances but such right is limited to ingress and exgress, to travel thereon and to movement thereon but does not extend to hunting thereon. Therefore it is not land to which Indians have a right of access for the purpose of hunting.

Relying on R. v. Mousseau, this Court upheld a conviction of a Treaty Indian charged with unlawfully using a spotlight for the purpose of hunting contrary to s.37 of the Wildlife Act. The case was R. v. Merasty, [1984] 1 C.N.L.R. 153, and it too was tried on an agreed statement of facts. There the accused drove slowly along a grid road at night shining a spotlight up and down the ditches and onto the adjacent fields. The Court held that he had no right of access to the road for the purpose of hunting, and had, therefore, been properly convicted.

This Court also applied R. v. Mousseau in two other cases: R. v. Standingwater, [1983] 3. W.W.R. 766, [1983] 3 C.N.L.R. 153 and R. v. Dillon (November 5, 1984, unreported at trial: [1984] 35 Sask. R. 68) [[1984] 3 C.N.L.R. 148 (Sask.Prov.Ct.), rev'd [1984] 4 C.N.L.R. 94 (Sask.Q.B.)]. They were also dealt with on agreed statements of fact. In both cases, Treaty Indians had been charged with unlawfully shooting moose out of seas on. In each case the accused had fired a shot while standing on a highway. Standingwater fired onto adjoining private land, killing the moose there, while Dillon shot his in the ditch. Both were convicted. The convictions were upheld by this Court on the ground the common law did not afford a right of access to the highways of the province for the purpose of hunting, and, that being the case, the Indians were subject, on these occasions, to the province's game laws.

The agreed statements of fact upon which all of these cases were decided, including R. v. Mousseau, were silent about whether the public, during open hunting season, might in fact have used the roads in issue for the purpose of hunting, and might actually have had some rights of access for that purpose. In light of that, the cases are said to be limited to their own facts and distinguishable from this and other cases in which evidence touching such access was called.

(c) R. v. Bruyere and Courchene: the evidence cases

Before considering the decision of the Manitoba Court of Appeal in R. v. Bruyere and Courchene, in which evidence was called to show that people were permitted to hunt along the road in issue, reference should be made to two Saskatchewan cases which preceeded it: R. v. Fiddler, [1981] 2 C.N.L.R. 104 (Prov.Ct.) and R. v. Desjarlais, [1980] 3 C.N.L.R. 89 (Prov.Ct.), [1981] 3 C.N.L.R. 105 (Sask. C.A.). In both cases the accused, Treaty Indians hunting for food after dark, were charged with using a spotlight for the purpose of hunting, contrary to s.37 of the Wildlife Act. Richard Fiddler, while standing on the edge of a rural dirt-road, and with the aid of a spotlight, shot and killed a deer on land adjoining the road. He was acquitted. Joey Desjarlais did not fire a shot, but, while on a similar road, shone a spotlight onto the adjoining lands for the purpose, he said, of locating deer, intending should he locate one, to "freeze" and shoot it. He was convicted.

In Fiddler, Judge Seniuk, in carefully written reasons for judgment, found that the accused had a right of access for the purpose of hunting (i) to the adjoining land (because it was not posted in accordance with the Act); and (ii) to the roadway (since it was an offence to discharge a firearm along or across the travelled portion of a highway or grid road but not along or across rural dirt road, there existed an implied right of access to the road in issue for the purpose of hunting).

In Desjarlais, which was decided less than two weeks later, Judge Smith, in equally careful reasons for judgment, found that even though the adjoining lands were not posted, and that members of the public, admittedly, had been known to use the road with impunity for the purpose of hunting during open season, the accused did not have access for that purpose to either the adjoining land or the road. He held that sections 38(6) and 39 of the Act made it clear that the accused did not have a right of access to the land. These sections provided, respectively, that non-posting did not amount to implied consent to enter, and that an occupier owed no higher duty to a hunter than to a trespasser. As for the roadway, he concluded that since section 28 of the Act prohibited hunting other than at the times and in the places and manner prescribed by the Act or the regulations, neither of which expressly provided a right of access to roads for the purpose of hunting, the accused did not have such a right.

An appeal in Desjarlais by way of stated case was allowed by this Court (Culliton C.J., Woods and Hall JJ.A.) on February 25, 1981. The questions submitted for the determination of the Court were these:

> 1. Did the Court err in law in holding that Joey J. Desjarlais, a treaty Indian, could have no right of access to a road allowance for the purpose of hunting wildlife for food?
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> 2. Did the Court err in law in holding that by virtue of subsection 38(6) and Section 39 of The Wildlife Act, Joey J. Desjarlais, a treaty Indian, could have no right of access to unposted private land for the purpose of hunting wildlife for food?

