REGINA (Respondent) v. GEORGE MUSWAGON (Appellant)

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

Manitoba Court of Queen's Bench, Jewers J., March 25, 1992

R.P. Maertens, for the Crown
D. Valdron, for the appellant

The appellant appealed from his conviction for obstructing natural resources officers in the discharge of their duties pursuant to the *Migratory Birds Convention Act,* R.S.C. 1985, c.M-7. The officers observed the accused and others in circumstances suggesting that they had been, or were about to hunt Canada geese out of season, and the officers were in the process of investigating what they perceived to be possible offences under the Act. The issues before the court were, inter alia: whether the officers were acting in the discharge of their duties under the Act without first ascertaining if the accused was an Aboriginal or a treaty Indian entitled to hunt Canada geese out of season; whether the conduct of the accused was obstruction; and whether the refusal of the accused to identify himself to the officers was obstruction. No charges were ever laid against the accused for shooting game out of season, or having possession of such game. The only evidence as to the racial origin or treaty status of the accused was that he told the officers that he was entitled to exercise treaty rights and that he wished to speak in Cree.

Held: Appeal allowed; conviction quashed and a conviction for attempting to obstruct substituted.

1. Aboriginals and Metis living in Manitoba may very well have inherent rights to hunt and fish for food in all seasons. Many, if not all, treaty Indians have that right under the various treaties applicable in Manitoba.

2. Restrictions imposed by the *Migratory Birds Convention Act* are so extensive that they must be regarded as infringements of treaty rights such as those contained in Treaty No. 5. The Act does not appear to contain any scheme which would insure priority of allocation to satisfy Aboriginal or treaty hunting rights. Until the Crown has demonstrated the infringement to be justified, Aboriginal and treaty rights to hunt game for food must be recognized, notwithstanding anything to the contrary in the *Migratory Birds Convention Act.*

3. The scope of the duties of the conservation officers, and the extent to which they are entitled to go in their investigation of possible contraventions must be judged in light of what the prosecution has proved beyond a reasonable doubt to have been apparent to them.

4. Generally, the duty of the officers is to enforce the game laws and this includes investigating any possible contraventions of those laws. The prosecution must prove beyond a reasonable doubt that they had reasonable grounds to believe that an offence had been, or was being, committed. This entails the officers ascertaining the status of the members of the hunting party. If the members of a hunting party appear to be Aboriginal and there is no evidence to indicate that one or more of them did not have Aboriginal or treaty hunting rights, there is a very good chance that they would be immune from prosecution under the Act because of their treaty rights. Conversely, if the hunters were obviously not Aboriginal, or if they appeared to be Aboriginal but the officers had evidence to the contrary, then there would be grounds to believe that an offence had been committed. In this case the prosecution offered no evidence that any of the men appeared not to have been Aboriginal or had no treaty status, in fact the only evidence adduced suggested the contrary. There was no showing that the officers had grounds to search and seize.

5. The officers were, however, well within their duties to conduct an investigation to see whether they might find reasonable grounds, which would include going to the camp to see who else might be around. The actions of the accused in attempting to thwart this stage of the investigation were intended to obstruct the officers at the time they were carrying out their investigative duties. As it was not clear whether the conduct of the accused in blocking the path actually affected the officers in the execution of their duties what occurred was probably only the included offence of attempt to obstruct, rather than obstruction itself.

6. The accused was not guilty of obstruction by refusing to identify himself to the officers. It was not proved beyond a reasonable doubt that the officers actually observed an offence under the Act. The officers did not find the accused in possession of any migratory birds, and did not observe the accused actually hunting such birds. At most, the officers could only have had reasonable grounds to believe that they were witnessing an offence against the game laws if the accused and his companions had appeared not to be Aboriginal, or had acknowledged they had no Aboriginal or treaty rights to hunt and the Crown did not prove that this was apparently the case.

7. It was not proved beyond a reasonable doubt that the threat by the accused to seize the officers' helicopter obstructed, or was an attempt to obstruct, the officers in the execution of any particular duty.

