R. v. WEESK, KIOKE AND METATAWABIN

Ontario District Court, Desmarais J., October 31, 1985

R. Fournier, for the appellant, Crown
C.M. Beamish, for the respondents

The Crown appealed from the decision of the Provincial Court judge ([1984 2 C.N.L.R. 183) dismissing a charge against the respondents, treaty Indians, of unlawfully hunting moose during closed season contrary to s. 47(1) of the Game and Fish Act, R.S.O. 1980, c. 182. The hunting occurred on remote private property being used for lumbering purposes. There were no posted signs, fences or any sign of human habitation or commercial activity at the kill site. The accused believed, on reasonable grounds, that the land was unoccupied Crown land. The Crown argued that the Provincial Court judge erred in not considering the application of strict liability on the part of the accused to ascertain the ownership of the lands in question.

Held: Appeal dismissed.

1. The Game and Fish Act is a law of general application in the province.

2. A contravention of s. 47 of the Game and Fish Act brings about an application of strict liability against the offender, unless it can be shown that there was a mistake of fact, which, if true would absolve the accused of any guilt.

3. On the basis of the evidence presented it was reasonable for the accused to mistake the land for vacant Crown land on which they had a right to hunt.

4. It would be unreasonable to impose upon the accused in the circumstances of this case an obligation to ascertain the ownership of the lands in question.

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DESMARAIS J. (orally): This is an appeal from the decision of His Honour Judge G.E. Michel delivered at Cochrane, September 21st, 1983 [reported [1984] 2 C.N.L.R. 183]. The learned Provincial Court Judge dismissed a charge against the respondents that they did commit the offence of unlawfully hunting moose during the closed season contrary to s. 47(1) of the Game and Fish Act R.S.O. 1980, c. 182.

The Facts

The facts are not in dispute and can be summarized as follows:

On Sunday, January 23rd, 1983 at approximately 7:30 a.m., the three respondents left Timmins and proceeded some 70 kilometers along Highway 655 north in order to hunt moose. They stopped at three (3) sites along the highway. At the first two (2) sites they observed some equipment and a shelter. These two sites were approximately two kilometers east of Highway 655. They reached these sites by parking their vehicle along Highway 655 and by using snowshoes, walked in from the said highway. Upon perceiving the equipment and shelter, they immediately returned to the highway. The third site was approximately three kilometers south of the second site and 1.6 kilometers east of the highway. It is at this location that the respondent Joseph Metatawabin killed two (2) bull moose.

The respondents testified that there were no posted signs, fences, or any sign of human habitation or commercial activity at the kill site. Although Ministry of Natural Resources officials testified they could hear a skidder operating within close proximity of he site, I accept the respondents were not aware of this since the kill took place on Sunday when such commercial operation would not be operating.

At the outset of the trial it was agreed that the kill took place on private property.

It was also agreed that the respondents are Indian members of one of the bands subject to the James Bay Treaty also known as Treaty No. 9. and as such, are entitled to any defence arising out of the treaty. This treaty provides that Indians who are parties to it shall, in the words of the

treaty,…have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

At the trial of this matter the learned Provincial Court Judge allowed that the respondents could very well have mistook the site for Crown land and dismissed the charges accordingly. He went on to say "were it not for that mistake of fact, they would be guilty as charged" [p.184 C.N.L.R.].

The appellant argues on appeal that the learned Provincial Court Judge erred in that he did no "consider the aspect of strict liability on the part of the accused persons to ascertain the ownership of said lands."

The Issues

The issue before this court is to determine whether the Provincial Court Judge erred in not considering whether strict liability applied.

Decision

It is well settled that Indian who are members of one of the bands subject to Treaty No. 9 are entitled to any defence arising out of the treaty.

It is also well settled that the Game and Fish Act is a law of general application in force in the Province of Ontario.

