REGINA v. ROGER BIRD

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

Saskatchewan Provincial Court, Diehl P.C.J., March 22, 1991

G. Parker, for the Crown
V. Khaladkar, for the accused

The accused, a treaty Indian, was charged with unlawfully hunting in a game preserve contrary to s.5(1)(a) of the *Wildlife Regulations, 1981* made pursuant to the *Wildlife Act,* S.S. 1979, c.W-13.1. The accused was hunting wildlife with the use of a jacklight from a motor vehicle on a road border game preserve corridor.

The issues before the court were whether the accused was entitled to hunt in the preserve according to the provisions of Treaty No. 6 as "recognized and affirmed" by s.35 of the *Constitution Act, 1982* and pursuant to s.88 of the *Indian Act,* R.S.C. 1985, c.1-5; and, whether the Crown must show that the *Wildlife Regulations* were necessary, or necessarily incidental to the preservation of game for the sole use and benefit of the Indians.

Held: Accused guilty.

1 . The *Wildlife Regulations* are laws of general application within the meaning of s.88 of the *Indian Act* and are binding on the accused. The section of the Regulations in question was not intended to infringe Indian hunting rights since it applied to all persons equally and was not mala fides directed at Indians.

2. It is well settled in Saskatchewan that Indians have no right of access, for the purpose of hunting, to game preserves generally, including road-corridor game preserves.

3. Section 35 of the *Constitution Act* has no application to the matter. The court stated that the decision of the Saskatchewan Court of Appeal in *R. v. Horse,* [1984] 4 C.N.L.R. 99, as affirmed by the Supreme Court of Canada, [1988] 2 C.N.L.R. 112, determined the issue regarding the application of s.35. [Editor's Note: The *Horse* decision concluded that treaty hunting rights were merged and consolidated in para. 12 of the Natural Resources Transfer Agreement. On the coming into force of s.35(1), treaty hunting rights existed only to the extent that they had not been modified by para. 12 of the Agreement. Accordingly, s.35(1) has no effect on the application of provincial game laws to treaty Indians under para. 12.]

4. Conservation for the sole use and benefit of Indians was not an element of the offence charged, therefore the Crown did not need to prove this element.

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DIEHL P.C.J.:

Charge

The accused is charged that he did on the 4th day of November, 1989 unlawfully hunt in a game preserve contrary to s.5(1)(a) of the *Wildlife Regulations, 1981* (S.S. 1979, W-13.1, Reg 1).

Finding of Facts

At night, on the day in question the accused treaty Indian was hunting wildlife by use of a jacklight from a motor vehicle on a four hundred meter road border game preserve corridor near Candle Lake in Northern Saskatchewan. The east side of the highway was a solid game preserve. The highway itself was within the preserve and formed the western boundary. The corridor above described and in which hunting occurred was to the west of the highway. The area is known as the Candle Lake Game Preserve. Deer, moose, and coyote were prevalent in the area. The treaty Indian accused was from the Montreal Lake Band.

Issues

1 . Was the accused entitled to hunt in the Candle Lake Road Corridor Game Preserve according to the provisions of Treaty Number Six as "recognized and affirmed" by s.35 of the [*Constitution Act, 1982*] and pursuant to s.88 of the *Indian Act,* R.S.C. 1985, c.I-5?

2. Must the Crown show that the *Wildlife Regulations, 1981* are necessary, or necessarily incidental to the preservation of game for the sole use and benefit of Indians7

Rulings

1. Section 35(1) of the [*Constitution Act*] has no application to the present matter.

2. The impugned regulations are laws of general application within the meaning of s.88 of the *Indian Act,* and are binding on the accused.

3. Conservation for the sole use and benefit of Indians is not an element of the offence charged, and need not be proved in the Crown's case.

Law

1 . Respecting s.35 of the [*Constitution Act*]: The decision of the Saskatchewan Court of Appeal [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. 581 as affirmed by the Supreme Court of Canada in *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 determines the issue.

2. Respecting s.88 of the *Indian Act:* The impugned section of the *Wildlife Regulations,* 1981 was found by the Saskatchewan Court of Appeal in *R. v. Ross* (1985), 47 Sask. R. 317 (Sask.C.A.) to not be intended to infringe Indian hunting rights, since it applied to all persons equally and was not mala fides directed at Indians.

   It is well settled in this province that Indians have no right of access, for the purposes of hunting, to game preserves generally, including the recently created system of road corridor game preserves:

   (i) R. v. Smith, [1935] 2 WM.R. 433, [1935] 3 D.L.R. 703, 64 C.C.C. 131 (Sask.C.A.)
   (ii) R. v. Wolverine and Bernard, [1987] 3 C.N.L.R. 124 (Sask. Q.B.), affd [1989] 3 C.N.L.R. 181, [1989] Sask. D. 5684-01 (Sask.C.A.)
   (iii) R. v. Ross, (1985) [1986] 2 C.N.L.R. 142 (Sask Prov. Ct), affd [1986] 2 C.N.L.R. 153 (Sask. Q.B.), affd (1985), 47 Sask. R. 317 (Sask.C.A.)

Conclusion:

I am indebted to counsel for extensive briefs and reports of law filed in this proceeding.

Since the matter first came on for trial *R. v. Sparrow,* [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 WM.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 111 N.R. 241 has been delivered from the Supreme Court. No doubt the Court of Appeal for Saskatchewan may have to reconsider some areas of law touching on the issues raised before me. However, the decisions I have considered binding on me in Saskatchewan do just that: they bind me. In this decision I have kept the issues as simple as possible and I have applied the Saskatchewan law that I consider binding on me without elaborating to such an extent as to be seen to be re-inventing the wheel in Saskatchewan.

The thoughtful decision of my brother Judge His Honour Judge Fafard in *R. v. McIntrye,* [1991] 2 C.N.L.R. 146, [1991] 1 WM.R. 548 arrives at a different conclusion based on similar facts [reversed on appeal - see p. 129, *infra*]. No doubt both of these decisions of his and mine will be reviewed due to the important principles involved.

Determination:

The accused is found guilty as charged. Counsel may now speak to sentence.