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JEWERS J: This is a summary conviction a peal from a conviction for obstructing natural resource officers in the discharge of their duties pursuant to the *Migratory Birds Convention Act,* R.S.C. 1985, c.M-7 and Regulations. The officers had observed the accused and others in circumstances suggesting that they had been, or were about to hunt Canada geese out of season, and the officers were in the process of investigating what they perceived to be possible offences under the Act. At issue is whether the officers were acting in the discharge of their duties under the Act without first ascertaining if the accused was an Aboriginal or a treaty Indian entitled to hunt Canada geese out of season; whether the conduct of the accused was obstruction; and whether the refusal of the accused to identify himself to the officers was obstruction.

The facts are set out in the respondent's factum as follows:

1. On the 29th of April, 1989 at approximately 10:45 a.m., Natural Resource Officer Randy Woroniuk and R.C.M.P. Constable Ralph Sinclair, while on a helicopter patrol, noticed Canada geese decoys placed up the Walker River.

2. The Officers also observed two sleighs in the foreground area (the decoys were in the background by the River) and what appeared to be a camp up on the rock. The Officers descended from the helicopter to make further observations.

3. Natural Resource Officer Woroniuk, observing a shotgun in the sleigh seized the shotgun. Having seen the geese decoys in the area in question, Officer Woroniuk was concerned that there was someone hunting geese out of season. Officer Woroniuk said he seized the gun as a result of what he called his investigation into a possible hunting offence and for the purpose of preserving what he called a valuable piece of evidence which might otherwise disappear.

4. Shortly after Natural Resource Officer Woroniuk seized the shotgun he was confronted by the (Accused) Appellant (hereinafter called the Appellant) who enquired as to what he was doing.

5. Officer Woroniuk at that time was not armed with his own weapon and the barrel of the shotgun that he had seized was pointed down to the ground. Officer Woroniuk was wearing his green patrol jacket with the cross of St. George with the buffalo on the shoulder flash, with conservation officer written on it and a bush cap further indicating Woroniuk' status as a Conservation Officer.

6. In response to the Appellant's initial question, Officer Woroniuk indicated that he was taking the shotgun and would speak to the Appellant at the camp. Moreover, Officer Woroniuk specifically mentioned the *Migratory Birds Convention Act* to the Appellant.

7. As Officer Woroniuk started up the hill, the Appellant "barred" the officer's way up the hill. The Appellant picked up an axe and then advised Officer Woroniuk to drop the shotgun. The Appellant was physically standing in such a manner that Officer Woroniuk had to sidestep him to go around to get back onto the trail. This step-around manoeuvre was executed while the Appellant had the axe in one of his hands.

8. After Officer Woroniuk was forced to step around the appellant and proceeded to the camp, Woroniuk encountered three other individuals and Constable Sinclair. Officer

Woroniuk advised the Appellant that there would probably be charges laid under the *Migratory Birds Convention Act.*

9. Officer Woroniuk then requested the appellant to identify himself for the first of many times. The Appellant refused to do so. Moreover, nothing at that time was provided by way of explanation by the Appellant or anybody in his presence.

10. Constable Sinclair described the Appellant as being "very adamant" in his refusal to provide any identification.

11. After refusing to identify himself a number to times, and after a "warning" that the helicopter was at the bottom of the rock, the Appellant left and walked down towards the helicopter.

12. Officer Woroniuk was left at the upper portion of the rock and was soon surrounded by three individuals at the campsite who continued to reflect an uncooperative and aggressive attitude.

13. Officer Woroniuk reached the Appellant and Constable Sinclair down from the rock and away from the campsite, and the Appellant again refused to identify himself.

14. At one point, the Appellant said something to the effect of "we'll keep the helicopter."

15. The Appellant advised the officers that he was entitled to hunt by way of treaty rights and that he wished to speak to his lawyer. No charges had yet been laid and the Appellant was not under arrest. The officers advised the Appellant that they would be flying into Cross Lake for fuel and that the Appellant could call his lawyer from there. The Appellant advised the officers that he wanted to talk to his lawyer from that specific site. He also demanded of the officers that they hover above the campsite to call his lawyer. The officers indicated they did not have that capability. Officer Woroniuk indicated that had the Appellant accompanied the officers, their intention was to fly him to Cross Lake, give him an opportunity to speak to his lawyer from the R.C.M. Police Office or from the Northern Resource Office.