Section 88 of the Indian Act, R.S.C. 1970, c.I-6 provides as follows:

> Subject to the terms of any treaty, and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The general rule therefore is that all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province. There are four exceptions to this general rule:

1. Where there is an inconsistency between the terms of nay treaty and a provincial law of general application, the former shall prevail over the latter.
2. Where there is an inconsistency between an Act of Parliament of Canada and a provincial law of general application, the former shall prevail over the latter.
3. Where there is an inconsistency between the Indian Act, subordinate legislation or an order made pursuant to that Act and a provincial law of general application, the former shall prevail over the latter and,
4. To the extent that provision for a matter is made by or under the Indian Act and by a provincial law of general application, the latter shall not apply to Indians.

Section 47(1) of the Game and Fish Act reads as follows:

> 47. (1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose.

In R. v. Batisse, reported in 19 O.R. (2nd) 145, 84 D.L.R. (3d) 377, 40 C.C.C. (2d) 34 (Ont.Dist.Ct.) Judge Bernstein said the following [[pp. 378-79 D.L.R.]:

> …The James Bay Treaty - Treaty No. 9 was entered into during the years 1905 and 1906, covering approximately, 90,000 square miles of Northern Ontario. Prior to the execution of this treaty there had been no extinguishment of Indian interest in the land. Increased activity in mining and railroad construction caused the senior governments to make serious efforts to obtain a cession of Indian title, eventually resulting in the treaty presently in issue.
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> Treaty No. 9 provided that the various Indian tribes inhabiting this vast area:

> Do cede, release, surrender and yield up to the government of the Dominion of Canada, for His Majesty, the King and His successors forever, all their rights, titles and privileges whatsoever to the lands…

As part of the bargain the following term concerning Indian hunting, trapping and fishing rights was inserted:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. (Emphasis mine)

I am satisfied therefore that on the basis of the various authorities cited that Indian could continue to hunt, trap and fish throughout the tract of land surrendered subject to two (2) limitations: firstly - subject to such regulations as may from time to time be made by the government of the country, and secondly - saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

The first limitation referred to has no application in this case as it is conceded that there are no regulations passed by the federal government as would derogate from the Indians' rights under Treaty 9 to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered. Section 88 of the Indian Act specifically preserves to the Indians any defence they may have as a result of any treaty entered into.

The second limitation is the one which causes all the difficulty in this case.

When the treaty was drafted the intention was that there would be no hunting carried on in an area which was required for settlement, mining, lumbering, trading or other purposes.

The facts in this case reveal that the kill took place on private property that was being used for lumbering purposes. It's conceded the respondents were not aware lumbering operations were taking place on the property. It will be recalled the kill took place on a Sunday and that the respondents did not come upon any signs, fences, or any actual operations on that day.

It is my view as it was that of the Provincial Court Judge, that the respondents would be held guilty as charged if they knew the land to be privately owned or if they knew that it was being used for lumbering purposes.

In my view, a contravention of s. 47 of the Game and Fish Act brings about an application of strict liability against the offender, unless it can be shown that there was a mistake of fact, which, if true would absolve him of any guilt before the court.

In this case, the kill site was a remote area off Highway 644 in the District of Cochrane. The respondents had entered two other area before eventually ending up at the kill site. At these two previous sites, they were able to see equipment and a shelter and therefore left the sites immediately.

At the third site, although it was subsequently found out that lumbering operation was taking place within close proximity, there were no signs posted, no fences and no activity taking place at the time of the kill which would have put the respondents on notice. A lumbering operation requires some kind of activity taking place. The mere existence of a timber licence alone is not sufficient to bring it within the scope of an activity. It appears from the evidence presented before the learned Provincial Court Judge that the respondents were not aware of any equipment, signs or activity going on at the kill site as would put them on notice. As a result of this, they mistook the land for being vacant Crown land on which they had a right to hunt.

I agree with the Provincial Judge that the mistake of fact, if believed, offers a defence to the charge against them.

I cannot in the circumstances of this case find that the learned judge erred in his application of the principle of strict liability as against the respondents. It would be unreasonable to impose upon

the respondents in the circumstances of this case, the obligation to ascertain the ownership of the lands in question. In my view, they acted reasonably.

In the end, therefore, this appeal is dismissed.