The Court, while giving no reasons for doing so, answered "yes" to each of these questions.

Whether, on the issue of access to the roadway for hunting purposes, Fiddler was brought to the Court's attention, seems unlikely--otherwise the conflict in respect of that issue between Fiddler and Desjarlais likely would have been resolved. But certainly the Fiddler decision is consistent with that of this Court in Desjarlais.

As for the other issue--access to the adjoining lands--the Court appears, despite intervening amendments to the Act, including 9-9.38(6), to have reaffirmed the right of Indians to hunt for food in any season, at any time of day, on unposted private land, as it had earlier decided in R. v. Tobacco, [1913] 1 W.W.R. 545, 4 Sask.R. 380, [1980] 3 C.N.L.R. 81.

Since then, however, this Court (Hall, Tallis and Vancise JJ.A) decided R. v. Horse, 14 C.C.C. (3d) 555, [1984] 4 C.N.L.R. 99, holding that in the absence of custom or usage to the contrary a treaty Indian has no right of access to private land for the purpose of hunting, unless he has the consent, express or implied, of the owner or occupier. The Court held that s. 38(6) of the Act (which does not appear in the meantime to have materially changed) "makes it abundantly clear that the failure to post land is not sufficient to imply consent to enter on the land or imply a right of access": per Vancise J.A. at p.561 [p.105 C.N.L.R.]. Reference may also be had to R. v. Baptiste (1955), 40 Sask. R. 250, [1986] 1 C.N.L.R. 61, another recent decision of this Court (Brownridge, Wakeling and Gerwing JJ.A.) to the same effect. R. v. Horse is under appeal to the Supreme Court of Canada, and unless that Court should determine otherwise, the law in this jurisdiction is to be taken as that expressed in R. v. Horse and R. v. Baptiste rather than which may be implied from the answer to the second of the questions in the earlier case of R. v. Desjarlais.

The answer, however, to the first of the questions in R. v. Desjarlais remains significant. Whether the Court may be said to have held, as did Judge Seniuk in R. v. Fiddler, that, since provincial legislation prohibits hunting by certain means on certain roads, there must exist a general right of access to public roads for the purpose of hunting where no prohibition exists, is not altogether clear; but certainly that is its direction.

This broad question of whether, apart from the general common law principle to the contrary, there may in appropriate circumstances exist a right of access to a roadway for the purpose of hunting came before the Manitoba Court of Appeal in R. v. Bruyere and Courchene. The case is one of the earliest in which evidence was called respecting the nature of the road in issue and its use from time to time for the purpose of hunting. And it is one of the first cases in which the courts, on this basis, distinguished R. v. Mousseau.

Messrs. Bruyere and Courchene, Treaty Indians, were convicted of unlawfully hunting at night with a light. They were hunting along a fireguard road in a forest reserve. The road had been built by the Manitoba Department of Natural Resources for several purposes: to provide fire protection, to accommodate travel between forest communities, to allow vehicular access to the forests for workers and their equipment, and to facilitate hunting and recreation. The road was gravelled,

signed, and well-travelled throughout the year by motorists, bush workers, hunters, and so on. The Manitoba Court of Appeal inferred that during hunting seasons hunting was permissible on and from the fireguard road, and set aside the conviction on the ground the accused had a "right of access" to this road for the purpose of hunting. That being the case, the Court found that he was not subject to provincial game laws: he could hunt from or on the road at night, with a light. In delivering the Court's judgment, Hall J.A. said [p. 196 C.N.L.R.]:

> It seems to me that there is a significant factual distinction to be made between fireguard 31 in a forest reserve and provincial road number 265 [as in R. v. Mousseau]. In Mousseau, the Appeal Courts seemed to have accepted as a fact that the provincial road in question was wholly designed, constructed and maintained solely for use by the public for the passage of vehicles. Fireguard 31 is used for vehicular traffic but is also used by hunters, and bush workers and was primarily constructed as a fireguard. There is no evidence that hunters, including Indians, are prohibited from hunting on, and from fireguard 31. Indeed, what evidence there is establishes implied, if not express, permission to hunt on and from the fireguard. In my view, the present case is distinguishable from Mousseau on the facts.

