REGINA v. GILBERT POTTS, WILLIAM POTTS, PERCY POTTS AND HOWARD BRUNO

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

Alberta Provincial Court, Ayotte P.C.J., November 15, 1991

J. Bowron and M. Unsworth, for the Crown
L.G. Anderson, for Percy Potts
L. Mandamin and A.D. Pringle, for Gilbert Potts and William Potts
D.C. Ward, for Howard Bruno

The four defendants faced 23 charges pursuant to the *Wildlife Act,* R.S.A. 1988, c.W-9.1, arising out of an 18 month investigation of wildlife trafficking by the Alberta Department of Fish and Wildlife. The defences raised included entrapment and constitutional issues. Two of the defendants, G.P. and W.P., were Treaty 6 Indians. They argued that s.61(1) of the *Wildlife Act,* which made it an offence to traffic in wildlife or to be in possession of it for the purposes of trafficking, interfered with their treaty right to hunt for commercial purposes as protected by s.35 of the *Constitution Act,* 1982 and that the Crown had not met the burden cast upon it by *R*. v. *Sparrow,* [1990] 3 C.N.L.R. 160 to justify that interference. The Crown relied on *R*. v*. Horseman,* [1990] 3 C.N.L.R. 95 to show that the treaty right to hunt commercially no longer existed.

Held: **Treaty right to hunt commercially not extinguished. Impugned provisions of Wildlife Act were an unreasonable and unjustifed interference with the treaty right and were therefore of no force or effect pursuant to s.52(1) of Constitution Act, 1982. Three of the four accused convicted as they were not acting bona fides in pursuance of treaty right.**

1. The defendants failed to make out the defence of entrapment. They properly sought to invoke the doctrine, as there was clear proof of their guilt. But they failed to meet the burden of proof on a balance of probabilities. Assuming that the agent's actions qualified as random virtue testing, it was permissible as part of a *bona fide* investigation.

2. The investigation was a response to specific complaints of trafficking in a number of small communities, including the reserve where the defendants lived. The size of the area targeted may affect the *bona fides* of an investigation. However, what is an appropriate area will be affected by the type of offence being investigated and the nature of the information available to police. Wildlife offences by their nature lend themselves to commission in rural, sparsely populated regions, and the complaints here emanated from a number of small communities in such areas. The district chosen included communities in sufficient proximity to one another and sufficiently connected to justify operations there.

3. There was no unlawful search or seizure breaching s.8 of the Charter when the agent first approached G.P. The agent was present on the defendant's property by mistake. When he discovered this, his sole concern was to obtain directions to his original destination until the defendant, of his own volition, suggested and then completed negotiations for the sale of his moose. The entire transaction was conducted in his yard; the agent made no attempt to enter his dwelling house.

4. The analysis in *Sparrow* and the tests it imposes apply equally to Aboriginal and to treaty rights.

5. The defendants have shown a *prima facie* treaty right to hunt commercially. At the time of the signing of Treaty 6, the government had an interest, because of its own limited resources, in encouraging the continuation by the Indians of their traditional means of maintaining a livelihood which included the commercial aspect of hunting.

6. The Crown relied on *Horseman* as irrefutable proof that the right to hunt commercially has been extinguished. The test of extinguishment is that the Sovereign's intention must be clear and plain. "Existing" means "unextinguished" rather than exercisable at a certain time in history. The fact that a right is controlled in great detail by regulation does not mean that the right is thereby extinguished. Neither para. 12 of the Natural Resources Transfer Agreement nor provincial legislation in existence from time to time, even given that para. 12 permitted provincial legislation to affect treaty rights, specifically addressed extinguishment of the right to hunt commercially. *Horseman* did no more than confirm the provincial right to regulate all aspects of the treaty right to pursue the avocation of hunting, except hunting for food. Section 35 of the *Constitution Act, 1982* was not considered in *Horseman.*

7. The impugned provisions of the *Wildlife Act* interfered with the treaty right to hunt commercially, even conceding that by Treaty 6 itself the right is subject to reasonable regulation by the Crown. The effect of the restriction was unreasonable and created undue hardship by casting too wide a net.

8. Legislation which negatively affects s.35 rights may be justified if there is a valid legislative purpose. These provisions of the *Wildlife Act* were designed to preserve the wildlife resource for the use of future generations, which was a valid objective. However there was no evidence justifying the extent to which treaty rights were restricted by the Act. Therefore, pursuant to s.52(1) of the *Constitution Act, 1982,* they are of no force or effect in respect of those engaged in the exercise of treaty rights.

9. Those who claim the protection of their treaties must show that they were acting *bona fide* in pursuance of those rights. This was not a case of a treaty Indian selling the fruits of his hunt to others but one of going with others without treaty rights in part to assist them with their illegal activities.

10. G.P.'s liability may also be grounded on s.21 of the *Criminal Code,* which was applicable to these proceedings by operation of the *Provincial Offences Procedure Act,* S.A. 1988, c.P-21.5. Whatever his own rights, G.P. knew that B. intended to commit an offence by re-selling the meat he sold to him, thus making him a party to the offence B. subsequently committed. Even if the undercover agent can also be considered a party to B.'s offences, that did not assist G.P. by reason of s.23.1 of the *Criminal Code.*

AYOTTE P.C.J.: "Operation Clean-up" was the governmental response to complaints of trafficking in both fish and game that it had been receiving over the previous two or three years. By sending an undercover contract agent, Kevin Stalker, into selected areas of the province, the Alberta Department of Fish and Wildlife hoped that it would identify and ultimately expose some of those

involved in these illegal activities. Stalker's investigation began in October 1988, and over the next eighteen months he discovered, among others, the four defendants, who now face, jointly, severally and in varying combinations, some 23 charges pursuant to the *Wildlife Act*, R.S.A. 1988, c.W-9.1. Their trial has occupied the better part of two weeks and they present defences ranging from entrapment through traditional concepts of reasonable doubt to constitutional challenges to the legislation itself. As might be expected, not all of the defendants rely on the same arguments nor does all of the evidence pertain equally to each of them.

Keeping in mind the difficulties presented by trial on an information as involved as this one and acknowledging immediately the arbitrariness of my approach, I propose to deal with the issues as follows: (1) the case against Percy Potts; (2) the entrapment defence; and (3) the constitutional arguments.

