R. v. HORSE

Unreported at date of publication

Saskatchewan Court of Queen's Bench, Dielschneider J., February 29, 1984

J.R. Cherkewich, for the appellant
R.G. Kirkham, for the respondent

The appellant, a treaty Indian, appeals his conviction of unlawfully using lights for the purpose of hunting, contrary to s.37 of the Wildlife Act, S.S. 1979, c.W-13.1. The appellant was hunting for food for personal consumption on unposted private property. It is agreed by both counsel that the appellant would not have been charged were it not for s. 38(6) of the Wildlife Act, as amended.

Appeals by a number of other appellants separately charged and convicted for jacklighting contrary to s.37 of the Wildlife Act will be disposed of by the application of this judgment.

Held: (Dielschneider J.)

1. Section 38(6) as amended does not strike down any statutory right of access to hunt on unreported private lands.

2. A treaty Indian's right to hunt does not rise or fall with the creation or repeal of provincial wildlife legislation such as s.38(6). Rather, such right is based on para.12 of the Natural Resources Transfer Agreement which grants a treaty Indian the right to hunt "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".

3. The rights protected by para.12 of the Natural Resources Transfer Agreement supersede provincial wildlife legislation.

4. Provincial legislation which would curtail or place conditions upon a right of access to land which a treaty Indian may otherwise have is legislation altering the Natural Resources Transfer Agreement. Section 38(6) of the Wildlife Act does not alter the Agreement, it is mere surplusage.

5. Appeal allowed; conviction set aside.

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DIELSCHNEIDER J.: Ernest Horse, Philip Horse, Clement Horse, Peter Horse, Ken Standingwater, James Standingwater, James Fiddler, Clarence Fiddler and Percy Alexander were separately charged and convicted in Provincial Court for jacklighting contrary to section 37 of the Wildlife Act, S.S. 1979, c.W-13.1. [See R. v. Horse et al., [1983] 3 C.N.L.R. 121; R. v. Standingwater and Standingwater, [1983] 3 C.N.L.R. 156.]

Each of the accused appeals under section 748 of the Criminal Code, R.S.C. 1970, c.C-34 asserting a right to hunt for food on land to which they had access. By agreement of counsel each separate appeal will be disposed of by application of my judgment relating to Ernest Horse to each of the other appellants.

The facts are set out in an agreed statement which reads [p.123 C.N.L.R.]:

> 1. After the onset of darkness, in the evening of September 26, 1982, the accused was hunting with a spotlight as contemplated by section 37 of the Wildlife Act, but the accused denies any offence.
>
> 2. The hunting occurred on the NE 1/2 6-55-19 W3rd, which land was at the time owned by Ways-Ways Farms Ltd., of which the principal shareholder is Dick Roney. The land at the time was leased to Fred Woidyla.
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> 3. That land was at the time sown for hay and there were bales yet to be removed. There was no damage to the field or bales.

4. There had been no communication between the accused and the owner of the land, or the lessee, Woidyla, concerning permission, leave or authority to hunt on this land and the accused did not know who owned the property, and Roney and Woidyla did not know the accused.

5. None of the land displayed any signs at all, and without limiting the generality of the foregoing, there were no signs concerning hunting or trespassing.

6. The accused is a treaty Indian.

7. The accused was hunting for food for personal consumption.

8. It is common ground that the accused would not have been charged were it not for section 38(6) [of the Wildlife Act], as amended by the Wildlife Amendment Act, 1982, S.S. 1982, c. 20, section 7.

In summary, Ernest Horse was hunting game for food at night on private land which was not posted.

The accused relies on section 12 of the Natural Resources Agreement, 1930 (Sask.), c. 87 which reads:

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.

