

R. V. DANIELS, DANIELS, YOUNG, GEORGE

[Indexed as: R. V. Daniels]

Manitoba Provincial Court, Webster P.C.J., January 8, 1990

C.R. Bond, for the Crown
V. Savino, for the accused

The accused, all treaty Indians, were charged with possession of migratory game birds in excess of the possession limit allowed under the *Migratory Birds Convention Act*, R.S.C. 1985, c.M-7. Facts were in dispute as to the number of persons (four or eight) involved in the hunting party and whether the purpose of the hunting trip was to hunt food for a community feast.

Held: Accused acquitted.

- 1. On the evidence, the possession limit set out in the *Migratory Birds Convention Act* was exceeded regardless of whether there were eight or four people in the hunting party.
- 2. The evidence as to whether there were eight or four hunters fell short in establishing a so-called community hunt.
- 3. The birds in question were shot for food and were to be consumed not only by the hunters but by other members of the band.
- 4. There was no evidence as to the historical hunting practices and rights of the band, nor was there evidence as to a community hunting tradition.
- 5. *Constitution Act, 1982*, s.35 rights are not subject to s.1 of the *Canadian Charter of Rights and Freedoms*.
- 6. The judgment of the Manitoba Court of Queen's Bench in *R. v. Flett*, [1989] 4 C.N.L.R. 128 is binding. Treaty Indians have the right to hunt migratory birds for food at any time of the year on unoccupied Crown land, and that right includes the unfettered right to exceed the possession limits set out in the Regulations unless such Regulations are reasonable for conservation purposes. This right was an existing right at the time Treaty No.5 was signed.
- 7. As there was no evidence that the daily possession limits were a reasonable regulation, the possession limit was not applicable to the accused treaty Indians.

Editor's Note: A Notice of Appeal has been filed by the Crown in the Manitoba Court of Queen's Bench.

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WEBSTER P.C.J.:

1. CHARGE:

Leonard John Daniels, Oliver Daniels, Albert Abraham Young, and Samuel Gordon George are charged pursuant to ss.10(2) of the *Migratory Birds Convention Act*, R.S.C. 1985, c.M-7, namely over-possession of migratory game birds.

2. FACTS:

(a) Undisputed Facts

Exhibits 2 and 3 respectively, notices pursuant to s.7, the *Constitutional Questions Act*, were served upon the designate of the Attorney-General of Canada and the Attorney-General of Manitoba.

All the accused are treaty Indians, members of the Chemawawin First Nation and the band is a signatory of Treaty 5.

On October 10th, 1987, at approximately 3:45 p.m., Dwayne Strate, a Natural Resources Officer, attended the dock area at Easterville, Manitoba, and observed Oliver Daniels unloading a number of ducks from a boat and placing them in the back of a pick-up truck. (Evidence, p.3)

The ducks were migratory game birds within the meaning of the *Migratory Birds Convention Act*.

Also present at the dock were Leonard Daniels, Albert Abraham Young, and Samuel Gordon George, who were assisting in loading the birds into the truck. (Evidence, pp.5-6)

When asked by the Natural Resources Officer "whose ducks they were," Oliver Daniels "advised the names of the other three individuals." (Evidence p.6; cross-examination, p.19)

Officer Strate seized 123 ducks, comprised of 26 scaup, 72 mallard, 13 widgeon, 9 gadwall and 3 pintail. The seizure was photographed, and the photograph was filed as Exhibit 1. (Evidence, pp.10-11)

October 10th, 1987, was open season in the Easterville area for these types of migratory game birds (evidence, pp.4-5), and the possession of "bag" limit pursuant to the Regulations was 12 birds per hunter (evidence, p.13).

(b) Disputed Facts

(i) *Number in Hunting Party*

The accused, Samuel Gordon George, testified that there were a total of eight persons involved in the hunting party, not just the four located with the boatload of ducks at the dock. He further stated that the other four hunters in the party were in a second boat about 10 minutes behind the first boat (evidence, pp. 21-22; cross-examination, pp.28-29).

Mr. Raymond Lachose was called as a witness on behalf of the accused to establish the existence of the eight-man hunting party (evidence, p.45).