Percy Potts

By the conclusion of the trial there remained only three charges against Percy Potts: hunting elk outside the open season for such game, possession of it for the purpose of trafficking and trafficking itself. The charges cover the alleged events of April 21 to 23, 1990 and the evidence consists in large part of a series of conversations between Stalker and the defendant himself, as alleged by the former and explained by the latter.

Although Percy Potts had figured earlier in the agent's investigation, the events which resulted in these charges occurred by chance and at a time when the latter's inquiries into the activities of the four defendants had for all intents and purposes concluded. Stalker, who had officially become a wildlife officer in November 1989, and a young companion were out baiting bears when they met Potts in the company of the defendant Howard Bruno and others. The defendant had just shot two elk, and Stalker and his young friend helped his group load them. The agent made it known then that he had a place to sell one of the animals and was invited to meet the defendant at the place where the animals were to be cleaned. Not wanting to involve the juvenile in his investigation, he did not keep that rendezvous, but instead phoned Potts the next day. During that conversation, according to Stalker, the defendant asked him to sell the elk for Bruno and himself and initially quoted a price of $500. When pressed by the agent on the price, Potts apparently retreated, saying that he couldn't ask anything because the elk belonged to Bruno, not himself. The conversation ended somewhat inconclusively with Stalker indicating that he would check with his prospective customer to see if he was still interested and the defendant agreeing to keep the animal one more day before beginning to get rid of it. However, when the agent contacted the defendant the next day, he was told that they had already disposed of the animal.

Percy Potts generally agrees with Officer Stalker's version of these events, except that it is his recollection that the latter not only raised the possibility of selling the elk at the kill site itself but that it was there that Potts himself threw out the $500 figure. While confirming that they were to meet at Sand Hills later that day, he says that he didn't go there either and never had any intention of going. He defends his conduct by explaining that it is the Native way to deal with matters like this indirectly rather than simply saying "no." In other words, Mr. Potts' position is that he didn't want to and never intended to sell meat to Stalker. By appearing to go along and then not showing up to complete the transaction, it was his hope that the latter would "get the message" without the necessity of a direct and perhaps unpleasant confrontation.

The defendant also has a different recollection regarding the number of and the contents of his subsequent telephone contacts with Stalker. As already noted, the discussions about selling and the asking price took place, according to Potts, not on the telephone but at the kill site itself and, as Stalker concedes, it was he, not the defendant, who brought the subject up. Potts, however, denies ever asking Stalker to sell meat for him, and he recalls only one telephone conversation, one in which he told Stalker that "... we had got rid of the meat, that there was no meat for sale." He denies ever intending to sell meat to him and testifies that if he had known that merely *agreeing* to sell amounted to an offence, he would never have chosen this method to deflect Stalker's unwelcome propositions. Innocent intent, then, is his defence.

All counsel have, I believe, conceded that possession for the purposes of trafficking in wildlife and trafficking itself are full *men rea* offences. I agree with that characterization in view of the nature and working of the prohibitions involved and the penalties provided. The availability of the innocent intent defence Percy Potts propounds will depend then on his ability to raise a reasonable doubt about that intent on all of the evidence. I say "all of the evidence," because, quite frankly, were his defence dependent entirely on his own explanations for his actions, it would fail.

Percy Potts was not an appealing witness. Although he presented himself as a relatively well-education and sophisticated man, the manner in which he responded to the questions put to him, even by his own counsel, made it clear that he is deeply resentful of both white people, and as he termed it, "the dominant society." Unfortunately, this feeling led him in many instances to be unresponsive to the questions put to him and to make speeches and gratuitous remarks apparently calculated either to remind the court of the injustices visited on his people in the past, to embarrass Officer Stalker or to demonstrate the inferiority of the latter's white friends. A few examples may suffice:

> Q All right. Just before we go on, can you describe to the Court what you mean by the sun dance and what your involvement in it was?
>
> A The - at this point I would like to express, Your Honour, that our people restrict us in some ways of speaking to the fullest extent of the sun dance because they have - we have a total distrust of - of the infringement of the dominant society upon our ceremonial ways because, you know, I don't think you can fault us for that because history bears out that our people were jailed and stuff for that -

And later:

> A So he left. And I went back in, and we started packing. And he came in there, and he helped us. He brought this young fellow in. I was kind of surprised that he was about the same – this young fellow was about the same height as my son, Zachary, and Roland. And Roland and Zachary were able to pack out these hind quarters. We gave him a front quarter with a rib, this young gentleman of - gentleman from Mr. Stalker's, and he couldn't even pack it out. He had to stop.

And later in cross-examination:

> Q Wouldn't it have been easier to make that clear to him by simply saying no at the beginning?
>
> A We don't understand how you white people operate. The way we operate is sooner or later people get the message from us when we don't want to associate with them, we keep pushing them away, that we don't want them around. It has never been our intention to just go out and tell somebody to take off or whatever. We've never operated that way. I wanted the man to get the message without having to insult him because by that time I believed - I believed what he had told me earlier about all his problems, his sexual problems, having intercourse with his grandmother, and stuff like that, that I believed this man was deeply troubled.

As revealing of the speaker as these answers may be, they and others like them did little to resolve the issues presented to the court. On those issues, Percy Potts was less than persuasive. His explanation for the manner in which he dealt with Stalker were, on the face of it at least, inconsistent and unconvincing, ranging from telling an emotionally troubled man what he wanted to hear to deflecting unwanted proposals in the traditional Native way to simply wanting, in his own words, "... to piss him off so that he would leave me alone."

Having said that, however, one must remember that prosecutions must be decided on evidence, not on the charm of those who give it. In the case of Percy Potts it is important not to confuse the singer with the song. Even accepting Kevin Stalker's evidence as credible, and I do, the case against Potts amounts to nothing more than words. Stalker never witnessed a sale of elk; nor did anyone else who gave evidence at the trial. Neither can he point to a course of conduct consistent with an intent by Percy Potts to engage in such activity.

