HER MAJESTY THE QUEEN V. GEORGE HENRY HEATHEN

[Indexed as: **R. v. Heathen**]

Saskatchewan Provincial Court, Deshaye, P.C.J. May 8, 1992

R. Kirkham, for the Crown
H. Neufeld, for the accused

The accused treaty Indian was charged with three counts of trafficking in wildlife contrary to s.41 of the Saskatchewan *Wildlife Act,* S.S.1979, c.W-13.1, and one count of providing false information contrary to s.44 of the Act. The accused relied on defences based on Treaty 6.

Further, defence counsel argued for a judicially directed stay of proceedings based on the fact that the undercover agent brought alcohol onto the reserve during the course of the investigation. There was at all material times a by-law prohibiting the bringing of alcohol onto the reserve. The undercover agent was unaware at the time of the operation of the existence of the by-law.

Held: Accused found guilty on two charges of trafficking.

1. It was conceded by the Crown that the evidence did not prove an offence under s.44 of the Act and therefore the charge of providing false information was dismissed.

2. The various definitions of the word “traffic” contemplate a transaction actually occurring or touted.

3. With respect to the first count of trafficking, the Crown relied on two statements made by the accused to the undercover agent over a course of a few days. The court found that the accused's first statement, asking the undercover agent what he would pay for the head of a buck that he had shot, was equivocal. It could mean that the accused was asking the undercover agent's opinion as to the value of the head, or it could mean that the accused intended to solicit offers. Either meaning could not be ascribed with certainty to the words spoken by the accused. That statement alone did not conclusively amount to “trafficking” within the meaning of the Act. In the second statement the accused stated the prices he charged for moose or deer. At the time this statement was made the accused did not have any meat or wildlife that he intended to sell. In stating the prices it could be fairly presumed that the accused meant he asked these prices if and when he had wildlife for sale. The mere statement by the accused that he charged money for moose and deer did not fall readily into any of the meanings of the word "traffic" as contained in the Act.

4. The evidence was clear with respect to the two remaining charges of trafficking that the accused made two sales of moose meat to the undercover agent. Both sales occurred at the accused's residence on reserve. The meat sold was "wildlife" within the meaning of the Act and the transactions clearly amounted to trafficking in wildlife.

5. The accused could not rely on the original treaty right to hunt commercially, because that right was taken away when the hunting rights of the Indians were merged and consolidated in the Natural Resources Transfer Agreement. The right of Indians to hunt commercially could be regulated by provincial law but the right to hunt for food could not. Thus the right to hunt commercially did not exist at the time s.35 of the *Constitution Act, 1982* came into effect.

6. The fact that the undercover agent brought alcohol Onto the reserve and offered some to the accused did not in any way amount to inducement to the accused to commit the offences charged. If in fact the bringing of alcohol onto the reserve did result in a violation of treaty rights the appropriate judicial response would be a reduced penalty rather than to stay the charges.

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DESHAYE P.C.J.: The accused is charged with four counts under the *Wildlife Act,* S.S. 1979, c.W-13.1, as follows:

> (1) Between the 11th day of December, A.D. 1990, and the 20th day of December, A.D. 1990, at or near Onion Lake, Saskatchewan, did unlawfully traffic in wildlife, contrary to

section 41 of *The Wildlife Act.*

(2) On or about the 14th day of January, A.D. 1991, at or near Onion Lake, Saskatchewan, did unlawfully traffic in wildlife, contrary to section 41 of *The Wildlife Act.*

(3) On or about the 19th day of January A.D. 1991 at or near Onion Lake, Saskatchewan did unlawfully traffic in wildlife, contrary to section 41 of *The Wildlife Act.*

(4) On or about the 27th day of February, A.D. 1991, at or near Onion Lake, Saskatchewan, did provide false information, contrary to section 44 of *The Wildlife Act.*

The facts are not in dispute. The accused is a member of the Onion Lake Indian Band and resides on the reservation at Onion Lake, Saskatchewan. He is entitled to the protection afforded to Indians under paragraph 12 of the Natural Resources Transfer Agreement and contained in the Statutes of Saskatchewan, 20 George V, 1930, c.87. That provision is as follows:

> 12. 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.