That paragraph and the relevant sections of the Game Act, R.S.C. 1978, c.G-1 were reviewed by the Saskatchewan Court of Appeal in R. v. Tobacco, [1981] 1 W.W.R. 545 [[1980] 3 C.N.L.R. 81] which concluded at page 552 [p.88 C.N.L.R.] per Culliton C.J. (now retired) as follows:

As I have already stated, in my opinion, s.21(1), (2) and (6) of the Game Act create a right of access for the purpose of hunting to all licensed hunters to enclosed and occupied lands which have not been posted. The right of access to hunt for food is accorded to Indians in all seasons of the year. Thus, in the present case, when admittedly the land was not posted, the respondents had a right of access to the land in question for the purpose of hunting for food and were exempt from the ordinary game laws; see the dissenting judgment of Freedman J.A. in R. v. Prince [40 W.W.R. 234, 39 C.R. 43, reversed [1964] S.C.R. 81, 46 W.W.R. 121] which was adopted by Hall J. in R. v. Prince, supra; see also R. v. Wesley, [1932] 2 W.W.R. 337, 58 C.C.C. 269, [1932] 4 D.L.R. 774 (Alta.C.A.), and Myran v. R. [[1976] 2 S.C.R. 137, [1976] 1 W.W.R. 196]. That being so, they were not subject to the provincial game laws respecting spotlights or time of hunting.

Since Tobacco, the Game Act has been repealed and replaced by the Wildlife Act.

In R. v. Standingwater, [1981] 3 W.W.R. 553 [[1981] 1 C.N.L.R. 109] Gerein J. (then of the District Court, now of this Court) compared the Game Act and the Wildlife Act. In particular, after reviewing section 38 of the Wildlife Act, he concluded at page 559 [p.114 C.N.L.R.]:

…I hold that the decision in R. v. Tobacco, supra, is still effective and that the respondent is entitled to the exemption provided by the Natural Resources Agreement if he was hunting on land to which he had a right of access for the purpose of hunting for food.

In the case at hand, counsel for both sides agree, as is shown by paragraph 8 of the agreed statement of facts, that Horse would not have been charged in the circumstances here but for s.38(6) of the Wildlife Act, as amended by s. 7 of c. 20, S.S. 1982.

The whole of section 38 as amended now reads:

38.(1) Where there are legible signs, of a size specified in the regulations, prominently placed along the boundaries of any land so as to provide reasonable notice bearing the words "No Trespassing", "No Hunting", "No Shooting" or words or symbols to a like effect,

no person shall hunt any wildlife within the boundaries of such land except the consent of the owner or occupant.

(2) Subject to this Act and the regulations, where there are legible signs of the size specified in the regulations prominently placed along
the boundaries of any land so as to provide reasonable notice of instructions concerning the method of hunting or the use of vehicles connected with hunting, no person shall hunt any wildlife on such land except in accordance with the posted instructions.

(3) No person shall erect or place or cause to be erected or placed a sign mentioned in subsection (1) or (2) along the boundary of any land of which he is not the owner or occupant, except with the consent of the owner or occupant.

(4) No person shall tear down, remove, damage, deface or cover up a sign erected or placed in accordance with subsection (1), (2) or (3).

(5) In a prosecution for a contravention of subsection (1) or (2), the onus is on the person charged to prove:

(a) that he had obtained the consent of the owner or occupant to carry out such actions;

(b) that land was not posted with signs as set out in subsection (1) or (2).

(6) Nothing in this section limits or affects any rights or remedies of an owner or occupier of land for trespass at common law, and, where he has not erected or placed signs along the boundaries of his land in accordance with subsection (1) or (2), that fact alone is not to be deemed to imply a right of access to his land for the purpose of hunting. 1979, c.W-13.1, s. 38; 1982-83, c. 20, s. 7.

In convicting the accused the learned Provincial Court Judge Seniuk followed the decision of his brother Gosselin in R. v. Francis Nippi (dated February 23, 1983, unreported). At page 6 of his judgment Gosselin P.C.J. said:

> The new provisions of s.38(6) of the Wildlife Act in Saskatchewan are now identical to those contained in s. 40 of the Manitoba Wildlife Act. The wording of this amendment and the comments of Dickson J. in Myran, Meeches et al. v. The Queen, [[1976] 2 S.C.R. 137] and of Culliton C.J. leads me to conclude that under the present circumstances there is no longer a "statutory right of access for the purposes of hunting to any licensed hunter to enclosed or occupied land which has not been posted" in Saskatchewan.

