TAWIYAKA v. R.

Unreported at date of publication

Saskatchewan Court of Queen's Bench, Forbes J., December 21, 1983

W.J. Klebeck, for the appellant
L.E. Leslie, for the respondent, Crown

The appellant, a treaty Indian, appeals his conviction on a charge of unlawfully hunting wildlife out of season contrary to s. 28(1) of the Wildlife Act, S.S. 1979, c.W-13.1. At the time in question the appellant was hunting on unposted privately owned farmland which he had entered without the permission of the owner-occupier.

Held: (Forbes J.)

1. Paragraph 12 of the Natural Resources Transfer Agreement, 1930, assures to Indians the right to hunt for food at all seasons of the year on unoccupied Crown lands or on lands to which they may have a right of access. Privately owned land is not included in the expression "on any other lands to which the said Indians may have a right of access" contained in para.12. R. v. McKinney, 50 C.C.C. (2d) 576, [1981] 2 C.N.L.R. 113 -- followed; R. v. Bellegarde (Sask.C.A.) September 8, 1983 (unreported) -- followed.

2. Section 38(6) of the Wildlife Act provides, among other things, that failure to post land by itself is not to be deemed as implied consent or as implied right of access. Section 38(6) is not ultra vires the provincial legislature as it is general legislation applying to all hunters and not just Indians.

3. Appeal dismissed.

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FORBES J.: The accused, a treaty Indian, was convicted on 11 April, 1983 at Fort Qu'Appelle, Saskatchewan, on a charge under s. 28(1) of the Wildlife Act, S.S. 1979, c.W-13.1, that he did unlawfully hunt wildlife out of season on the 20th December, 1982, and has appealed the conviction. He killed a deer out of season on privately owned farm land which was not posted and which he had entered without permission of the owner-occupier.

The Wildlife Act, supra, s.38(6) as amended by the Wildlife Amendment Act, S.S. 1982, c.20, s.7, now reads as follows:

> Nothing in this section limits or affects any rights or remedies of an owner or occupier of land for trespass at common law, and, where he has not erected or placed signs along the boundaries of his land in accordance with subsection (1) or (2), that fact alone is not to be deemed to imply consent by him to entry upon his land or to imply a right of access to his land for the purpose of hunting.

The Natural Resources Agreement, 1930, paragraph 12 reads:

> 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.

On September 8, 1983, in the case of The Queen v. Bellegarde (unreported), the Saskatchewan Court of Appeal, without written reasons dismissed the appeals of three accused Indians who had been convicted on a charge under s.37 of the Wildlife Act of unlawful use of lights for hunting. They were hunting on a road allowance and private property, using a flashlight. The question posed in the stated case was as follows:

> Did I err in law in holding that the accused did not have a right of access for the purpose of hunting to privately owned land?

It is quite apparent that the court decided that Indians have no absolute or implied right of hunting on private property and privately owned land is not included in the expression "on any other lands to which the said Indians may have a right of access" contained in paragraph 12 of the Natural Resources Agreement, 1930.

Section 38(6) is not ultra vires as it is general legislation applying equally to all hunters and not just Indians.

The Court of Appeal of Saskatchewan, in a judgment dated March 24, 1983 in the case of R. v. Merasty [reported at p. 153, supra] dealt with right of access and dismissed the appeal of an Indian, and Woods J.A. stated [p. 156, supra]:

> In R. v. Mousseau (1980), 52 C.C.C. (2d) 140, at 148 [[1980] 3 C.N.L.R. 63, at 70], Dickson J., giving judgment for the Supreme Court of Canada agreed with the statement of Monnin J.A. of the Court appealed from, where he stated:
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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 egress, 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.
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> As the learned judge in the Court appealed from found in the matter before us, the appellant here is not entitled to hunt on a public highway.

In R. v. McKinney, 50 C.C.C. (2d) 576 [[1981] 2 C.N.L.R. 113] the Supreme Court of Canada upheld the Court of Appeal of Manitoba, reported at 46 C.C.C. (2d) 566 [[1979] 2 C.N.L.R. 87]. The headnote of that report is as follows:

> Although para. 13 of the Natural Resources Agreement adopted by the British North America Act, 1930 provides that the Province assures to Indians the right to hunt for food at all seasons of the year on unoccupied Crown lands and any other "lands to which the said Indians may have a right of access", the words "lands to which the said Indians may have a right of access" do not include private property merely because the land is not posted or because hunters have not been warned off it by the owner. While there may be areas of the Province where, as a result of custom or usage or implied permission, it may be said that Indians, and others, have a right of access to open land unless prohibited it is not the case that unless there are notices a person has a right of access to any land in the Province.

The appeal is dismissed.