As Stalker conceded during Mr. Anderson's very thorough and effective cross-examination, this defendant never contacted him to go hunting. As late as October 4, 1989, when, at Gilbert Potts' suggestion, he sought out Percy to go hunting, he acknowledged that he did so because the latter's involvement was still unclear. Although he added that by the end of that day he had “a sense" of the defendant's involvement, it is difficult to understand what had changed in view of his aborted attempt to go hunting with Potts that day. He never saw him again prior to the April events. In fact, throughout his 18-month investigation he only managed two hunts in which Percy Potts was involved: December 8, 1988 and September 10, 1989. With respect to the first, he conceded in cross-examination that Percy kept only part of the animal killed that day and that Gilbert Potts took the bulk of it. Even more to the point, the discussions about selling the meat they had taken that day were between Gilbert Potts and Stalker, not this defendant, though some of them were in his presence. His involvement is best described in the agent's own words:

> At 1650 we were having a discussion, and Mr. Percy Potts informed me regarding the dangers of selling meat and getting caught, and that why would I want to be involved or something along those lines.

This warning about the dangers of trafficking was apparently repeated during the September 10th hunt, as Stalker confirmed later in his testimony:

> September 10th, Percy stated he would rather give it away than sell it, what would you want it for and then he went on just to face all that trouble and this goes back to the other part on

> December 8 as I refer to my notes again, there was two, two conversations where he initially warned about getting caught.

Even the second conversation as he originally remembered it is inconclusive as regards Percy Potts' willingness to become involved himself in these activities. As he first recounted it, Stalker remembered telling the defendant that he had a buyer for a moose at a price of $200 whereupon Percy replied that the agent was not selling it, but giving it away at that price. Indeed, several versions of this conversation came out during his testimony so that it became difficult to know for sure what exactly it was that the defendant had said.

Against this background I am asked to convict solely on a stated intention to sell by the defendant on April 21, as evidenced by the price he quoted, and an admission the next day that he had sold. Dealing with the second submission first, it is to be noted that, on Stalker's own version of that conversation, one would have to infer a sale, presumably from the previous day's request, because there is no actual admission of one, only that

> ... he had got rid - he had got rid of it. I was too slow. They had - they got no freezer - they got no freezers out here, and I may have written it wrong, but they have no freezers out here was the indication, and he said next week give him a call.

Considering that the previous day's conversation had ended so ambiguously, as noted above, these words provide a rather tenuous thread upon which to hang proof beyond a reasonable doubt.

In any event the defendant's testimony is that throughout his dealings with Kevin Stalker he was trying to deflect the latter's efforts to involve him in illegal activities and that on April 20 he was in fact engaged in a hunting expedition whose purpose was to obtain meat for the Sun Dance ceremony. His words at trial are supported by his words and his actions outside the trial, as explained by Stalker, and in part by the very credible evidence of others, specifically Peter Bird and Francis Alexis.

His assertion of an attempt to deflect "in the traditional Native way" the blandishments of the undercover agent is borne out by the difficulties the latter had in getting Percy Potts involved at all. This may have been because the latter had some inkling of Stalker's true purpose, but that is mere speculation. The *evidence* is that the history of the agent's dealings with this defendant is largely one of missed appointments and unfulfilled assurances. The defendant demonstrated by his conduct a reluctance, at the very least, to hunt with Stalker. On the two occasions when he did, it is significant, though not conclusive, that he cautioned the agent about the dangers of trafficking.

Both Peter Bird and Francis Alexis confirmed that there *was* a Sun Dance in the spring of 1990, that Percy Potts was the Sun Dance "maker," and that his duties as such would include the securing of meat for the ceremony, thus lending plausibility to Potts' explanation for the April hunt. Alexis confirmed that indirectness in dealing with others, described by Potts in his evidence, is a common trait among his people, again lending some support, in theory at least, for Potts' explanation of the reasons for the statements he made to Stalker in April.

In the result, then, unappealing though the defendant may have been as a witness, there is, on all of the evidence, a doubt about the *bona fides* of his offer to sell on April 21 and about the purpose for his possession of the animals in question. As indicated above there is also a reasonable doubt about

whether any sale to which he was a party ever took place at that time. He is entitled to a resolution of those doubts in his favour and accordingly I find him not guilty on Counts 33 and 35 of the information.

Insofar as Count 34 is concerned, Percy Potts concedes that the dead elk Officer Stalker saw on April 20 were on fenced land *when the agent saw them.* His evidence is, however, that they were shot on unoccupied land and ran wounded onto the fenced land where he actually finished them off. Stalker cannot contradict this, as he did not see the actual killing but only arrived later. The issue is important because the "open season" provision of the *Wildlife Act* can only apply to the defendant, a treaty Indian, if he were hunting outside his treaty rights, as he would be if the hunt occurred on occupied land without permission of the owner.

There is no evidence one way or the other as to the owner of the land in question or whether or not permission was granted, although an inference can be made from Potts' own description of his hunt that there was none. The case depends, again, almost entirely on a statement made by the defendant, or more precisely, interpreted by Officer Stalker. The statement itself was not led by the Crown, but extracted by Mr. Potts' counsel on cross-examination of the officer. As Stalker describes it, he came upon the defendant's group whose truck was parked some 400 yards from the kill site even though, according to him, there was a trail leading almost directly to it. The ensuing conversation, as Stalker reports it, was as follows:

> A ... I asked him if he was going to bring the truck over, and he said it was too easy to get caught.
>
> Q What did you understand it to mean by that?
>
> A That they knew that they were on private land, and that putting the truck out in the middle of the field and start loading animals would make it very apparent that something was going on there, and we proceeded to park the vehicles on the road. And we had a - the discussion about the vehicle on the road, they wouldn't know where we were.

The case turns on that one rather ambiguous bit of evidence. It is unclear, beyond the few words about getting caught, whether the defendant made any other statements or whether the rest is simply Stalker's interpretation of what was happening. Evidence of a more detailed discussion was neither led by the Crown nor extracted in cross-examination. In view of the fact that they were in an area relatively far removed from any dwelling houses, does "caught" mean "discovered" or "stuck"? There is only the officer's opinion, based, as he conceded, on certain assumptions that he made, of what was meant by that remark. There is no other evidence, either observations made by Stalker or explanations allegedly given by the defendant, to confirm that the hunt took place on private land rather than in the way described by Potts. Nor is there any to dispute his assertion that in killing the animals on fenced land he was simply finishing a legal hunt in the only reasonable way open to him in the circumstances. Mindful again of the comments I made earlier about Mr. Potts' credibility, I am satisfied that, on all of the evidence, he has discharged any burden cast upon him whether it be phrased as raising a reasonable doubt that he was hunting on private land or showing that those actions which did occur there simply amounted to exercising without negligence the diligence required of a hunter to assure that animals he has wounded are humanely disposed of. It follows, then, that Count 34 must also be dismissed.

