

HER MAJESTY THE QUEEN v. ERNEST WOLFE, TERRENCE COOK, PERCY HEATHEN, HARRY HEATHEN, OLIVER BELLY and WILLARD HARPER

[Indexed as: R. v. Wolfe]

Saskatchewan Provincial Court, Young J., July 20, 1992

R. Kirkham, for the Crown  
T. Mandamin, for the accused

The accused were charged with various counts of trafficking in wildlife, contrary to s.41 of the Saskatchewan *Wildlife Act*, S.S. 1979, c. 13.1, carrying a loaded firearm in a vehicle, contrary to s.36(a) of the Act, unlawfully discharging a firearm within a road corridor game preserve, contrary to s.5(1)(c) of the *Wildlife Act Regulations*, and providing false information, contrary to s.44 of the Act. All accused are treaty Indians residing on reserve and descendants of the signatories of Treaty 6. The Crown was able to prove the facts of the offences beyond a reasonable doubt except for one count against one accused. The accused relied on defences based on Treaty 6 and entrapment.

**Held: Accused convicted on all charges.**

1. Although alcohol was brought onto a dry reserve by an undercover agent, it was not used to induce or entrap the accused to hunt or traffic in wildlife.
2. By the language of Treaty 6, the Indians' right to pursue their avocation of hunting and fishing was subject to federal regulation. By paragraph 12 of the 1930 Natural Resources Transfer Agreement, the government of Canada agreed that provincial game laws would apply to Indians, except that Indians would have the right to hunt for food on unoccupied Crown lands and any other lands to which they have the right of access. From 1930 until 1982 the province and the federal government were free to swap the regulatory rights back and forth if they so chose. In 1982 Indian hunting rights as they then were, were enshrined in the *Constitution Act, 1982*. From that point on, a constitutional amendment would be required to alter Indian hunting rights.
3. The Natural Resources Transfer Agreement rather than Treaty 6 applies to selling meat commercially.
4. Indian consent is not required for the creation of a road corridor game preserve in their traditional hunting grounds, as long as the road corridor game preserve is established for bona fide reasons. In this case a road was required to access a natural gas well.
5. False information was given to a wildlife officer who was known to be investigating a specific offence under the Act. The fact that there was no mischief or inconvenience caused by this false information was to be taken into account in sentencing.

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**YOUNG P.C.J.:** The accused are charged under the *Wildlife Act*, S.S. 1979, c.W-13.1, as follows:

- (2) That Ernest Wolfe (B: 02 JUN 48), Terrence Cook (B: 14 MAY 59) and Percy Heathen (B: 18 OCT 55) all of Onion Lake, Saskatchewan on or about the 22nd day of February, A.D. 1990 at Onion Lake District, in the Province of Saskatchewan did unlawfully traffic in wildlife contrary to Section 41 of the *Wildlife Act*.
- (3) That Percy Heathen (B: 18 OCT 55) of Onion Lake, Saskatchewan on or about the 10th day of November, A.D. 1990 at Onion Lake in the Province of Saskatchewan did unlawfully traffic in wildlife contrary to Section 41 of the *Wildlife Act*.
- (4) That Ernest Wolfe (B: 02 JUN 48) of Onion Lake, Saskatchewan on or about the 26th day of November, A.D. 1990 at Onion Lake, in the Province of Saskatchewan did unlawfully traffic in wildlife contrary to Section 41 of the *Wildlife Act*.

