

R. v. WEESK, KIOKE AND METATAWABIN

Unreported at date of publication

Ontario Provincial Offences Court, Michel P.C.J., December 21, 1983

R.N. Fournier, for the Crown
C.M. Beamish, for the defendant

The accused Treaty No.9 Indians were charged with hunting moose during the closed season, contrary to s. 47(1) of the Ontario Game and Fish Act, R.S.O. 1980, c. 182. The hunting occurred on privately owned lands in an isolated area alongside a public highway. There were no markings of any kind indicating that the land was privately owned. The accused believed, on reasonable grounds, that the land was unoccupied Crown land.

Held: (Michel P.C.J.)

1. The Game and Fish Act is a law of general application in the Province of Ontario.
2. The reference in Treaty No.9 to Indian hunting, fishing and trapping rights "throughout the tract surrendered as heretofore described...saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" is a definition of unoccupied Crown lands.
3. The mistake by the accused in believing they were hunting on unoccupied Crown lands was a mistake of fact.
4. If the facts has been as they believed, they would not be guilty, as they would have been hunting on unoccupied Crown land and Treaty No.9 would have provided them with a defence.
5. If it were not for that mistake of fact, they would be guilty as charged
6. Charges dismissed.

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MICHEL P.C.J. (orally): John Weesk, Thomas Kioke and Peter Joseph Metatawabin are jointly charged that on or about the 23rd of January, 1983, at the Township of Nesbitt, in the District of Cochrane, they did commit the offence of unlawfully hunting moose during the closed season, contrary to section 27, subsection 1, of the Game and Fish Act, R.S.O. 1980, c. 182.

I am satisfied firstly, that the Game and Fish Act is a law of general application in the Province of Ontario.

I am satisfied also that the kill of the two moose took place on the 23rd of January, 1983, at the Township of Nesbitt, in the District of Cochrane.

I am satisfied that John Weesk, Thomas Kioke and Peter Joseph Metatawabin are treaty Indians and are part and come under the James Bay Treaty, Treaty No. 9.

The defence in this matter basically is that they are excused from the application of the Game and Fish Act by reason of Treaty No. 9, in its clause which reads, and I quote:

And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

I am satisfied that that is a definition or another way of saying, unoccupied Crown lands. I am satisfied that the lands in question, and the Township of Nesbitt, were previously owned as shown by Certificates of Title filed as Exhibit Number 4, and Exhibit Number 3. I am satisfied that the

right to hunt at will on private lands is inconsistent with fee simple ownership. As these lands were transferred in fee simple, as shown in Exhibit Number 3, and Exhibit Number 4 I am satisfied that the area in the Township of Nesbitt where the kill took place is an isolated area alongside a public highway with no markings of any nature as to the nature of the land, and one where the ordinary, reasonable man could well and reasonably expect it to have been Crown lands.

I am satisfied that the three hunters in this occasion were of that view, which was a mistake of fact. But a mistake if true would absolve them of guilt of the charge for which they are here before the Court. I am satisfied that that mistake of fact must inure to the benefit of the three hunters. Although were it not for that mistake of fact they would be guilty as charged. They must be found not guilty on the basis of that mistake and the charges are therefore dismissed.