I remark in passing that I do not recall and my notes do not reflect any mention in the evidence of what the open season for elk was in 1990. Nor was it suggested in argument that I could or should take judicial notice of that fact.

Entrapment

Unlike Percy Potts, none of the other defendants gave evidence. As a result Kevin Stalker's testimony against them remained both uncontradicted and unexplained. Nor was that evidence challenged or discredited by his cross-examination. On the contrary, I found Officer Stalker to be a careful, fair witness who by and large took great pains during his lengthy investigation to record in some detail the events in which he participated. On the basis of his testimony and, particularly in the case of William Potts, the inferences to be drawn from it, the three remaining defendants must be convicted of the charges against them unless they can provide some explanation which in law will excuse their actions. They attempt to do this first by advancing the defence of entrapment:

It is clear, certainly since the decision of the Supreme Court of Canada in *R*. v. *Mack* (1988), 44 C.C.C. (3d) 513, that entrapment is not truly a defence, though that term is commonly used to describe it, but is rather an aspect of the doctrine of abuse of process. As Lamer J. (as he then was) phrased it at p. 567 of *Mack,* "The accused has done nothing that entitles him or her to an acquittal; the Crown has engaged in conduct, however, that disentitles it to a conviction." As explained in that case, the consequences of this characterization of the doctrine are fourfold:

> (1) the accused must seek, not an acquittal, but a judicial stay of the proceedings;
>
> (2) the application is only appropriate when it is clear that there is proof of his guilt beyond a reasonable doubt;
>
> (3) being a form of abuse of process, the remedy should be granted, in accordance with the authorities, only in the "clearest of cases;"
>
> (4) the burden of proof is on the accused and on the balance of probabilities.

There is a fifth requirement, not relevant here, that the issue must be determined by the judge, not the jury, in cases tried that way.

In the present case the remaining defendants properly seek to invoke the doctrine, as there is clear proof of their guilt. The only question is whether they have adequately discharged the burden imposed by requirements 3 and 4 above. To do so they rely entirely on the evidence of Officer Stalker and his superior, Special Investigator Dennis Hockley, who was ultimately responsible for the manner in which "Operation Clean-up" was implemented. That evidence, they say, confirms that they are simply victims who have become ensnared in the net cast by an operation which was intended to, and did in their case, randomly test the virtue of its targets. In the alternative they submit that, in implementing it, Stalker engaged in an impermissible importuning and enticement of the defendants.

In *R*. v. *Mack, supra,* the Court summarized at pp. 559-60 the circumstances in which the defence of entrapment will operate:

> As mentioned and explained earlier there is entrapment when,
>
> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry;
>
> (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence.
>
> **...**
>
> The absence of a reasonable suspicion or a *bona fide* inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime and because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis.

R. v*. Barnes* (1991), 63 C.C.C. (3d) I followed, explained and refined *Mack.* In *Barnes* the argument was that there can be impermissible "random virtue testing," even during a *bona fide* inquiry, if an opportunity to commit the offence is offered to a person without a reasonable suspicion that that person is likely to commit it. *Mack* was urged in support of this proposition. The argument is of particular interest here because it is conceded that at Stalker's first meeting with Gilbert Potts, that meeting where the first sale was made and from which all the other contacts with these defendants stemmed, he knew absolutely nothing of the vendor, not even his name.

In rejecting the argument in *Barnes,* Lamer C.J.C., for the majority, acknowledged in that case that some of the language he had used in *Mack* may have been responsible for a misinterpretation of that decision. He accordingly made the following clarification at pp.10-11:

> This statement should not be taken to mean that the police may not approach people on a random basis, in order to present the opportunity to commit an offence, in the course of a *bona fide* investigation. The basic rule articulated in *Mack* is that the police may only present the opportunity to commit a particular crime to an individual who arouses suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present *any* person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry.
>
> Random virtue testing conversely, only arises when a police officer presents a person with the opportunity to commit an offence *without* a reasonable suspicion that:
>
> > (a) the person is already engaged in the particular criminal activity, or
> >
> > (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

Remembering again that the evidence of both Stalker and Hockley is credible and uncontradicted, I am satisfied, against this judicial background, that entrapment must fail as a defence here.

As indicated above, the contact which led to his later involvement with all of the defendants was Stalker's meeting with Gilbert Potts on November 9, 1988 at the latter's residence. Stalker's version, and the only version, of that meeting is that it was accidental in the sense that he had made a wrong turn and mistaken Potts' place for the residence of the latter's neighbour, with whom he had a pre-arranged agreement to buy moose. When he asked for the neighbour, Potts pointed out that house and asked the agent why he wanted to see its occupant. When Stalker truthfully responded that the neighbour was going to sell him meat, Potts looked at the moose which was hanging in his own yard and offered to sell it to Stalker, according to the agent without any request or suggestion from him. The negotiations which followed resulted in the purchase of a quarter of the animal for $15, an exchange of names and phone numbers, an explanation by Potts of the prices he charged for his services and an agreement to meet on November 14 to hunt for a larger moose for Stalker.

It is difficult to see, on this evidence, how the agent's actions could be considered random virtue testing at all. His meeting with the defendant was fortuitous and it was Gilbert Potts who initiated both the questioning and the suggestion of a sale by himself. The most that can be said is that by truthfully stating the reasons for his presence in the area in full view of the defendant's animal, Stalker was impliedly inviting Potts to make him an offer. Assuming that this qualifies as random virtue testing, the next question is whether it was nonetheless permissible as part of a *bona fide* investigation.