- (5) That Ernest Wolfe (B: 02 JUN 48) of Onion Lake, Saskatchewan on or about the 2nd day of December 1990 at Onion Lake District, in the Province of Saskatchewan did carry a loaded firearm in or on a vehicle contrary to Section 36(a) of the *Wildlife Act*.
- (6) That Ernest Wolfe (B: 02 JUN 48) of Onion Lake, Saskatchewan on or about the 2nd day of December, 1990 at Onion Lake District, in the Province of Saskatchewan did unlawfully hunt wildlife within a road corridor game preserve contrary to Section 5(1)(a) of the *Wildlife Act Regulations*.
- (7) That Ernest Wolfe (B: 02 JUN 48) of Onion Lake, Saskatchewan on or about the 2nd day of December, A.D. 1990 at Onion Lake District, in the Province of Saskatchewan did unlawfully carry, possess or discharge a firearm within a road corridor game preserve contrary to Section 5(1)(c) of the *Wildlife Act Regulations*.
- (8) That Ernest Wolfe (B: 02 JUN 48) and Harry Heathen (B: 21 AUG 44) both of Onion Lake, Saskatchewan on or about the 2nd day of December, A.D. 1990 at Onion Lake, Saskatchewan did unlawfully traffic in wildlife contrary to Section 41 of the *Wildlife Act*.
- (9) That Ernest Wolfe (B: 02 JUN 48) of Onion Lake, Saskatchewan on or about the 2nd day of December, A.D. 1990 at Onion Lake, in the Province of Saskatchewan did unlawfully traffic in wildlife contrary to Section 41 of the *Wildlife Act*.
- (10) That Ernest Wolfe (B: 02 JUN 48) and Oliver Belly (B: 31 DEC 60) both of Onion Lake, Saskatchewan on or about the 12th day of December, 1990 at Onion Lake, in the Province of Saskatchewan did unlawfully traffic in wildlife contrary to Section 41 of the *Wildlife Act*.
- (11) That Ernest Wolfe (B: 02 JUN 48) and Percy HEATHEN (B: 18 OCT 55) both of Onion Lake, Saskatchewan on or about the 16th day of December, A.D. 1990 at Onion Lake District, in the Province of Saskatchewan did unlawfully carry, possess or discharge a firearm within a road corridor game preserve contrary to Section 5(1)(c) of the *Wildlife Act Regulations*.
- (12) That Ernest Wolfe (B: 02 JUN 48) of Onion Lake, Saskatchewan on or about the 16th day of December, A.D. 1990 at Onion Lake, in the Province of Saskatchewan did unlawfully traffic in wildlife contrary to Section 41 of the *Wildlife Act*.
- (13) That Ernest Wolfe (B: 02 JUN 48), Harry Heathen (B: 21 AUG 44) and Willard Harper (B: 28 JUL 38) all of Onion Lake, Saskatchewan on or about the 23rd day of December, A.D. 1990 at Onion Lake, in the Province of Saskatchewan did unlawfully traffic in wildlife contrary to Section 41 of the *Wildlife Act*.
- (14) That Willard Harper (B: 28 JUL) 38) of Onion Lake, Saskatchewan on or about the 23rd day of December, A.D. 1990 at Onion Lake, in the Province of Saskatchewan did sell, trade or barter, or offer for sale, trade or barter fish, contrary to Section 42(2)(e) of the *Saskatchewan Fishery Regulations*.
- (15) That Percy Heathen (B: 18 OCT 55) of Onion Lake, Saskatchewan on or about the 28th day of January, A.D. 1991 at Onion Lake, in the Province of Saskatchewan did unlawfully traffic in wildlife, contrary to Section 41 of the *Wildlife Act*.
- (16) That Percy Heathen (B: 18 OCT 55) of Onion Lake, Saskatchewan on or about the 27th day of February, A.D. 1991 at Onion Lake, in the Province of Saskatchewan did provide false information contrary to Section 44 of the *Wildlife Act*.
- (17) That Harry Heathen (B: 21 AUG 44) of Onion Lake, Saskatchewan on or about the 27th day of February, A.D. 1991 at Onion Lake, in the Province of Saskatchewan did provide false information contrary to Section 44 of the *Wildlife Act*.
- (18) That Willard Harper (B: 28 JUL 38) of Onion Lake, Saskatchewan on or about the 27th day of February, A.D. 1991 at Onion Lake, in the Province of Saskatchewan did provide false information contrary to Section 44 of the *Wildlife Act*.

- (19) That Terrence Cook (B: 14 MAY 59) of Onion Lake, Saskatchewan on or about the 27th day of February, A.D. 1991 at Onion Lake, in the Province of Saskatchewan did provide false information contrary to Section 44 of the *Wildlife Act*.

All of the accused are treaty Indians residing on the Onion Lake Indian Reserve in the province of Saskatchewan. They are descendants of the original signators of Treaty Six.

Mr. Ken Aube is a conservation officer employed with the Saskatchewan Department of Parks and Renewable Resources. Senior wildlife officers had suspected widespread trafficking in wild meat in the Lloydminster area. Ken Aube was sent in as an undercover investigator. He rented an apartment and got a job driving taxi in Lloydminster. On February 17, 1990 while at the Prince Charles Hotel beverage room he met the accused, Ernest Wolfe. During a conversation in the beverage room, Wolfe advised Aube that he was a hunter and he could get him meat. Wolfe said he had sold a bull moose for \$150 to a man named Dave at B & D Auto Sales. Wolfe then asked Aube if he was an undercover agent, advising "you can never be too careful." That night at the beverage room, Aube bought a round of drinks for Wolfe's table. They exchanged names and their acquaintance had begun. Wolfe then introduced Aube to all of the other accused over the months that followed.