The principle of R. v. Bruyere and Courchene governed the disposition of two Saskatchewan cases which recently came before this Court: R. v. Kakakaway and R. v. Bellegarde. Eldon Bellegarde, a Treaty Indian from Balcarres, was convicted by Judge Bellerose on April 24, 1984 of hunting with a spotlight contrary to s.37 of the Wildlife Act. The accused was observed by a wildlife officer driving down a little-used rural road allowance, after dark, shining a spotlight along the ditches. The ditches were largely overgrown with weeds, and the road, which in several places was reduced to a single trail, was bounded on each side by intermittent bush. It was not kept open in the wintertime. In convicting the accused the learned trial judge was careful to distinguish the case from R. v. Bruyere and Courchene, holding that the facts of that case were "vastly different": "natives could hunt on either side of [the fireguard road]", and the fireguard was not a "public road". On the other hand, in the opinion of Judge Bellerose, Mr. Bellegarde did not have access to the adjoining lands, and the road in question was a "public road". The learned trial judge then went on to find that, while the wildlife officer who testified before him had from time to time found hunters on the road in issue, it could not be said that they, or Mr. Bellegarde, had access to the road for the purpose of hunting. Finally he held that while it was an offence to discharge a firearm "along or across the travelled portion of a public highway or a grid road", that fact, and the existence of no other offences connected with shooting on or from other roads and road allowances, did not, by implication, give access to them for the purpose of hunting.

The accused appealed his conviction to the Court of Queen's Bench. The appeal was dismissed for reasons virtually identical to those in the case now before us. With that Mr. Bellegarde launched an appeal to this Court.

In the meantime John Kakakaway, a Treaty Indian from Kamsack, had also been convicted of an offence under s.37 of the Wildlife Act, and was appealing his conviction. He too had been hunting for food after dark, with a light, on a little-used country road allowance which, according to the evidence of a game officer. hunters were known to use. In convicting him, Judge Bobowski said this:

> I am of the opinion that this case is distinguishable from R. v. Bruyere and Courchene ... in that there are nearby farm residences which have access to this road. In fact on the same day a man was observed pulling a drill with his half ton truck. I am satisfied beyond a reasonable doubt that the road in question is a public road and accordingly find the accused guilty as charged. R. v. Standingwater, [1983] 3 W.W.R. 766 [[1983] 3 C.N.L.R. 153].

Mr. Kakakaway's appeal to the Court of Queen's Bench was dismissed for reasons, which again, were much like those given in this and in the Bellegarde case. The Summary Conviction Appeal Court relied, as it had done before, on R. v. Mousseau, R. v. Standingwater and R. v. Merasty.

The Kakakaway and Bellegarde appeals came on before this Court on June 3rd, 1985. R. v. Kakakaway was allowed. R. v. Bellegarde was dismissed. In its factum in R. v. Kakakaway, the Crown said this:

> While it is clear that roads are prima facie occupied Crown lands to which Indians have no "right of access" for the purposes of hunting within the meaning of the Natural Resources Agreement, (R. v. Mousseau) in this case there was evidence to establish that members of the public generally may legally hunt and do hunt on the road on which the appellant was

> hunting. That being so, the appellant had a right of access to the road in question so long as he exercised that right in a nondangerous manner. (Moosehunter v. R.)
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> As there was evidence that the manner of hunting of the appellant did not amount to dangerous or careless hunting the appellant should have been acquitted of the offence.

Having regard for this, the Court allowed the appeal and set aside Mr. Kakakaway's conviction.

In dismissing the appeal in R. v. Bellegarde, Chief Justice Bayda, in brief oral reasons delivered on behalf of the Court, said this:

> The trial judge found as a fact that the road in question has not customarily, or traditionally, or otherwise been used to hunt on. It is this basic fact that led the trial judge to conclude that the road does not Qualify under R. v. Mousseau as occupied Crown land to which persons have a right of access for the purpose of hunting and to further conclude that the present case does not fall within the exception exemplified by R. v. Bruyere and Courchene.
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> The appellant complains about the judge's conclusions. When analyzed, the complaint is really directed against the judge' s original finding of fact on which the conclusions are based. We find that the judge's conclusions are correct--indeed given the basic fact as found by him he could reach no other conclusions--and of course, we are not in a position to overrule his finding of fact.