Having regard to the manner in which it was conceived and the instructions which were given to its protagonist, "Operation Clean-up," in my view, clearly was the sort of *bona fide* inquiry envisaged by Lamer C.J.C. in both *Mack* and *Barnes.* It will be remembered from Investigator Hockley's evidence that the operation was conceived as a response to specific complaints of trafficking over a three year period. There were specific individuals named in the complaints and some, but not all, of them lived on the Alexis Reserve. The complaints emanated from a number of small communities west of Edmonton and that area was therefore targeted as one in which Stalker would be active. Indeed the contact which led ultimately to the present charges was made at Alberta Beach, one of the communities involved. While the fact that the complaints themselves included residents of the reserve would have justified, in my view, Stalker's presence there as an undercover operative, it is to be noted that he was there on November 9 only because of a legitimate contact made elsewhere which led him there. Acknowledging that the size of the area targeted may affect the *bona fides* of an investigation (see *Barnes,* p. 10), what is an appropriate area will surely be affected by the type of offence being investigated and the nature of the information available to police. Wildlife offences by their nature lend themselves to commission in rural, sparsely populated regions and the complaints here emanated from a number of small communities in such areas. The district chosen included communities in sufficient proximity to one another and sufficiently connected to justify operations there. In other words any person engaged in this sort of illegal activity could reasonably be expected to appear in any one of the targeted communities.

Being engaged in a *bona fide* investigation, it was then permissible for Stalker to present any person in the targeted area with the opportunity to commit the offence. Having said that, I reaffirm my own opinion that what happened at Gilbert Potts' house on November 9 is more properly characterized as an attempt by him to "get in on the action" than as one by Stalker to "test his virtue."

Counsel for Gilbert Potts also submitted that it was significant that this first approach occurred at his client's residence and that this fact alone may have converted Stalker's actions into unlawful search and seizure and thus have tainted the subsequent transaction and evidence with Charter implications. He points out that this was the result in *R.* v. *Bamford* (1987), 32 C.C.C. (3d) 22 (Sask. Q.B.). Whether or not that decision is correct, it is decided on facts very different from these. There the officer's presence at the defendant's house was both intentional and pre-planned. He actually gained entry into the dwelling house and did so by stratagem in order, as the Court found, to search it, even though there was ample opportunity to obtain judicial authorization in the usual way beforehand. In this case, as already noted, Officer Stalker was present on the defendant's property by mistake. When he discovered this, his sole concern was to obtain directions to Kootenay's house until the defendant, of his own volition, suggested and then completed negotiations for the sale of his moose. The entire transaction was conducted in his yard; the agent neither entered nor attempted to enter his dwelling house. In these circumstances there are no Charter implications arising from a breach of s.8 or otherwise.

There remains to consider whether Stalker went beyond merely presenting an opportunity to actually inducing the commission of the offence. Much is made of the fact that he had with him a 4-wheel drive vehicle and a fancy firearm both of which were used by the defendants from time to time in their hunts with him. The suggestion is that the advantages offered to those without vehicles of their own or weapons so modern were too tempting for the defendants to resist and that Stalker knew it; that he hoped they would in effect be prepared to be used by him to ensure their own success in hunting for food for their families. This submission overlooks the fact that, with the exception of the meat kept by Percy Potts from the December 8th hunt, the *evidence* is that all of the meat taken during the various hunts with Stalker was sold or was to be sold either by the agent or one of the defendants. In any event it is difficult to see how the presence of these so-called inducements could have enticed Gilbert Potts to sell a moose he had already killed without the assistance of Stalker's vehicle or his gun. There is, for example, no suggestion that subsequent hunts were conditional on that first sale. It is, I am sure, clear by now that on the view I take of the November 9th transaction there was no inducement and that any claim of entrapment must fail.

The only question with respect to the charges against Gilbert Potts arising out of events subsequent to November 9th is again whether Officer Stalker "induced" in the sense of "procured" the commission of these offences. Remembering that after Gilbert Potts gave the agent his name, Stalker knew that it was one which appeared on the list of those about whom there were specific complaints and remembering that Potts had already sold once to the agent, Stalker had a "reasonable suspicion that he was engaged in illegal activity." Accordingly, from that stage on there is no question of "random virtue testing." Without reviewing in detail the evidence of the agent's subsequent dealings with this defendant, any suggestion that he procured Gilbert Potts' commission of these offences simply does not have an air of reality. Even conceding that Stalker himself initiated some of the phone calls between himself and Gilbert, this was, on the former's uncontradicted evidence, clearly and simply as part of an ongoing relationship to which the latter was a willing, even eager, party. There can also, in my view, be no credible suggestion that the provision by Stalker of his vehicle and his gun had any appreciable influence on Gilbert Potts' decision to engage in activity which he knew was illegal. He has not presented any evidence of his own to support such an inference. He had his own gun. In any event he was at the time legally prohibited from possessing or using any firearm. On all of the evidence and considering the burden on him, Gilbert Potts' submission must fail.

So too must that of William Potts. If he was presented with an opportunity to commit the offences with which he is charged or induced to commit them, the offer came from Gilbert Potts, not Kevin Stalker. That is the only reasonable inference to be drawn from the evidence. He was throughout a secondary, though willing participant in the activities arranged between Gilbert and Stalker. There is nothing to suggest that the latter did anything special to encourage William's involvement. On the contrary, the evidence is that his participation was arranged by Gilbert on the latter's own initiative. In these circumstances his claim of entrapment can stand no higher than Gilbert's and in fact it is even less compelling.

The primary difference between William Potts and Howard Bruno is that the latter's participation was first suggested by Stalker. However, even this occurred only after Gilbert Potts had told the agent enough about Bruno to raise a reasonable suspicion in the latter's mind that Bruno too was engaged in illegal activities. In any event the first contact with Bruno was made by Gilbert Potts. There is no evidence of precisely what was said during that telephone conversation, but the fact that Gilbert thereafter gave Stalker Bruno's phone number and address with appropriate instructions leads to a reasonable inference that the latter had received and accepted *Gilbert Potts'* invitation to become involved. Any misapprehension he may have had was cleared up on the way to Potts' house after Stalker picked him up that first morning. The only version of that conversation in evidence reveals, not enticement or importuning, but an individual well aware of what was proposed and most prepared to participate. This was confirmed by his subsequent conduct. On the circumstances revealed by the evidence, any claim of entrapment by Bruno is artificial at best and I reject it.

The Constitutional Issue

The final and most difficult question arises from the submission by Gilbert and William Potts that, whatever their conduct, these provisions of the *Wildlife Act* do not apply to them by virtue of ss.35 and 52 of the *Constitution Act, 1982*. They say their actions are protected by the terms of Treaty 6 guaranteeing them the right to pursue their "avocation" of hunting, which included the right to hunt for commercial purposes. Relying on the recent analysis of s.35 by the Supreme Court of Canada in *R.* v*. Sparrow,* [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 70 D.L.R. (4th) 385, 56 C.C.C. (3d) 263, 111 N.R. 241 the defendants say that s.61(1) of the *Wildlife Act,* which makes it an offence to traffic in wildlife or to be in possession of it for the purposes of trafficking, interferes with their treaty rights and that the Crown has not met the burden cast upon it by *Sparrow* to justify that interference.