Aube made a number of trips to the Onion Lake Reserve where he purchased wild meat from some of the accused. He also accompanied Ernest Wolfe and others on a hunting trip in the bush north of the reserve which included hunting on a road corridor game preserve.

Officer Aube was working under the supervision of a senior wildlife officer, Mr. Ron Maynard. Mr. Maynard would meet with Aube throughout the undercover operation and take charge of the wild meat, photograph items and in general supervised Aube's undercover operation. Throughout the course of the operation, Officer Aube kept detailed notes. When Officer Aube's undercover operations were complete, other wildlife officers continued the investigation by interviewing the accused men. Ernest Wolfe was confronted by wildlife officials in his hotel at Prince Albert, Saskatchewan where he was attending a trapper's convention. He was interviewed in Prince Albert. A recording of the interview was made and transcripts were produced. The accused Ernest Wolfe and the other accused all testified at the trial. Most of the accused were present in the courtroom at all times during the entire case.

### The Facts

In finding the facts I accept in its entirety the testimony of Ken Aube. Mr. Aube was very careful and candid throughout his testimony. It was obvious he had taken very detailed notes. It was equally obvious that he was fair in terms of his characterization of the individuals and the incidents which occurred. Through extensive examination in-chief and cross-examination it was apparent that he was not involved in embellishment of the facts or merely providing the court with the facts and circumstances he felt would promote the Crown's case. Officer Aube's testimony did not conflict and was not at variance with any of the other numerous Crown witnesses who testified at the trial.

During the initial interview of the accused conducted at the conclusion of the undercover operation, the accused denied being involved in trafficking in wild meat and Ernest Wolfe even denied knowing the undercover agent, Ken Aube. During the course of the trial it was apparent that defense counsel was particularly interested in the amount of alcohol Ken Aube had brought onto the Onion Lake Indian Reserve: the reserve being a dry reserve. When the accused men testified they had an amazing recollection as to the number of bottles of beer that the undercover agent brought onto the reserve. However, when pressed as to the details of the transactions involving wild meat they had little if any recollection of the events and claimed for the most part that they were too drunk to remember what had happened. The accused Ernest Wolfe gave considerable details when he was interviewed in Prince Albert while at the Trapper's convention. When on the stand at the trial he could not remember having made the majority of the admissions he had made in Prince Albert. On the stand Mr. Wolfe claimed that he was drunk at the time of the interview in Prince Albert. When pressed in cross-examination as to why he could remember more in Prince Albert than he could now he volunteered that he could remember more when drunk than when sober. Ironically a medical doctor called by the defense to give expert opinion evidence on alcoholism testified that in his opinion if a person has the memories when drunk, they should also have those memories when sober. Accordingly, this combined with the evasiveness that the accused Ernest Wolfe demonstrated on the stand leaves me unable to accept his version of the events and I accept the testimony of Ken Aube wherever it conflicts with that of the accused Ernest

Wolfe. The other accused were not as blatant as Ernest Wolfe; however, in my view they were all being less than candid with the court when they testified that they did not remember the circumstances of the events that led to the charges against them.

Percy Heathen says he is a non-drinker and did not use drunkenness as a reason for not remembering his dealings with Ken Aube. Notwithstanding this, he still suggested he could not remember his trafficking in wildlife. He did have a very vivid memory however, that when the skidoo was loaded on the undercover's truck, he had noticed that both the undercover and Ernest each had a bottle of beer in their hand and there were three cases behind the seat. This evidence I do not accept. The amount of liquor Officer Aube had with him was of considerable concern to Ron Maynard and the other senior officers in charge of the investigation. It was also of considerable concern to Officer Aube. A full case of beer never made it to the reserve with Officer Aube. The defense witnesses exaggerated the amount of alcohol that came to them via Officer Aube. In my view the Crown has proved beyond a reasonable doubt the facts they rely upon in each count with the exception of Count #10 as it pertains to the accused, Oliver Belly.