Mr. Ken Aube is a conservation officer employed with the Saskatchewan Department of Parks and Renewable Resources. Commencing in the summer of 1990, Officer Aube began operating as an undercover officer residing in Lloydminster, Saskatchewan. He let it be known to certain people that he was interested in purchasing wild meat for his own use and for resale. Eventually, he came to know the accused, principally through meeting and getting to know another individual from the Onion Lake area, one Ernest Wolfe. The first meeting between Mr. Aube and the accused occurred on December 11, 1990. The preceding day, Ernest Wolfe had told Aube that George Heathen had shot a ten-point buck. Mr. Aube expressed an interest in seeing the buck and so went to George Heathen's residence on the reserve the next day, accompanied by Ernest Wolfe. When Mr. Heathen met Aube, he explained that he had shot the buck in the provincial forest north of Onion Lake. He then asked Aube what he would pay for the head. Mr. Aube said that that would depend on the size of the rack. When Mr. Heathen went in to get a tape measure, Aube asked Ernest Wolfe if he thought George would take $40 for the head. Ernest then spoke to George out of earshot of Officer Aube. Shortly after this, the accused came to speak to Aube and told him that he wanted to keep the buck since it was the largest one he had ever shot. The next contact between Aube and the accused was on December 16, 1990. Aube had again gone to meet Heathen in company with Ernest Wolfe under the pretext of wishing to make an offer to buy the buck's head. When he met with the accused on December 16th, Mr. Aube told the accused he needed a moose and two deer. The accused said he was going to go hunting in the next few days, and that he charge $250 for a moose and $75 for a deer. Aube asked the accused if he had a place to hang the meat and Heathen said that he did. On December 20, 1990, Aube again attended at Heathen's residence and asked if he had been hunting yet. The accused replied that he had not because it was too cold.

These are the facts on which the Crown relies to prove the first offence charged. The word "traffic" is defined in the *Wildlife Act* as meaning, "offer for sale, expose for sale, advertise for sale, sell, buy, barter, exchange, deal, solicit or trade." The only wildlife the accused had on December 11th and 16th was the ten-point buck. The only possible circumstance which could amount to an intention to traffic in that wildlife would be when Mr. Heathen asked Officer Aube how much he would pay for the head. In my opinion, this statement is equivocal. It may mean Mr. Heathen was asking Aube's opinion as to the value of the head, or it could mean that Mr. Heathen intended to solicit offers for the buck's head. I do not think I can ascribe with certainty either meaning to the words spoken by the accused. I do not think that that statement alone where Heathen asked Aube what he would pay for the head conclusively amount to "trafficking" within the meaning of the Act. The other circumstance relied on by the Crown is the discussion of December 16th. Mr. Aube told the accused he wished to obtain moose and deer meat. The accused told Mr. Aube what he charged for wild meat. I think it is a significant circumstance that at the time this statement was made, the accused did not, in fact, have any meat or wildlife that he intended to sell. Again, I must attempt to determine what meaning can be imparted to the accused's words and then to decide whether in law the conduct of the accused amounts to trafficking. When the accused stated, "I charge $250 for a moose and $75 for a deer," it may fairly be presumed that he meant he asked for these amounts when he sold wildlife. Put another way, the words might very well be taken to mean

that the accused would ask for these amounts if and when he had wildlife for sale. In my opinion, this statement is not a trafficking in wildlife as contemplated by s.41 of the Act.

The various definitions of the word "traffic" contemplate a transaction actually occurring or touted. I think this is apparent from the words themselves, "offer for sale, expose for sale, advertise for sale, sell, buy, barter, exchange, deal, solicit or trade." In *Rex* v. *Wright* (1915), 24 C.C.C. 321, the Ontario Court of Appeal was asked to consider what constituted a sale under the *Liquor Licence Act,* R.S.O. 1914. It was held that the particular wording of the statute in that case required that the word "sell" be interpreted to include an agreement to sell, although Latchford J. was of the opinion that the taking of an order was not a sale within the strict technical meaning of the word.