16. At no point in time, despite numerous requests, did the Appellant identify himself.

17. The appellant advised the other persons at the camp with him not to identify themselves.

18. With the threat to seize the helicopter already having been made and the continual refusal on the part of the Appellant to identify himself, Officer Woroniuk deemed the situation at the campsite to be very hostile and any type of complete search was terminated.

19. Officer Woroniuk indicated that after the individuals were again requested to identify themselves and refused, the officers decided to leave the individuals who seemed to be coming a little more "irate."

20. The officers departed the scene.

21. The Appellant was charged with obstructing a Natural Resource officer pursuant to the *Migratory Birds Convention Act.*

22. The Appellant was found guilty and a conviction was entered by His Honour Judge Drapack on the 8th day of May, 1990.

23. The Appellant was sentenced by His Honour Judge Drapack to pay a fine of $200.00 plus costs.

I should add that no charges were ever laid against the accused for shooting game out of season, or having possession of such game.

I agree with counsel for the appellant that the scope of the officer's duties must be defined in relation to the possible status of the accused as an Aboriginal or a treaty Indian. I say "possible" because the record does not definitively prove the racial origin or status of the accused. There

was evidence that the accused told the officers that he was entitled to exercise treaty rights, and that he wished to speak in Cree. But there was no other evidence as to the racial origin or treaty status of the accused or the other men with him at the camp.

Aboriginals and Metis living in Manitoba may very well have inherent rights to hunt and fish for food in all seasons; many, if not all, treaty Indians certainly have that right under the various Indian treaties applicable in this province.

The right is recognized and upheld in *R. v. Flett,* [1987] 3 C.N.L.R. 70, [1987] 5 W.W.R. 115 (Man. P.J.C.), affd [1989] 4 C.N.L.R. 128 (Man. Q.B.), [application by Crown for leave to appeal dismissed] [1991] 1 C.N.L.R. 140 (Man. C.A.). There, the accused, a treaty Indian, was charged with unlawfully hunting migratory birds, to wit, Canada geese, out of season on unoccupied Crown land, and with possession of migratory birds killed in contravention of the *Migratory Birds Convention Act.* The accused was a member of The Pas Indian Band, and lived on The Pas Indian Reserve. He was found in possession of two Canada geese at The Pas in Manitoba, and he admitted that he had shot the geese the day before on unoccupied Crown land. The learned trial judge, Martin P.J.C., found that the members of The Pas Indian Band always felt that they could take "birds for food" until the prosecutions of the 1950s and sixties; that geese and ducks have from time immemorial been part of the Indians' diet; and that "Indians in this part of the country" had traditionally hunted and fished for food. He concluded [at p. 74]:

> It can be said, based on the facts, they (the Indians) were exercising an aboriginal right to seek food, but as well it was a treaty right. In 1876 The Pas Band, which it is to be remembered, the accused is a member, entered into Treaty number "Five," (in evidence) which inter alia states:
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> > Her Majesty further agrees with her said Indians that they the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered ...

He went on to hold that these Aboriginal and treaty rights were guaranteed by s.35(1), as well as s.25 of the *Constitution Act 1982;* that the *Migratory Birds Convention Act* was of no force and effect to the extent that it was inconsistent with the Aboriginal and treaty rights; and that the accused should be acquitted.

The decision was upheld by Schwartz J. of this court, and leave to appeal from his decision was denied by the Manitoba Court of Appeal. I might add that, in his judgment, Schwartz J. did not appear to deal with the issue of whether the accused had Aboriginal rights as such, but he certainly agreed that he had rights under Treaty No. 5.

R. v. Flett is, of course, consistent with the subsequent decision of the Supreme Court of Canada in *R. v. Sparrow,* [1991] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.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 which recognized and upheld the Aboriginal rights of the Musqueam Indians in British Columbia to fish for food in certain waters in that province, and held that, by reason of the *Constitution Act, 1982,* these rights enjoyed a certain paramountcy over the *Fisheries Act,* R.S.C. 1970, c.F-14.