Oliver Belly found himself with Ernest Wolfe in the early morning hours of December 11, 1990. They had missed their ride back to the reserve and went to the undercover agent's apartment and requested that they be allowed to sleep overnight. In the morning Wolfe asked Aube if he could give them a ride to Onion Lake. Wolfe advised that at Onion Lake they could talk to Harry Heathen and see if he had had any meat. Wolfe said that if he did not have meat Percy Heathen had shot a moose and would have some for sale. Aube then gave them a ride. Wolfe then asked to stop at the mall. Wolfe then asked if he could borrow ten dollars which Aube gave him. Wolfe assured Aube that this amount would be taken off the price of the meat. Wolfe then went into Shopper's Drug Mart and came back with two bottles of Listerine which Wolfe and Belly began to consume. When they arrived at Percy Heathen's, Percy Heathen joined with Wolfe and Belly in the consumption of Listerine. They then went over to Harry Heathen's to see if he had meat for sale. When they arrived at Harry Heathen's, Wolfe went inside and after approximately ten minutes came out and said that Harry was not back from up north but there were two front shoulders of a young deer that Aube could have for ten dollars. Belly was handed one of the quarters and he put it in the truck. In my view Oliver Belly was a mere bystander. Although he handled the meat he only did so after it had been handed to him by the undercover officer. I find that the Crown has not made out a case against Oliver Belly.

### The Role of Alcohol

The Onion Lake Reserve has a bylaw prohibiting alcohol from being brought onto the reserve. The defense argued that the charges against the accused should be stayed as a result of the undercover agent bringing beer onto the Onion Lake Reserve. The wildlife officers in charge of the investigation testified that at the time of investigation they did not realize Onion Lake was a dry reserve. Ken Aube was advised to pour out his beer onto the ground if he could do so unbeknownst to the suspects. The beer he brought with him was carefully monitored and controlled. Ron Maynard testified that the beer was part of the fitting-in process at Onion Lake and was required to maintain Ken Aube's cover. Officer Maynard was of the view that if you did not drink you would be asked about it.

From the whole of the evidence it is clear that alcohol is involved in the daily life of the accused with the exception of Percy Heathen. The rest of the accused admitted under oath that they were alcoholics. Beer, whiskey, Listerine and moose milk were the common intoxicants utilized by the accused men. They drank during the meat transactions. They drank in motor vehicles. They drank while hunting in the daylight and after dark. In my view some association with alcohol would be required to camouflage the undercover agent. There is no evidence that alcohol was used to induce the accused men to hunt or traffic in meat. The onus would be on the accused in any event to establish on a balance of probabilities a defense of entrapment. The evidence falls far short of even raising a doubt that alcohol was an inducement or an entrapment used by the Crown in this case.

### Treaty Rights

The defense argued that treaty Indians have the right to hunt the deer, moose and elk which were the subject matter of these charges on a commercial basis further to the provisions of Treaty 6. I believe the law is clear and well settled on this area in the province of Saskatchewan.

My brother Judge L.P. Deshayé in his May 8, 1992 decision in *R. v. Heathen* [reported *supra*, p. 157] gives an accurate review of the law in this area. Judge Deshayé's explanation of the law is correct and I am unable to improve or better explain his concise reasoning. I adopt his reasons as mine in finding that the accused's rights to hunt in Saskatchewan are those set out in paragraph 12 of the Natural Resources Transfer Agreement contained in the Statutes of Saskatchewan, 20 George V, 1930, c.87. The federal government agrees that laws respecting game in Saskatchewan shall apply to Indians; however, the Indians are assured the right of hunting for food in all seasons on unoccupied Crown lands and on any other lands to which they have the right of access.

It's interesting to note that the Indian's right to pursue their avocation of hunting and fishing contained in Treaty 6 was clearly subject to such regulations as may be made from time to time by the federal government and excepting any land taken up for settlement, lumbering or other purposes by the federal government. Accordingly, it is clear that from the time Treaty 6 was signed in 1876 the federal government was quite entitled to regulate Indian hunting in any form the federal government desired. The 1930 Natural Resources Transfer Agreement is the operative document. The government of Canada agrees that game laws in Saskatchewan will apply to Indians (they delegate their regulatory right under Treaty 6 to the province); however, the government does not vest the province with its entire regulatory powers contained in Treaty 6. It vests these powers subject to the province assuring the Indians of the right to hunt for food on unoccupied Crown lands or any other lands to which the Indians have the right of access. From 1930 until 1982 the province and the federal government were at liberty to swap the regulatory rights back and forth if they chose to do so. The federal government did not relinquish its right to regulate Indians hunting for food on unoccupied Crown land. It just refused to give this regulatory power to the province of Saskatchewan.