(d) Reconciling the cases

In my opinion, R. v. Mousseau, and the line of cases which followed it, including Merasty, Standingwater, and Dillon, are not irreconcilable with those of Desjarlais, Bruyere and Courchene, Kakakaway, and Bellegarde. In Mousseau, Mr. Justice Dickson described the framework of principle by which these cases fall to be decided [p. 69 C.N.L.R.]:

> 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: (a) all unoccupied Crown lands; (b) any occupied Crown lands to which the Indians, or other persons have a tight of access, by virtue of statute or common law or otherwise, for the purpose of hunting, trapping or 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. (Emphasis added)

Roads are occupied Crown land to which people do not, as matter of general principle, have rights of access for the purpose of hunting by virtue of the common law. Thus Messrs. Mousseau, Merasty and others, who were unable to point to anything showing that, despite the general principle of the common law, they had rights of access to the roads upon which they were hunting, were held not to possess such rights. Persons may, however, as Mr. Justice Dickson indicated in R. v. Mousseau, have such rights "by virtue of statute ... or otherwise."

So if the legislature by appropriate amendment to the Wildlife Act gave persons the express right, let us say, to hunt along rural road allowances, but prohibited them from doing so along highways or grid roads, then, despite the general common law rule, people would clearly have rights of access to rural road allowances for the purpose of hunting by virtue of "statute" - and, just as clearly, would not have such rights in relation to highways and grid roads.

Likewise, if the appropriate governmental authority in exercise of its owner' s or occupier' s powers over the land dedicated to roadways should grant general permission to go on that land for the purpose of hunting (as it may do, for example, for the purpose of growing crops upon or removing hay from the non-travelled portions of the roadways) then, of course, people would have rights of access to those roadways for the purpose of hunting, not by virtue of statute or common law but "otherwise".

3. The right of access in this case
(a) Access to the roadway

The first question then, is whether, within this framework of principle, and on the evidence in this case, the appellants had a right of access to the road in issue for the purpose of hunting. If members of the public, generally, enjoyed a tight of access to the road for that purpose during open season, then, of course, the appellants possessed that right during all seasons, and without regard to the game laws except those whose object is safety. In R. v. Mousseau Mr. Justice Dickson concluded that [at p.69 C.N.L.R.]:

> 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 definition of "hunting" which appears in Webster's Third New International Dictionary was accepted by the Supreme Court of Canada in Prince and Myron v. The Queen, [1964] S.C.R. 81 (at p.84):

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

So far as we were informed there exists neither express statutory provision for or against hunting along rural roads. Regulation 16 of the Wildlife Regulations, 1981 (O.C. 1304/81: Sask. Gazette August 21st 1981) is as close as the law comes to the subject. It provides as follows:

> 16. No person shall discharge a firearm along or across the travelled portion of provincial highway or grid road.

Nor were we apprised of any owner's or occupier's express general permission or prohibition to hunt on lands set aside for roads, and it seems unlikely that s.36 - having to do with posting applies to roadways.

Now the wildlife officer said that during the various open seasons hunters were entitled to use the road in issue for the purpose of searching for game. And as far as he was concerned it was both lawful and permissible during open season for people to shoot game along the right-of-way provided they adhered to the requirements of the Wildlife Act and did not fire across or along the travelled portion of the road. Certainly, he, as an agent of the Crown, would not have interfered with hunting on or from the roadway as long as no infraction of the Act was involved.

Three things, then, are clear:

1. The province's game laws only prohibit discharging a firearm across or along the travelled portion of a highway or a grid road; they do not render it unlawful for persons to hunt along the road in issue during any of the open seasons.

2. During the various hunting seasons, hunters, in fact, used the road in issue to search for game (both on and off the land dedicated to the roadway) for purpose and with the means of killing that game.

3. The province's wildlife officer did not, during open season, interfere with the use by hunters of the road for the purposes of searching for or killing game, whether on or off the right of way, provided in doing so, they adhered to the province's game laws.

While the case for a right of access in the appellants to this roadway for the purpose of hunting is not as strong, perhaps, as was that in R. v. Sutherland and R. v. Moosehunter, it is at least the equal of that in R. v. Fiddler, R. v. Desjarlais and R. v. Kakakaway. The public, generally, were permitted during the various open seasons to use the road in issue for the purposes of hunting. Having regard for that, for the general principles referred to earlier (including the rationale for the decisions in R. v. Desjarlais, R. v. Kakakaway and R. v. Bellegarde), and for the fact the appellants were hunting for food, I do not think it can be said, to the extent their hunting was confined to the land within the right-of-way of the road, that they were guilty of an offence under s.37 of the Act.