The Crown responds that it bears no burden until the defendants first show the existence of a right protected by s.35. In this case they say that 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, 53 C.C.C. (3d) 378, 108 N.R. 1 conclusively shows that the treaty right upon which the defendants rely does not include the right to hunt commercially.

Horseman, on its face, appears to stand for the proposition put forward for it by the Crown. However, the defendants reply that the decision must be read cautiously because s.35 of the *Constitution Act* was neither argued nor apparently considered there by the Supreme Court. Ms. Unsworth, counsel for the Crown both here and in *Horseman,* concedes that that is the case. Even so and even though defence counsel suggest that *Horseman* would have been differently decided in a s.35 context, that case, in my view, effectively precludes the result sought by the defendants unless it can be

reconciled in some way with the first requirement of *Sparrow* that a right capable of s.35 protection exists. Accordingly, the best approach, it seems to me, is to first consider whether the defendants have shown *prima facie* that there is a right. If they have, the Crown in turn must prove the extinguishment of that right. The decision in *Horseman* will be relevant to this question. If, however, extinguishment is not shown, the right is an "existing" treaty right and in the words of *Sparrow, "The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal [treaty] right protected under s.35(1)*." (p. 289 [C.C.C., p. 181 C.N.L.R.]) (Insertion mine) I should point out at this stage that I proceed on the basis that the analysis in *Sparrow* and the tests it imposes apply equally to Aboriginal and to treaty rights.

So far as step one is concerned, the defendants have shown to the necessary standard that the hunting right contemplated by Treaty 6 included, and was understood to include, a commercial aspect. The evidence of Dr. John Foster, a specialist in the treaties and the period in which they were signed, makes this clear. In addition to explaining the ramifications of the term “avocation" as it was used at that time, Dr. Foster opined that the government of the day had an interest, because of its own limited resources, in encouraging the continuation by the Indians of their traditional means of maintaining a livelihood which included the commercial aspect of hunting. Accordingly, it would have understood the hunting right it was guaranteeing to include that dimension. In any event the Supreme Court itself acknowledged in *Horseman* the commercial aspect of the hunting right when Cory J., for the majority, said at p. 373 [C.C.C., p. 100 C.N.L.R.]:

> An examination of the historical background leading to the negotiations for Treaty No. 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the treaty included hunting for commercial purposes.

The *prima facie* existence of the right having thus been shown, the Crown relies on *Horseman* as irrefutable proof that the right has been extinguished. Before examining the force of that argument, it is important to note, in the words of Dickson C.J.C. at p. 280 [C.C.C., pp.174-175 C.N.L.R.] of *Sparrow,* that "The test of extinguishment to be adopted, in our opinion, is that *the Sovereign's intention must be clear and plain* if it is to extinguish an Aboriginal right." (Emphasis mine)

Remembering the admonition of the Court in *Sparrow* that

> ... academic commentary lends support to the conclusion that “existing" means "unextinguished" rather than exercisable at a certain time in history. (p. 275 [C.C.C.; p. 170 C.N.L.R.])

and that the fact that a

> ... right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. (p. 279 [C.C.C.; p. 174 C.N.L.R.])

one must, I think, first consider whether *R*. v. *Horseman* deals with extinguishment or merely with regulation.

Unfortunately, the words of the judgment itself do not provide an easy answer to that question. Nowhere is the word "extinguished" used. The Crown suggests that such meaning is to be inferred from the language employed, but it seems to me that an inference of that sort is not inevitable upon a

careful analysis of the reasons given. At p. 375 [C.C.C.; p. 102 C.N.L.R.] of the majority judgment Cory J. says the question to be resolved is "... whether or not that right was in any way *limited or affected* by the Transfer Agreement of 1930." (Emphasis mine) Later at p. 377 [C.C.C.; p. 104 C.N.L.R.] he speaks of a "... *quid pro quo* granted by the Crown for the *reduction* in the hunting right." (Emphasis mine) Again at p. 378 [C.C.C.; p. 105 C.N.L.R.], "It is thus apparent that although the Transfer Agreement *modified* the treaty rights as to hunting, there was a very real *quid pro quo* which extended the native rights to hunt for food." (Emphasis mine) In my view none of that vocabulary is clearly consistent with extinguishment. For example, if my salary is reduced, modified of limited, it is not extinguished, only regulated. The words by their very nature imply the continued existence of the noun they describe.

Having said that, I acknowledge that elsewhere in his judgment Cory J. discussed the "merger and consolidation" theory and said at p. 377 [C.C.C.; p. 104 C.N.L.R.] "Although the agreement did *take away the right to hunt commercially,* the nature of the right to hunt for food was substantially enlarged." (Emphasis mine) Even accepting that the phrase "take away" can in one sense mean extinguish, it is also commonly used to describe a "temporary removal," as in "taking away a child's privileges for a week." Having regard to his judgment as a whole, it seems to me that one can only ascribe to Cory J. the intention to use the phrase in its former meaning if one accepts that he viewed the hunting right as two separate and distinct rights, one of which was eliminated while the other was at the same time expanded. However, this interpretation does not accord with either the sources he used or the cases he relied on.

For example, in determining that hunting at the time of Treaty 8 included a commercial aspect, His Lordship refers to the work of Professor Ray and quotes the following passage at p. 374 [C.C.C.; p. 101 C.N.L.R.] of his judgment:

> ... For these reasons, *differentiating domestic hunting from commercial hunting is unrealistic* and does not enable one to fully appreciate the complex nature of the native economy following contact. (Emphasis mine)

Further on in his judgment Cory J. confirms what Dickson J. said at p. 198 [D.L.R.; p. 94 C.N.L.R.] of *Nowegijick* v. *Canada,* [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, 144 D.L.R. (3d) 193, [1983] C.T.C. 20, 83 D.T.C. 5042, 46 N.R. 41: "... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian." In the present case the right under consideration is phrased in Treaty 6 as "... the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described ..." It seems clear to me that the use of the plural word "avocations" was intended, not to create a series of divisible hunting and fishing rights, but rather to confirm that the right conferred included both the avocation of hunting and that of fishing. If in fact that is doubtful, the interpretation most favourable to the Indians, in this case the one which preserves the right, even in a regulated form, is the one to be adopted. I am satisfied then that Cory J., applying the rule of interpretation articulated above, felt in *Horseman* that he was dealing with different aspects of one right, not with separated and distinct rights.