The word "sell" was also considered by the Alberta Court of Appeal in *Rex.* v. *People's Wine and Spirit Brokers* (1917), 28 C.C.C. 16. It was there held that "the transference of the thing bought or sold appears to be the primary consideration." The Court of Appeal also quoted with approval from *Titimns* v. *Littlewood,* [1916] 1 K.B. 732 as follows:

Lord Reading C.J.:

> We ought not to construe the word "sell" as meaning an "agreement for sale" unless there are other words in the statute which lead to that conclusion.

and Sankey J.:

> In my judgment the words which are plain do not refer to an executory agreement for sale, but to an actual sale, and as we are construing a section which provides a penalty, I do not think we ought to stretch its plain language so as to include a meaning which the words do not bear.

The *Concise Oxford Dictionary* defines "barter" as "exchange (goods or immaterial things) for other goods; part with for a consideration." The plain meaning of this word contemplates an actual exchange in the form of a transaction. The same dictionary defines "solicit" as "invite, make appeals or requests to, importune, ask importunately or earnestly for." Section 41 of the Act makes it an offence to "traffic in wildlife" and in the context of this section the word "solicit" might be construed to mean "make a request to deal or trade in wildlife," or perhaps it may not strain the meaning of the words too much to hold that they mean "invite or ask for the exchange of wildlife." Even if these interpretations could be applied to the statute, I do not think that the actual facts here would fit into any of them. The mere statement by the accused that he charges money for moose or deer does not fall readily into any of the meanings of the word "traffic" as contained in the Act. I find that an offence under count 1 in the Information has not been proved.

As for count 4, the Crown concedes that the evidence does not prove an offence under s.44 of the *Wildlife Act.* In the circumstances, it is not necessary for me to outline the facts pertaining to this count and I hold that the charge under count 4 is also dismissed.

I turn not to a consideration of counts 2 and 3 in the Information. I have said the facts are undisputed. The evidence is clear and uncontradicted that on January 14, 1991, the accused sold a hind-quarter of moose meat to Officer Aube for $60. It has also been established that on January 19, 1991, the accused sold a complete cow moose carcass to Officer Aube for $200.

Both sales occurred at the accused's residence on the Onion Lake Reserve in Saskatchewan. In each instance, the meat sold was "wildlife" within the meaning of the statute. These transactions clearly amounted to a trafficking in wildlife and the issue is whether s.41 is enforceable against the accused because of his special status as an Indian.

The Onion Lake Reserve is located within the area covered by Treaty 6, and I take it to be common ground in this case that the accused is entitled to rely on the provisions in that treaty to the extent provided by law. Although not strictly proved, I believe the provisions of the treaties are of sufficient notoriety that their text may be extracted from the historical literature. I refer here to the provisions of Treaty 6 as reproduced in the work by the Honourable Alexander Morris, P.C., entitled , *The Treaties of Canada with the Indians of Manitoba and the North-West Territories.* The relevant provision is as follows:

> Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of her Dominion of Canada, and saving and excepting such tracts as may

> from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefor, by the said Government.

It is argued for the Crown that the leading applicable case is the decision of the Supreme Court of Canada 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. In that case, Mr. Horseman sold a grizzly bear hide to a licenced hide dealer for $200. He had a licence to sell a bear hide, but the hide he sold was acquired by him the year previous and this amounted to a contravention of a provision in the Alberta *Wildlife Ace* prohibiting the trafficking in wildlife. Horseman was an Indian and a descendant of the signatories to Treaty 8. He argued that this status allowed him to sell the bear hide in order to buy food. When the case reached the Supreme Court, two questions were posed for the determination of the Court. The questions were cited at page 381 [C.C.C.; p.107 C.N.L.R.] of the judgment:

> Between February 1, 1984, and May 30, 1984, was section 42 of the *Wildlife Act,* R.S.A. 1980, c.W-9, constitutionally applicable to Treaty 8 Indians in virtue of the hunting rights granted to them under the said Treaty?
>
> In particular, were the hunting rights granted by Treaty 8 of 1899 extinguished, reduced or modified by paragraph 12 of the Alberta Natural Resources Transfer Agreement, as confirmed by the *Constitution Act, 1930?*

Both questions were answered in the affirmative.