The Supreme Court in *Sparrow* made it clear that Aboriginal rights are not absolute, and the court said at pp. 180-81:

> Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s.35(1).
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> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867.* These powers must, however, now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

The court then proceeded to set out a "test" for *prima facie* interference with an existing Aboriginal right, and for the justification of such an interference. The onus is on those challenging the legislation to show that it constitutes a *prima facie* infringement of s.35(1); once the infringement is established, then the onus is on the Crown to justify the interference. The justification might lie in the need to take appropriate conservation measures. However, even then, the legislation would have to give first priority to the Aboriginal right.

The court stated that to determine whether Aboriginal rights have been interfered with so as to constitute a *prima facie* infringement of s.35(1) certain questions must be asked. First: Is the limitation unreasonable?; second: Does the Regulation impose undue hardship?; third: Does the Regulation deny to the holders of the right their preferred means of exercising that right?

It is implicit in the reasons for judgment of both Martin P.J.C. and Schwartz J. in *R. v. Flett* that they regarded the *Migratory Birds Convention Act* to be, at the very least, an infringement of the Aboriginal and treaty rights of the accused to hunt for food. Indeed, Schwartz J. said it was an unreasonable prohibition. My own view is that the restrictions imposed by the Act are so extensive that they must be regarded as infringements of treaty rights such as those contained in Treaty No. 5. As far as I know, there has, as yet, been no attempt by the Crown to justify the infringement, as, for example, an appropriate conservation measure. I can only speculate as to whether the Crown might believe it could be justified in this way; in any event, I would observe that it does not appear to contain any scheme which would insure priority of allocation to satisfy Aboriginal or treaty hunting rights. Manitoba courts and the Supreme Court have acknowledged the constitutional validity and priority of these rights and unless, and until, the Crown has demonstrated the infringement to be justified, Aboriginal and treaty rights to hunt game for food must be recognized, notwithstanding anything to the contrary in the *Migratory Birds Convention Act* and Regulations. Treaty No. 5 clearly grants those rights, and the same is probably true with respect to most, if not all, of the other treaties in this province.

The *Report of the Aboriginal Justice Inquiry of Manitoba* [Public Inquiry into the Administration of Justice and Aboriginal People, Winnipeg, 1991; (Commissioners: A.C. Hamilton and C.M. Sinclair)] (Vol. 1) p.147 under the heading of "Aboriginal and Treaty Rights" states that "The written versions of Treaties 1 to 6, 9 and 10, all have relevance in Manitoba"; and that, although hunting and fishing rights were not included in the written versions of Treaties 1 and 2, they were promised orally and have been written into each of the subsequent Manitoba treaties.

As to what must be proved in a prosecution for obstructing a peace officer in the execution of his duty, the Nova Scotia Court of Appeal in *R. v. Murphy* (1981), 58 C.C.C. (2d) 56 at 60 adopted the following:

> The Canadian Abridgment, 2nd ed. (1968), p. 153, para. 778, gives the following summary of *R. v. Taillefer,* [1954] R.L. 562:
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> 778. s. 168 - *Obstructing or resisting police officer - Elements of Offence.* The essential elements of an offence under s. 168(a) are: (1) that the peace officer should have been in the execution of his duty; (2) that there should have been actual resistance or obstruction; and (3) that the resistance or obstruction should have been "wilful." The burden of establishing all three of these ingredients is on the prosecution. If there is reasonable doubt in respect of any of them accused is entitled to be acquitted.

The court, in that case, was dealing with a charge of obstruction against a person who was allegedly drunk in a "public place"; namely, the hallway area of a highrise apartment complex. The police attempted to arrest the accused, and he strenuously resisted them. The court held that the prosecution had failed to prove that the "place" appeared to be a public place, and that the burden was on the Crown to at least prove that the premises reasonably appeared to be a public place. The court further held that "in the final analysis, the Crown failed to prove beyond reasonable doubt that the police, in arresting the appellant, were acting in the execution of their duty as peace officers."

In my view, the scope of the duties of the conservation officers, and the extent to which they were entitled to go in their investigation must be judged in the light of what the prosecution has proved beyond a reasonable doubt to have been apparent to them.