That, then, raises the issue of whether the appellants were hunting the land adjacent to the roadway. If they were, and if they did not have access to it for that purpose, then, even though their hunting along the roadway was not unlawful, they would be in breach of s.37.

(b) Access to the adjoining lands

The land was privately owned, and there was no evidence of the appellants having had access to it by custom, usage, or permission for the purpose of hunting. Indeed the evidence was to the contrary. The only question, then, is whether their activity constituted hunting on the adjoining land. Judge Gosselin held that it did not, since all they were doing was shining a light onto that land.

4. Were the appellants "hunting" the adjoining lands

In deciding that the appellants were not hunting the land beside the road, Judge Gosselin was guided by considerations referred to by him in his earlier decision in R. v. Cote, [1984] 2 C.N.L.R. 113, (an appeal from which was dismissed in the Court of Queen's Bench on January 25, 1984). In that case the road on which the accused were hunting was conceded to be one to which people had access for that purpose. During their hunt along this road at night the accused scanned adjoining lands to which they had no right of access. In acquitting the accused Judge Gosselin said this:

> It is clear that the accused were searching for game. While involved in this search they at all times remained on land [the road] to which they had a right of access. In the process they scanned their spotlight onto land to which they did not have a right of access. In other words they were looking onto land to which they didn't have a right of access from land to which they did have a right of access.
>
> If a licensed hunter was standing in a field where he could lawfully hunt and in the process of searching for game , looked across the Pence into a field where he didn't have a right of access to hunt and did nothing further, surely it cannot be said that he would be hunting unlawfully under the provisions of the Wildlife Act.
>
> If this same hunter saw a deer on the restricted land and hid himself in the hope that the deer would leave the restricted area and come onto the land where he could lawfully shoot it, that likewise is not what is contemplated as hunting unlawfully on land to which you do not have a right of access.
>
> Likewise, a Treaty Indian who can lawfully use a spotlight to hunt, simply by shining a spotlight onto a restricted area cannot be said to be hunting on land to which he does not have a right of access.
>
> In the context of this particular case the accused must have been hunting on land to which they did not have a right of access before they could be committing an offence. When it is the lack of a "right of access" that created the offence, it is my view of the law that you must actually be on the land "searching for game". Looking onto the land or shining a light onto the land would fall within the meaning of "searching for game:" but there must also be a violation of the "right of access" restrictions.
>
> In this case the accused did not go on the land to which they did not have a "tight of access" so they were at all times lawfully using their spotlight.
>
> Shining a spotlight onto private property which in this case was a remote, uninhabited farm field does not amount to unlawfully going on it any more than would looking onto it--even if the object involved is searching for game.
>
> In addition it would be reasonable for the accused to shine their light in that direction to see if there were any signs along the fence line restricting hunting in that area.
>
> I am satisfied that the accused did not go onto any land to which they did not have a right of access. Therefore it was legal for them to use the spotlight. The accused are found not guilty and the charges dismissed.

This case was raised before this Court in R. v. Baptiste, but, since the cases differed factually, the *Cote* decision was not examined in any detail. However, Mr. Justice Brownridge, in delivering the judgment of this Court, did express the view that a person might be found to be hunting on land without actually being upon the land.

The Manitoba Court of Appeal was confronted with a similar issue in R. v. Daniels et al, [1985] 4 C.N.L.R. 151. There the appellants were hunting at night with a light on reserve land, but continued their hunt onto a municipal road beyond the reserve, shining a spotlight back and forth over adjacent private property intending to locate game on that property, and having located it, to attract, confuse, and "fix" it with the use of the light, and then to kill it. The Court upheld their convictions, holding that the act of shining a spotlight from land upon which there exists a right to hunt onto property in relation to which no such right exists constitutes hunting on that property if the light is shone on to it with the intention of there locating, fixing, and then shooting a game animal.

I agree with Mr. Justice Brownridge: one does not necessarily have to set foot upon property to be found to be hunting thereon. I agree, as well, with the approach taken by the Manitoba Court of

Appeal in R. v. Daniels, and believe the case before us falls to be decided according to the same principle.

Since the appellants could be found to be hunting the adjoining lands only if they intended to locate, and with the aid of the light, kill game on the adjacent property, the Crown had to prove, beyond a reasonable doubt, that that was their intention. The nature of the intention required of an accused before he can be said to be hunting within the meaning of s.37 of the Wildlife Act is, of course, a matter of law, while his particular intention in doing the act complained of is an issue of fact. Lampard v. The Queen, [1969] S.C.R. 373. Whether, and to what extent, Judge Gosseling considered the intention of the appellants in shining their light upon the nearby lands is not altogether clear.