In *Horseman,* the Supreme Court considered the effect of paragraph 12 of the Alberta Natural Resources Transfer Agreement, identical in its terms to paragraph 12 as related to Saskatchewan and cited earlier in these reasons. It was held that the original treaty right to hunt clearly included hunting for purposes of commerce. The evidence of Dr. John Foster who testified for the defendant in this case was to the same effect. I take it as uncontested that the Indian people who claim rights under Treaty 6 were at the time of the treaty entitled to hunt for commercial purposes. Section 35(1) of the *Constitution Act,* 1982 provides:

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

The Supreme Court in *R.* v. *Sparrow,* [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. 1, 56 C.C.C. (3d) 263, 111 N.R. 241, has held that the word “existing” makes it clear that the rights to which *s.35(1)* applies are those that were in existence when the *Constitution Act, 1982* came into effect, namely April 17, 1982. The case further held that "existing" means "unextinguished" and that extinguished rights are not revived by s.35(1).

Cory J., who wrote the majority opinion in *Horseman,* adopted what was said by Dickson J. in the earlier Supreme Court decision in *Moosehunter* v. *The Queen,* [1981] 1 S.C.R. 282, [1981] 1 C.N.L.R. 61, 123 D.L.R. (3d) 95, 59 C.C.C. (2d) 193 at p.195 [C.C.C.; p.63 C.N.L.R.]:

> 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 Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not.

Based on this case and others, Cory J., held at page 377 [C.C.C.; p.104 C.N.L.R.] of the report that "the agreement did *take away* the right to hunt commercially" (my emphasis).

Learned counsel for the defendant argued that the *Horseman* decision should be given limited scope because the Supreme Court did not specifically address the provisions of *s.35(1)* of the *Constitution Act, 1982.* Reliance was placed on two unreported Provincial Court 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]. Both decisions adopted the same premise, namely that the *Horseman* decision did not deal with the "extinguishment" of the treaty right of the Indians to hunt commercially, but rather with regulation of the right to hunt commercially. It was said that since Cory J. did not use the word "extinguished" it was possible to distinguish or narrowly apply the judgment. Then, relying on *Sparrow,* the judges in those cases went on to hold that since there was not held specifically to be an "extinguishment," the right of the Indians to hunt commercially still exists. With respect, I cannot agree with the

reasons in the *Potts* and Littlewolf decisions.

It is quite clear from a reading of the whole of the majority opinion in *Horseman* that it was held that the treaty right of the Indians to hunt commercially did not exist after paragraph 12 of the Transfer Agreements came into effect in the provinces of Alberta and Saskatchewan. The clear effect of his words and the judgment of the Supreme Court in that case was that the right to hunt commercially was "taken away" when the hunting rights of the Indians were merged and consolidated in 1930. The question posed for the opinion of the Court was whether treaty hunting rights were "extinguished, reduced or modified" by the Natural Resources Transfer Agreement. The Court held that this was the effect of the Transfer Agreement and, in my opinion, no amount of captious reasoning alters that effect. The right to hunt commercially did not exist at the time s.35(1) of the *Constitution Act, 1982* came into effect.

Other decisions in Saskatchewan lend support to the conclusion at which I have arrived. In *R.* v. *Horse,* [1984] 4 C.N.L.R. 99, [1985] 1 W.W.R. 1, 14 C.C.C. (3d) 555, 34 Sask. R. 58 the Saskatchewan Court of Appeal considered the question of the effect of s.35(1) of the *Constitution Act, 1982* on paragraph 12 of the Natural Resources *Memorandum of Agreement,* 1930 (Sask.), c.87. Vancise J.A. said at pages 562 and 563 [C.C.C.; p.106 C.N.L.R.]:

> Treaty rights were merged and consolidated in s.12, the "game laws" paragraph of the Agreement. Section 52(2) of the *Constitution Act, 1982* provides that the Acts and orders in Sch. 1, which included the Natural Resources Agreement, 1930, are included in the Constitution of Canada. Section *35(1)* must be read subject to the "game laws" paragraph of the Constitution which provides for Indian hunting, fishing and trapping. The treaty rights to hunt and fish which were consolidated in s.12 of the Agreement as at April 17, 1982, existed only to the extent that they had not been modified by that paragraph. In my opinion, s.35(1) has no effect on the application of provincial game laws to treaty Indians under the Agreement.