In 1982 the Indians' hunting rights as they then were, were enshrined in the Constitution. From that point on a constitutional amendment would be required to alter the Natives' hunting rights.

Learned counsel for the defendants placed considerable reliance on two unreported decisions from Alberta, namely *R. v. Potts et al.* (Ayotte P.C.J. - November 15, 1991) [reported [1992] 1 C.N.L.R. 142] and *R. v. Littlewolf* (Fraser P.C.J. - March 11, 1992) [reported [1992] 3 C.N.L.R. 83] which effectively allowed treaty Indians the right to hunt wildlife and sell the meat commercially. With the greatest of respect, these decisions are clearly wrong. They both misinterpret the Supreme Court of Canada decision in *R. v. Horseman*, [1990] 1 S.C.R. 901, [1990] 3 C.N.L.R. 95, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 108 A.R. 1, 55 C.C.C. (3d) 353, 108 N.R. 1. The practical consequences of these Alberta decisions would leave wildlife management an impossibility without the Natives themselves setting up a complete management bureaucracy involving quotas, enforcement officers and probably even undercover agents.

### Road Corridor Game Preserve

The defense argues that the charges against the accused pertaining to their hunting on a road corridor game preserve should be dismissed. The defense argues that the Natives at Onion Lake never agreed to the game corridor and accordingly it would be wrong to impose the hunting restrictions of a game preserve on them.

The road corridor game preserve is located in the Bronson Lake Provincial Forest in an area a number of miles north of the Onion Lake Indian Reserve. Because this area is proximate to the Indian reserve and because it is unoccupied Crown land Indians from Onion Lake have hunted in this bush for numerous years. The province of Saskatchewan some years ago granted the Onion Lake Band a block fur permit covering this area allowing them the exclusive trapping rights in this block of land.

The accused, through their testimony, believe that this fur permit gives them some measure of exclusivity in this forest as it pertains to hunting. Their reasoning then goes that no hunting restriction as a result of a road corridor game preserve or otherwise should be imposed on this forest without their express consent.

The recent case of *R. v. Noel Francis McIntyre* which is a May 27, 1992 decision of the Saskatchewan Court of Appeal [reported [1992] 3 C.N.L.R. 113], clearly establishes the province's right to establish road corridor game preserves if the same are established for bona fide reasons. In this case a road into the bush was required in order to access a natural gas well. It appears on the evidence before me that in fact the Onion Lake Band was consulted prior to the establishment

of the road and preserve. The court in this trial heard evidence as to the rapid depletion of game in an area if hunting was allowed off of a bush road and the evidence of Officer Aube indicates that a number of the accused in this trial systematically use the road to hunt from with great success. Ernest Wolfe showed Officer Aube where he had shot five animals off the road and all of the shots fired during Aube's hunting trips with Ernest Wolfe were shot from this road. In my view the accused have no more exclusivity to this area than any other person. The band of which they are a member does have exclusive trapping rights in this area.

### False Information Offences

Following the conclusion of the undercover operations the wildlife officers conducted same day interviews on a number of the accused. For the most part a wildlife officer attended at the accused's home on the Onion Lake Indian Reserve together with an RCMP officer. The accused was asked to attend at the RCM Police Detachment at Onion Lake to answer questions pertaining to a wildlife trafficking investigation. The accused who attended the RCM Police detachment were photographed and then interviewed by a wildlife officer. The accused denied selling wild meat. It's worthy of note that Officer Aube's undercover work had been completed at this point. The wildlife officers did not believe the accused for one second. They were not mislead or in any way inconvenienced by the denial of these accused men. At the trial Percy Heathen was questioned in cross-examination as to why he had lied about selling meat at the interview. Mr. Heathen's answer was straightforward. He said he had told the officers he didn't sell meat because he didn't think they knew he had sold meat. The information given by the accused was certainly false and it was given by the accused to a wildlife officer who was known to be investigating a specific offence under the *Wildlife Act*. Courts do not get involved in directing peace officers in how they should exercise their discretion when it comes to laying charges. The fact that there was no mischief of inconvenience caused by this false information will certainly be taken into account when assessing penalty.