His reference to R. v. Cote suggests, on the one hand, that he may have thought that so long as the appellants neither set foot on the adjoining lands, nor actually shot an animal on those lands, they could not be said to be hunting thereon. If so, and with respect to Judge Gosselin, that would have been an error of principle. On the other hand, he may have thought, as he appears to have done in R. v. Cote, that even if the appellants had shone the light onto the adjacent land for the purpose of locating deer on that land, he could not safely infer, without more, that they intended to shoot the deer there, and that being the case, could not say with assurance that they were hunting on the adjoining land. There would have been no error in principle had he believed that.

But, as I say, it is by no means clear just how he approached this question. Having found that the appellants were hunting on a roadway to which they had no right of access for that purpose, and were, therefore, guilty of the offence, I do not think he really directed his mind to their intention in shining their light on to the nearby land.

Nor did the Summary Conviction Appeal Court consider their intention in doing so. Having found that the trial judge had not erred in concluding that the appellants did not enjoy a right of access to the road for the purpose of hunting, the Summary Conviction Appeal Court did not, of course, go on to address the other issues, including the appellants' intention.

That issue, then, went largely unresolved both at trial and on appeal. Whether, in the absence of any explanation from the appellants, the inference would be inescapable that they intended to locate and shoot a deer on the adjoining land need not be gone into because, in fact, they did offer an explanation. While none of them testified at trial, they did, when apprehended, give a statement to the wildlife officers. The appellants said they had earlier shot the deer in their possession on the Indian reserve a short distance away and were on their way home after having been to a nearby forest reserve where they had spotted a bear. Apparently it was lawful there to kill bears at all seasons of the year. They said they had not seen a deer after having left the Indian reserve, and even if they had, they would not have shot it. They went on to say that the accused Sanderson had forgotten to unload one of the guns, and that they had fled from the wildlife officers only because they feared getting caught with deer in their possession outside the area in which they were lawfully entitled to hunt. What weight should be given to this statement, having regard for the circumstances and the evidence as a whole, is difficult to know, just as it is difficult to know what inferences might safely be drawn from all of the evidence.

5. Conclusion

The absence of clear cut legislation (combined perhaps with a lack of uniformity in the courts and of consistency among Crown counsel) has resulted in an uncertain and artificial foundation for these cases. There exists a wide-spread practice in rural Saskatchewan of hunters using the municipal roads and road allowances, as well as many of the grid roads--if not the highways--for various aspects and forms of hunting, including both locating game, and in the case of game birds and small game animals especially, by shooting game along the rights-of-way. Bur while this is so, and, while the courts have considerable latitude in taking notice of things which are widely known but not proved in evidence, the doctrine of judicial notice is probably not broad enough in scope to permit the courts, in most situations, to have regard for that fact. And so people are acquitted or convicted of offences, not on the true state of things, but on whether the evidence (usually that of a game officer) discloses that hunters have been "seen" using the road in issue, or have been "known" to do so, or as in this case, do so without being charged or asked to desist by the wildlife officer as long as they do not shoot across or along the travelled portions of the road. And at times guile or innocence will rest on such extraneous matters as the presence or absence of nearby farms (as in Kakakaway) or the entitlement to hunt the adjacent lands (as in Bellegarde) or the condition of the road or road allowances in issue. A fairer, more certain standard, consistent with reality, is clearly desirable. But for the most part, that is a matter for the legislature.

The remarks of Mr. Justice Dickson in R. v. Mousseau, while made with reference to a different standard, are nevertheless worth recalling [p.70 C.N.L.R.]:

> A further reason impels one to resist adopting the approach which found favour with the majority of the Manitoba Court of Appeal. That approach recognizes in non-Indiana a right to hunt on public road allowances "where the activity can be carried on without danger to the public". From that right, a like right, indeed an extended right, is said to be enjoyed by the Indians. The difficulty presented in the practical application of such an ill defined test is obvious. The right to hunt would vary with the locality and the particular stretch of road, with the time of day, volume of traffic, proximity of habitation and non-hunters, and many other factors. The right to hunt would rest upon the view one might take as to the danger of the hunting. The impracticability of such a test is patent.

In conclusion, then, I would allow this appeal and set aside the conviction because of the errors of law below. In all of the circumstances, however, including the lack of findings of face respecting the intention of the appellants in shining their spotlight upon the lands next to the road, I would order a new trial rather than enter an acquittal.