# REGINA v McPHERSON

[1971] 1 W.W.R. 299

Manitoba County Court, Thompson Co.Ct.J., 19 October 1970

(Appealed to Manitoba Court of Appeal, **infra** p.365)

***Indians- Treaty Indian killing game for food with prohibited bullet- Whether exempt from prohibition- The wildlife Act, 1963 (Man.), c. 94, s. 46(1).***

**By reg. 52/66 made under The Wildlife Act it is made an offence for any person to hunt big game with cartridges described as having a metal-cased hard-point bullet. Appellant, a treaty Indians, shot a moose with such a bullet on land to which he had a right of access.**

**It was *held* that the appeal must be allowed; appellant had discharged the burden of proving that he was hunting for food and by virtue of s. 46(1) of The Wildlife Act he was outside the prohibition of the regulation under which he was charged: *Prince et al. v. The Queen*, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 2; *Rex v. Wesley*, 26 Alta. L.R. 433, [1932] 2 W.W.R. 337, 58 C.C.C. 269, [1932] 4 D.L.R. 774 applied.**

[Note up with 13 C.E.D. (2nd ed.) *Indians*, s. 22.]

*H. L. Pollock* and *A. J. Connor*, for accused, appellant.
*J. Guy*, for the Crown.

19th October 1970. THOMPSON Co. Ct. J.: -- The accused is charged under The Wildlife Act: "that he did on or about the end of February, 1969, at or near the Town of Bissett in the Province of Manitoba, unlawfully use metal cased hard point shells for the purpose of hunting big game animals."

Before Duval P.M. at Bissett the accused pleaded guilty and was sentenced to a fine of $25 and costs of $4.75. On appeal to this Court under the provisions of the Criminal Code the accused, who in his plea had not been represented by counsel, was allowed, after testimony was heard, to change his plea to not guilty and the matter was heard as a trial de novo.

Before 9:00 a.m. on 3rd February 1969, the accused was driving his wife's automobile along the road west of Bissett, Manitoba, when a moose appeared off the roadway about 150 feet. He stopped, took his rifle out of the car, where he always carried it, and proceeded to shoot the animal. He says it fell and he thought it was dead. The accused, a treaty Indian, then continued on to the Little Black River Indian Reservation, where he lives, in order that his young son, who was with him at the time, could get to school. Shortly before this incident the accused had driven some bushcutters from the reserve to a point on the far side of Bissett and his son went along for the ride. Father and son were on their way back to the reservation, a few miles west of Bissett, when the moose was shot. About 2:30 p.m. on the same day the accused returned to get the moose and was met by a conservation officer.

The conservation officer had discovered the moose about 9:30 that morning, wounded but still alive, and had ordered it to be disposed of by a person with him by a shot in the head. The animal had apparently crawled some 60 to 75 feet from the spot where it had been brought down.

The accused admits firing a hard-point bullet, the type prohibited in The Wildlife Act and reg. 52/66 passed under the authority thereof, although he said it was the first time he had used these cartridges and did not know the difference between these and other types. The type of ammunition used apparently does not spread on impact and tends rather to wound then kill unless striking a vital part of the animal and is prohibited for humane purposes.

The Wildlife Act replaces the provisions of The Game and Fisheries Act, R.S.M. 1954, c. 94, pertaining to wildlife. Section 88(26)(*i*) authorizes the passing of regulations pertaining to ammunition. Regulation 52/66 is as follows:

"PART VII

"21. No person shall hunt big game or bear with or have in his possession while hunting, any commercial cartridge, described as having a metal cased hard point bullet, including hard point military type cartridges."

The accused claims that as an Indian hunting for food on lands to which he had the right of access he is not subject to the restrictions and prohibitions of The Wildlife Act by virtue of s. 46(1) thereof, which states as follows:

"46. (1) Nothing in this Act reduces, or deprives any person of, or detracts from, the rights and privileges bestowed upon him under paragraph 13 of the Memorandum of Agreement approved under The Manitoba Natural Resource Act."

Paragraph 13 of the Memorandum of Agreement referred to is as follows:

"13. 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 law 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, with 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"

There is no doubt that the accused is an Indian or that he was on lands to which he had the right of access. The issue of whether he was at the time of the alleged offence hunting for food is the one to be determined. If he was hunting for food I would have to hesitation in finding that he is not subject to the provision of The Wildlife Act with the breach of which he is charged.

The leading authority is the Manitoba case of *Prince et al. v. The Queen*, [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 2, in which Indians charged with the use of a night light while hunting were acquitted. In this decision Hall J. refers with approval to the reasoning of Freedman J.A. in his dissenting judgment in the Manitoba Court of Appeal (40 W.W.R. 234, 39 C.R. 43, [1963] 1 C.C.C. 129), and the reasoning of McGillivray J.A. in *Rex v. Wesley*, 26 Alta. L.R. 433, [1932] 2 W.W.R. 337, 58 C.C.C. 269, [1932] 4 D.L.R. 774.

Freedman J.A. states at p. 242:

"The fundamental fact of this case, as I see it, is that the accused Indians at the time of the alleged offence were hunting for food. It was not a chase of hunting for sport or for commercial purposes."

McGillivray J.A. says at p. 245:

"It seems to me that the enacting part of the section subjecting Indians to the game laws of the province in general terms is subject to a clear excepting and qualifying proviso in favour of Indians who are hunting for food to whom the game laws of the province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access."

The accused lives with his wife and five children, ranging in age from 11 years to 10 months, in a five-room, one-storey home on the reservation, containing four bedrooms and a kitchen. He is employed at Dumbarten Mines at Bird Lake, about 100 miles from his home, where he had worked underground for a period of 13 years. He asked for time off about the middle of December 1968. He wanted a change of work to the surface, out of the mine. The accused was unemployed from mid-December 1968, until mid-April 1969, when he returned to his work. During these months, during which the alleged offence was committed, he received unemployment insurance payments. He testified that the unemployment insurance, which paid $96 or $99 every two weeks, was not enough to meet his needs. He says he saved a little for his time off and expected to live on unemployment insurance. The accused says he could have gone back to work at the mine at any time.

The accused's work was on a contract basis with some days producing nothing, some good. There is no other source of income. His wife does not work. A 1968 Chevrolet car is in his wife's name but was bought with his money and a 1965 Meteor trade-in. The sum of $2,000 was owing on the car.

The accused testified that his main source of food was meat and potatoes. He said he got the meat from the bush, depending on what is available. Of his supply of potatoes he grows a little bit and buys the rest if he runs short. This was the first moose he had shot that year but he had shot deer. He says at the time of the alleged offence food was getting short. The accused always carried his rifle with him.

Was the accused engaged in a quest for food? I am satisfied he was. There is no suggestion that he acted as he did for any other purpose. He shot the moose because he needed food. The evidence does not indicate that he had sufficient food at the time to satisfy his need.

The accused had a source of income, but this is not reason enough, as I find, to deny him the privilege which the law gives to an Indian seeking game for food. He depended on game. To the extent it was available he got his meat from the bush and is entitled to share with all Indians, as distinguished from citizens in general, the benefit and enjoyment of a right which Indians have enjoyed "from time immemorial".

I find that the accused is not subject to the regulation in question and allow the appeal.