Despite the ambiguity which may have been created by his use of the phrase "take away," it is evident, in my view, that his Lordship was purporting to address only the question of whether provincial game laws could be valid regulation of Mr. Horseman's treaty rights. Remembering that the controversy in *Horseman* centred on the proper interpretation of paragraph 12 of the Natural

Resources Transfer Agreement in 1930, by which control over certain of its resources was transferred to the Province of Alberta, it is important to note that the paragraph itself does not explicitly speak to extinguishment of the right to hunt commercially. Nor does provincial legislation in existence from time to time, even given that a proper interpretation of paragraph 12 is that it permitted such legislation to affect treaty rights. For example, the applicable legislation in force in 1907 did not prohibit trafficking in wildlife; it regulated it by requiring that a license be obtained yearly (see *The Game Act,* S.A. 1907 c.14, s.16). The province subsequently prohibited trafficking absolutely (see *The Game Act,* R.S.A. 1922, c.70, s.18) and then in 1932 permitted it again, subject to permit and regulation (see *The Game Act,* S.A. 1932, c.27, s.32). The province could, if it chose, remove all the restrictions tomorrow. I say "restrictions" because it is sometimes forgotten that even the present legislation does not prohibit trafficking in wildlife absolutely [see s.61(2)]. Recognizing that the history of the exercise of legislative power is largely one of regulation in response to the needs of the time, it is difficult to conclude that the sovereign, in transferring to the province a limited right to regulate treaty rights, clearly intended thereby to extinguish the commercial aspect of the hunting right.

That the majority in *R.* v. *Horseman* recognized this is shown, in my view, by the cases on which it relied in rejecting the arguments of the appellant. The judgment confirmed earlier decisions of Dickson C.J.C. in these words:

> These reasons constitute the carefully considered recent opinion of this court. They are just as persuasive today as they were when they were released. Nothing in the appellant's submission would lead me to vary in any way the reasons so well and clearly expressed in those cases. (p. 377 [C.C.C.; p. 104 C.N.L.R.])

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, 9 Sask. R. 149, 36 N.R. 437 is one of those authorities. Cory J. refers specifically to a part of that decision at p. 376 [C.C.C.; p. 103 C.N.L.R.] of his own:

> Similarly, in *Moosehunter* v. *The Queen, supra* at p. 285 [S.C.R.; p. 63 C.N.L.R.] he wrote
>
> > The agreement had the effect of merging and consolidating 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.* (Emphasis mine)

The Court speaks of regulation, not extinguishment.

Although it might be argued that Cory J.'s conclusion in *Horseman,* "*...* that the 1930 Transfer Agreement did alter the nature of the hunting rights originally guaranteed by Treaty No. 8" (p. 379 [C.C.C.; p. 106 C.N.L.R.] speaks to elimination of the rights, the word "alter" also does not inevitably import extinguishment. For the reasons I have attempted to express, I have concluded rather that the decision in *Horseman,* looked at in its entirety, does no more than confirm the provincial right to regulate all aspects of the treaty right to pursue the avocation of hunting, save hunting for food, and to do so constitutionally by reason of paragraph 12 of the Natural Resources Transfer Agreement of 1930 and s.1 of the *Constitution Act, 1930.* To suggest, as does the Crown, that the constitutional status of this right in effect nullifies the treaty right confuses, with respect, the nature of the power transferred. By paragraph 12 the province may regulate the right. In the words of Dickson C.J.C. at p.

279 [C.C.C.; p. 174 C.N.L.R.] of *Sparrow,* "That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished." Nor does the fact that the power to regulate makes the commercial aspect of the right unexercisable at this time in history mean that it does not exist.

The Crown relies entirely on paragraph 12 as interpreted by *R.* v*. Horseman* to show a clear and plain intention in the Sovereign to extinguish. In saying that is insufficient, I acknowledge the anomaly pointed out by counsel that the Supreme Court would make no reference to s.35 in a decision released some three weeks prior to its landmark judgment in *R.* v*. Sparrow.* However, the fact remains, as confirmed by Ms. Unsworth, that it was not asked to consider s.35 in *Horseman.* It is not for me to speculate why. I can only conclude, as I do for the reasons I have stated, that the treaty right put forward by the defendants still exists.

Even so, the Crown need not justify any government regulation until it is shown that it "has some negative effect" on the right. Asking here the questions asked in *Sparrow* to determine whether the right in that case has been interfered with, it is in my view apparent that the impugned provisions of the *Wildlife Act* have that effect. Those questions are:

> First, is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right? (p. 290 [C.C.C.; p. 182 C.N.L.R.])

Even conceding that by Treaty 6 itself the right involved here is subject to reasonable regulation by the Crown and that paragraph 12, within its own limits, permits the province to exercise that power, it is self-evident from its own wording that the present prohibition is extreme and beyond even the power reserved by the treaty to the Crown. "Traffic" is defined by s.1(1)(s) of the *Wildlife Act*, as "sell, buy, barter, solicit or trade or offer to do so." Considering the prohibitions contained in s.61(1) of the Act, it becomes an offence, on this definition, for one treaty Indian who kills a moose for food to trade part of it to another for a portion of the elk the latter has killed for the same purpose or, for that matter, to trade some of it for a litre of milk and three boxes of cereal. So too would it be an offence to accept money from an elderly relative, too old to hunt for himself, in return for meat one has killed. Remembering the evidence given regarding high unemployment rates on the reserve, the fact that this one is located relatively distant from the places where provisions are sold, and the evidence regarding the few vehicles there, it is clear, in my view, that the effect of this restriction is both unreasonable and creates undue hardship. If, as *Sparrow* suggests, rights are to be "... interpreted flexibly so as to permit their evolution over time," a regulation which prohibits even such elementary transactions must surely affect negatively those rights. Even though, as already noted, the trafficking prohibition is not absolute, the exceptions listed in s-s.2 are by and large vaguely worded, permitting, for example, the issuance of "specific" authorizations to traffic. Even apart from the question of whether it is reasonable to require specific authorizations for such simple transactions as those described above, there is no evidence as to when, how often or in what circumstances such permits are issued. Nor is it an answer to say that no one would ever be charged in the above examples. The protections offered by s.35 is not to be circumscribed by the discretion which may or may not be employed by every officer of the Crown who has the opportunity to exercise it.