(ii) *Purpose of Hunting*

Samuel George testified as to the purpose of the hunting trip as follows:

A. Let me say, sir, since I became a Chief, and we - we have a community feast for elders, for older people in the community once a year around September or October for our people, for my people. That's the purpose for our hunting - that trip at that time.

Q. You're out hunting specifically for migratory birds for this feast?

A. Yes.

Q. Who were you hunting for?

A. For - at that time, I was hunting for my people.

Q. You're saying your were hunting, not only for food for your own use?

A. No, not for my - not for my own use, but for the people which I was representing.

Q. You mentioned the elders?

A. Yes.

Q. How did you come to be hunting for the elders?

A. Well, that's the - what my - as a native person, and I very strongly believe the older people which I represent, not only that they're just like my advisors in this community, and what their suggestion was, why don't we give you the ammunition, like shotgun shells - go hunting for us. That's the purpose of that.

Q. You're saying the elders want to give you ammunition to hunt for them; is that correct?

A. That's correct, sir.

Q. Had that happened before?

A. Yes.

Q. And for how long has this been going on?

A. I'd say about five years now.

Q. During your personal experience of hunting?

A. Yes.

(Evidence, pp.23-24)

On cross-examination, the following questions were asked and answers given:

Q. One other question is that I have for you, as you said, this -this community dinner has been in existence on this reserve for about five years, is that right?

A. That's correct, sir.

Q. Five years from 1989, going back to 1984; or five years from 1987, going back to 1982? What is it?

A. We started... we started around, about 1985 for community dinners, for community feast.

Q. That was about the third year of the community feast?

A. Yes.

(Evidence, p.36)

Further, on cross-examination, Samuel George indicated the feast was planned for the entire community, not just the elders. (Evidence, p.30) He "guessed" that the hunting party was planning to shoot 300 ducks to feed the community of 500 (evidence, p.31); and that it had been discussed among the eight hunters in the party. (Evidence, p.31) No specific date was planned for the particular feast and no other food preparations had been made. (Evidence pp. 32-34)

As stated, Mr. Raymond Lachose was called as a witness on behalf of the accused.

It must be noted that Mr. Lachose was present in the courtroom throughout the testimony of *Natural* Resources Officer Strate and the accused, Samuel Gordon George. This was apparent in his response to a question of the Crown Attorney:

Q. What was the purpose of you going Out Onto the lake?

A. The Chief said... you heard what he said.

Additionally, Mr. Lachose's memory was faulty, for, by his own admission, "it's a long time ago." (Evidence, p.46; cross-examination, p.49)

As to the purpose of the trip, Mr. Lachose stated that it was his understanding that they were "gonna kill some ducks, to get some ducks," and "to get some ducks to eat. That's all." (Evidence, p.48)

As to quantity, Mr. Lachose said, "Nobody told me," (evidence, p.48), notwithstanding the evidence of Samuel George that the quantity was discussed among the eight alleged hunters in the party.

When cross-examined on the subject of community feast, Mr.. Lachose was asked:

Q. Were you told it was for the community dinner, or was it just to get ducks to eat?

A. The community dinner.

The Court noted Mr. Lachose's reply was in a questioning tone. He further testified that he heard "rumours that they were going to have a dinner for the elders." (Evidence, p.49)

In conclusion, given the presence of Mr. Lachose in court during the testimony of other witnesses, as well as his admitted faulty memory, little weight can be attached to his evidence.

3. POSITION OF THE PROSECUTION

Counsel for the prosecution submits that:

1) there was no evidence before this Court for the submission made on behalf of the accused that "it is well-known that Indian communities have, for centuries, harvested wild game on a communal, not just individual, basis."

2. there was, on the facts, no evidence of a community hunt which would give rise to recognition of a pre-existing treaty right as adopted by Schwartz J. of the Court of Queen's Bench in *R. v. Flett*, [1989] 4 C.N.L.R. 128, [1989] 6 W.W.R. 166.

Consequently, counsel for the prosecution submits that the *Migratory Birds Convention Act* and Regulations can validly regulate possession limits because *R. v. Flett* does not apply to the facts of this case.