The *Horse* case was appealed to the Supreme Court of Canada and the judgment is reported as *R.* v. *Horse,* [1988] 1 S.C.R. 187, [1988] 2 C.N.L.R. 112, [1988] 2 W.W.R. 289, 47 D.L.R. (4th) 526, 39 C.C.C. (3d) 97, 65 Sask. R. 176, 82 N.R. 206. The Supreme Court did not find it necessary to deal with the effect of s.35(1). Nevertheless, the judgment of Vancise J.A. in the Saskatchewan Court of Appeal is certainly in accord with the majority decision in *Horseman, supra,* and is binding upon this court.

The Saskatchewan Court of Queen's Bench in the case of *Stone, Glessing et al.* v. *The Queen* (Wimmer J. - October 1, 1990 - unreported) has held, "It is settled law that under Natural Resources Transfer Agreements made between Canada and the ... provinces [of Saskatchewan, Alberta and Manitoba], provincial game laws govern the activities of Indians on reserves except when hunting or fishing for food." Counsel has advised me that this case has been appealed to the Saskatchewan Court of Appeal which dismissed the appeal in an oral judgment on February 12, 1991.

In part to address the question of the "commercial" aspect of traditional Cree Indian hunting traditions, the accused called two ethnological and historical experts, as well as an elderly Indian gentleman who is a long time resident of the Onion Lake Reserve. The substance of their evidence was that, in the practices of the Cree culture, not every individual or even every family head is the person who hunts for food. Certain people from the community who are best suited by health, skill and resources are the hunters of the community. It was understood and expected in that culture that the hunters would share the wildlife they were able to kill with other members of the Cree community. In return, the Indian hunter may be provided with things to assist him in hunting, such as fuel for a vehicle or ammunition for a firearm. I wish to clearly state that it is not this sort of exchange that I intend to deal with when I speak in these reasons of a commercial traffic in wildlife. In my opinion, a distinction may well be drawn between a factual scenario involving the sale of meat to non-Indians as a commercial enterprise and a situation where an Indian hunting for food shares meat or fish with his family or perhaps other community members with the recognition that other goods or services will be forthcoming to him in recognition of his role as a hunter in the community. That is not this case, and I leave for another day the determination of that issue should it arise. The facts of the present case clearly contemplate a strictly commercial transaction in the sense in which that word is understood in the *Horseman* decision.

Counsel for the accused has argued that there should be a judicially directed stay of proceedings in this case because of the conduct of the undercover operatives during the course of the investigation. Specifically, he suggests that it would be proper for the court to direct a stay because alcohol was brought onto the Onion Lake Reserve by Officer Aube during the course of the

operation. There was at the material times a band council resolution, or by-law, prohibiting the bringing of alcohol onto the reserve. Officer Aube and his supervisor, Mr. Maynard, were unaware at the time of the operation, which took place over the course of several months, that there was such a by-law in existence. It appears as though alcohol was given to Ernest Wolfe on occasion by Officer Aube, although it was not established in evidence whether the alcohol was supplied or given to him off the reserve or on the reserve. There was at least one time when Ernest Wolfe and Mr. Aube had alcohol on the reserve at a time when it was supplied by Aube. Treaty 6 provides:

> Her Majesty further agrees with her said Indians that within the boundary of Indian reserves, until otherwise determined by her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force or hereafter to be enacted to preserve her Indian subjects inhabiting the reserves or living elsewhere within her North-West Territories from the evil influence of the use of intoxicating liquors, shall be strictly enforced.

I should indicate that the fact that Officer Aube brought alcohol onto the reserve, and in fact offered some to the accused, did not in any way amount to an inducement to the accused to commit the offences charged. What, in fact, occurred is that the accused declined to accept any alcohol from Aube when it was offered. As to whether alcohol played a pivotal role in Aube's relationship with Ernest Wolfe is far from clear on the evidence and I am unable to conclude on the evidence that Aube's introduction to the accused had any connection whatever to the supply of alcohol to Ernest Wolfe. Even if it had, I am not satisfied that it would provide any basis to stay the charges against George Heathen.

If, in fact, the bringing of alcohol onto the reserve by Officer Aube did result in a violation of the treaty rights of the Indians as protected by the *Constitution Act, 1982,* I would think that the appropriate judicial response would be a reduced penalty rather than to stay the charges.

For the reasons stated, I find the accused not guilty on counts 1 and 4, and guilty on counts 2 and 3.