Sparrow makes it clear that even legislation which negatively affects s.35 rights may be justified if there is a valid legislative objective (p. 291 [C.C.C.; p. 183 C.N.L.R.]). Although no evidence was called nor argument made on this issue by the Crown, I believe the defendants would concede that

these provisions of the Act are rooted in the desire to preserve the wildlife resource for the use of future generations and that this is a valid objective. Indeed, in argument their counsel emphasized that they were not suggesting that treaty rights permit the unrestricted killing and sale of wildlife, but rather that there is a need for government to consult Native groups before implementing such legislative schemes so that the Native right might be affected as little as possible and in keeping with the objective involved. This is a legitimate concern similarly expressed by the Supreme Court in *Sparrow* at p. 295 [C.C.C.; p. 187 C.N.L.R.]. In the words of Chief Justice Dickson: "... recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians."

Unfortunately, on the evidence before me, or lack thereof, that has not yet been done, though it should be remembered that *R.* v. *Sparrow* is a relatively recent decision and it is to be expected that there will be some delay before its principles are applied to legislation which it affects. Nonetheless, in this case no evidence has been presented justifying the extent to which treaty rights are restricted by these sections of the *Wildlife Act.* I conclude therefore that, pursuant to s.52(1) of the *Constitution Act, 1982,* they are of no force or effect in respect of those *engaged in the exercise of those rights.*

In emphasizing those final words, I refer to the question I raised during argument concerning the extent to which s.35 protection can be used to justify otherwise illegal activity. It is in my view implicit in *R.* v. *Sparrow* and in all other constitutional cases to which I have been referred that those who claim the protection of their treaties must show on the facts of their cases that they were acting *bona fide* in pursuance of those rights. The court in *R.* v*. Horseman,* for example, pointed to the good faith of the defendant in ordering a stay in that case (p. 382 [C.C.C.; p. 108 C.N.L.R.]). In this case, with the exception of the first sale to Stalker on November 9, 1988, it is clear that Gilbert Potts thought that the latter was committing or intending to commit wildlife offences. Clearly a part of the reason for their association was so Potts could use his treaty rights to shield Stalker and, when he was present, Bruno, who had no treaty rights himself, from liability for their own illegal acts. This, then, is not a case of a treaty Indian going hunting and then selling the fruits of his hunt to others. It is rather one of the treaty person going with others in part to assist them in their own illegal activities. Remembering again Stalker's uncontradicted recitation of the conversations he had with, and in the presence of, all three defendants, any claim of good faith advanced on Gilbert's behalf is, quite simply, unsupported by the evidence. In these circumstances his reliance on s.35 is precluded by his own conduct, save with respect to the aforementioned incident on November 9, 1988. That transaction did not involve any hunting with Stalker or any knowledge by Potts of what Stalker intended to do with the meat. Accordingly, count #6, which deals with that incident, is dismissed on the constitutional grounds discussed above.

Likewise counts #29 and #30 must be dismissed. These involved the animals shot by Gilbert and appropriated without his knowledge by "Stretch" and "Rusty." Though the evidence is that Potts eventually received a share of the proceeds the latter two obtained when they sold this animal, without some evidence of who they were and some knowledge by Potts of their intended actions, there is in my view insufficient evidence to convict for those offences considering his treaty rights.

On all the other charges, however, Gilbert Potts' treaty claims must fail. With respect to the animals later sold by Bruno in the presence of Stalker I would go further. In my view, Gilbert Potts' liability there may also be grounded on s.21 of the *Criminal Code,* which is by operation of the *Provincial Offences Procedure* Act, S.A. 1988, c.P-21.5, applicable to these proceedings. Whatever his own rights, Gilbert Potts knew that Stalker and Bruno intended to commit offences themselves by

re-selling the meat he sold to them. With this knowledge his use of his rights to obtain meat for them makes him a party to the offence Bruno subsequently committed. Among the cases which deal with this issue might be cited *R.* v. *Roan* (1985), 17 C.C.C. (3d) 534 where Harradence J.A. at p. 537 quotes with approval Johnson J.A. in *R.* v*. Hoggan,* [1966] 3 C.C.C. 1 at p. 5:

> There are two things which must be proved before an accused can be convicted of being a party by aiding and abetting. It must first be proved that he had knowledge that the principal intended to commit the offence and that the accused aided and abetted him.

Bruno clearly carried out this intention on both November 15th and November 17, 1988. Even if Stalker also can be considered a party to those offences, that fact does not assist Gilbert Potts by reason of s.23.1 of the *Criminal Code* which reads:

> 23.1 For greater certainty, sections 21 and 23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.

In their commentary on this section in the 1992 Edition of *Tremeear's Criminal Code* David Watt and Michelle Fuerst note that "The section does not describe or limit the basis upon which a conviction of the principal cannot be made."

William Potts' treaty claims must also be rejected by reason of the good faith requirement above referred to. Although there is very little evidence of direct conversation between Stalker and himself, the latter's testimony confirms that many of these conversations took place in William's presence. On the whole of Stalker's uncontradicted evidence, I am satisfied that the necessary inferences should be drawn that he willingly participated in hunts with Stalker knowing that the purpose thereof was to provide meat for illegal resale by the latter. Such activity is not a *bona fide* exercise of his treaty right. He is accordingly guilty of the offences with which he is charged.

In the case of Howard Bruno there is no s.35 question as there is no evidence that he is entitled to the protection of Treaty 6. Even if there were, any claim he might make would founder on the good faith and party issues discussed above. Although s.35(2) includes the Metis people within the term "aboriginal peoples," there is insufficient evidence, considering the burden on Mr. Bruno, to establish what rights if any are present here which would save his otherwise illegal actions. He too, then, must be convicted of the offences with which he is charged.

In closing I suggest to counsel that some of these offences may qualify for a conditional stay, for example those which charge possession for the purposes of trafficking and trafficking in the same meat. I invite submissions on these issues at the sentencing hearing to follow.