The Crown's contention before me is that s. 38 as amended strikes down any statutory right of access and with it falls the right of any person in Saskatchewan to hunt on private land without the consent of the owner or occupier. The Crown bases its position on Myran, Meeches et al. v. R., [1976] 2 S.C.R. 137 and the similarity of the Wildlife Act with the Manitoba legislation considered in that case. With the fall of the statutory right under the former Game Act, discussed in Tobacco, falls the right of a treaty Indian to hunt on private land in Saskatchewan.

I cannot agree. I am not persuaded that a treaty Indian's right to hunt rises or falls with the creation or repeal of the provincial legislation under discussion. Rather, such right is based on section 12 of the Agreement already quoted. In the interpretation of section 12 I am bound by the approach laid down in R. v. Sutherland, Wilson and Wilson (1980), 53 C.C.C. (2d) 289 [[1980] 3 C.N.L.R. 71] when Mr. Justice Dickson said at pages 297-298 [pp. 77-8 C.N.L.R.]:

> This proviso should be given a broad and liberal construction. History supports such an interpretation as do the plain words of the proviso. The right assured is, in my view, the right to hunt game (any and all game) for food, at all seasons of the year (not just "open seasons") on lands to which they have a right of access (for hunting, trapping and fishing). An interpretation which would recognize in Indians only the right of access accorded to all other persons, in the absence of proof of a "special peculiar right of access", has the effect of largely obliterating the right of hunting for food provided for in the proviso.

And again on page 300 [p. 80 C.N.L.R.]:

> If there is any ambiguity in the phrase "right of access" in para. 13 of the Memorandum of Agreement, the phrase should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph. Any attempt to construe

> "access" in limited terms as, for example, to hunt the particular type of game which non-Indians could legally hunt at the time would, it seems to me, run counter to the authorities to which I have referred and so dilute the word "access" as to make meaningless the assurance embodied in the proviso to para. 13.

Section 12 of the Agreement grants a treaty Indian the right to hunt "for food at all seasons of the year on all unoccupied Crown land and on any other lands which the said Indians may have a right of access." (Emphasis added.) Clearly, in my view, the rights protected by paragraph 12 supersede provincial wildlife legislation.

The Wildlife Act enacts as law the general prohibition which enjoins all persons from hunting anywhere in the province at any time when regulations are not in effect. For a more complete discussion of the application and operation of this Act and the regulations see the judgment of Vancise J. in R. v. Bellegarde, dated December 23, 1983 [reported [1984] 1 C.N.L.R. 98].

It is in my view that the Wildlife Act cannot be applied or considered, in the circumstances here, apart from section 12 of the Agreement earlier quoted. In the consideration of both pieces of legislation it is necessary, in my view, to distinguish the terms "access" and "hunting" as therein used. I can best illustrate what I mean by setting up two examples.

My first example: A owns Blackacre and grants B permission to enter and hunt. B now has a right of access which he exercises by entering the land and shooting a deer for food. If the regulations under the Wildlife Act are in effect, the shooting is lawful. If the regulations are not in effect, the shooting is unlawful.

My second example: A owns Blackacre and grants C, a treaty Indian, permission to enter and hunt. C now has a right of access which he exercises by entering the land and shooting a deer for food. The hunting is lawful because it occurred on land to which C had a right of access.

An intervention by the Province which would curtail or place conditions upon a right of access to land which a treaty Indian may otherwise have is legislation altering the Agreement. In Sutherland, Mr. Justice Dickson said [p. 74 C.N.L.R.]:

> If laws have the effect of altering the agreement, they are constitutionally invalid; if not, they are surplusage.

Section 38(6) is such surplusage.

The appeal is allowed. The conviction is set aside. Any hunting equipment seized from the accused is to be returned.