4. POSITION OF THE ACCUSED

Counsel for the accused submits that *R. v. Flett* is applicable to the case at Bar, and is thus binding on this Court on the following bases:

1) the accused have the right to hunt for food at all seasons of the year, and that this treaty right to hunt for food includes the Swampy Cree custom of the "community hunt" whereby the younger, healthier band members harvest food, not only for themselves but for the elderly and infirm band members, and that "it is well known that Indian communities have, for centuries, harvested wild game on a communal, not just an individual, basis." Counsel relies upon *R. v. McGillivray* (unreported), May 25, 1989, Sask. Prov. Ct. [reported *infra* at p.115];

2) the fact situation, being a community hunt, "fits squarely into the treaty hunting rights of the Band" and cannot, in view of s.35 of the *Constitution Act*, 1982 be "regulated";

3) that even if the treaty right to hunt for food is subject to reasonable regulation, the Crown, upon whom the onus rests, has failed to establish that such regulations are necessary for the proper management and conservation of the resource. (See *R. v. Stevenson*, (unreported), 27 Jan. 1988, Man. Prov. Ct.)

Counsel for the accused further submits, on the facts, that the Court ought not to construe the possession limit in the Regulations so narrowly, pointing Out that each of the eight hunters were only about three birds over their daily possession limit. Counsel points out that eight hunters are legally permitted a total of 96 birds. With 123 birds taken, the eight hunters were only 27 birds over the limit in total, or about 3 birds over the limit individually.

5. FINDINGS OF FACT

On the evidence adduced before this Court, there is no question that whether there were four hunters or eight hunters, the possession limit set forth in the *Migratory Birds Convention Act* and Regulations was exceeded, and consequently the Act breached.

The evidence adduced by the defence, primarily through the accused, Samuel George, as to whether or not there were eight hunters of four hunters, falls short of establishing, on these facts, a so called community hunt.

The Court accepts the evidence of the accused, Samuel George, and that of Raymond Lachose, that the ducks in question were shot for food. The ducks were to be consumed not only by the hunters but also by other members of the band. (Evidence, S. George, p.23; cross-examination, p.30; R. Lachose, p.48)

There is no evidence before this Court, as there was before the trial judge in *R. v. Flett*, as to the historical hunting practices and rights of the Chemawawin First Nation. Additionally, there is no evidence as there was in *R. v. McGillivray*, as to the community hunting tradition as noted by Wright J. [Diehl P.C.J.] in his decision.

6. APPLICATION OF THE LAW

Section 35(1) of the *Constitution Act, 1982* states:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 25 of the *Constitution Act, 1982*, states:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to aboriginal peoples of Canada including:

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7th, 1763.

Treaty 5, states, *inter alia*:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as herein before described, subject to such Regulations as may, from time to time, be made by Her Government of Her Dominion of Canada.

It is common ground that s.1 of the *Canadian Charter of Rights and Freedoms* is not applicable to this situation (see: *R. v. Arcand*, [1989] 2 C.N.L.R. 110; *R. v. Flea*; Argument of Counsel).

This Court is bound by the findings of Schwartz J. in *R. v. Flea*, that

1) the limitations set out in the *Migratory Birds Convention Act* were never intended to apply to treaty Indians hunting on Crown lands, and that such limitations amount to a prohibition rather than a regulation, which regulation must, by definition, be reasonable in its application.

2) that hunting rights which existed at the signing of Treaty 5 are existing rights and are "recognized and affirmed" in Manitoba.

Hunting rights as existing treaty rights, include, as noted in *R. v. Flett*, the right of treaty Indians to hunt migratory birds for food at any time of the year on unoccupied Crown land. In the absence of any law or evidence to the contrary, the right to hunt for food at any time of the year by treaty Indians on unoccupied Crown land includes the unfettered right to exceed those possession limits as now set out in the Regulations. This latter conclusion, of course, is subject to the proof that any such regulations can be reasonably justified as being necessary for the proper management and conservation of the resource or the public interest. (See *R. v. Sparrow*, [1987] 1 C.N.L.R. 145, [1987] 2 W.W.R. 577, 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, and *R. v. Stevenson, supra*.)

7. CONCLUSION

Based on *R. v. Flett*, which is binding upon this Court, treaty Indians have the right to hunt migratory game birds on unoccupied Crown land for food. Further, this right was "an existing right" at the time of Treaty 5. Being satisfied on the facts of this case that the four accused were hunting for food on unoccupied Crown land, and are, in fact, treaty Indians, and there being no evidence that daily possession limits are a reasonable regulation, the Court accordingly acquits the accused as charged.