Generally, the duty of the officers was to enforce the game laws and this would include investigating any possible contraventions of those laws. They were right to check into the activities at the camp, but they could only have seized weapons and searched the camp upon having had

reasonable grounds to believe that a contravention of the Act or Regulations, had been or was being, committed. (See ss.7 and 8 of the Act.) If any of the men was obviously not an Aboriginal, then the officers would have had ample grounds to believe that an offence had been committed; or, likewise, if they all appeared to be Aboriginal but the officers had evidence one or more of them had no Aboriginal or treaty hunting rights. But, otherwise, there was a very good chance that they enjoyed treaty rights which would have rendered them immune from prosecution under the Act, and in those circumstances, the officers would not have had reasonable grounds to seize or to search, without first ascertaining that the men did not enjoy treaty status.

The onus was on the prosecution to prove beyond a reasonable doubt that the officers were discharging their duties when they were allegedly obstructed. If the obstruction was alleged to be with respect to seizure and search, this would include proving beyond a reasonable doubt the factual foundation of a lawful right to seize and to search. The prosecution has offered no evidence that any of the men appeared not to have been Aboriginal or had no treaty status and, in fact, the only evidence adduced suggested the contrary. What is clear from the evidence is that the officers made no effort to ascertain the status of the men, and were only interested in getting their identification so they could prosecute them for offences which the officers had already concluded had been committed. There was no showing that the officers had the grounds to seize and search.

Beyond that, I think the officers were well within their duties to proceed up the path to the camp, if only to see who else was there. They may have intended to search the camp, but there was no evidence of such an intention; in any event, as I say, there has not been sufficient proof that they had the right to do so. Their plan seems to have been simply to advise the men that they were going to be charged under the Act and to get their identification for that purpose. They also had in mind to fly the accused to Cross Lake, though the purpose of that was not made clear. They never did arrest him or his companions. It would appear that, before they left the site, they talked to a Constable McIvor, described the accused, and were advised that he was one George Muswagon.

The officers were certainly within their rights to ask the men to identify themselves.

At the hearing of the appeal, Crown counsel submitted that the obstruction complained of could be divided into several phases:

1. the conduct of the accused in taking up the axe, blocking the path of the officer, and directing him to put the gun down;

2. the refusal of the accused to identify himself to the police and his encouragement of his companions to similarly refuse;

3. and the threat to seize the helicopter.

I think it reasonable to conclude that when the officer's path was blocked he was in the execution of his duties.

The officer had taken possession of the gun for evidence, and it is true that the right of game officers to seize weapons, etc., is circumscribed by s.8(1) of the Act which reads:

> 8.(1) Any game officer who believes on reasonable grounds that
> (a) any gun or other weapon, ammunition, boat, skiff, canoe, punt or vessel of any description, team, wagon or other outfit, motor vehicle or aircraft of any kind, decoy, appliance or material of any kind is being or has been used in contravention of or for the purpose of any contravention of this Act or the regulations, or
> (b) in contravention of this Act or the regulations any bird, nest or egg has been taken, caught or killed or is had in possession,
> may seize the article and shall deliver it to a justice of the peace.

I have already said that it has not been proved that the officers had the right to search and seize, and, therefore, it was not within the rights or duties of the officers to seize the gun pursuant to the above section. However, that provision contemplates more than just a temporary seizure to preserve evidence pending a further investigation, because it speaks of seizing the article and delivering it to a justice of the peace. While it may not have been proved beyond a reasonable doubt that the officers had reasonable grounds to believe that an offence had been, or was being, committed, nevertheless it has been proved that they at least were justified in conducting an investigation to see whether they might find such reasonable grounds, which would included going

up the path into the camp to see who else might be around. The temporary seizure of the gun pending further evidence of a possible offence was, in my opinion, a reasonable move and within the rights and duties of the officers. I appreciate that the officers retained the gun which they may not have been entitled to do; but that is a separate matter and it does not affect the right to initially take temporary custody of the weapon for possible evidentiary purposes.

Certainly it was within their rights and duties to proceed up the path to the camp.

In my view, the actions of the accused in attempting to thwart this stage of the investigation were intended to obstruct the officers at a time when they were exercising their investigative duties under the act.

In *R. v. Tortolano et al.* (1976), 28 C.C.C. (2d) 562, a decision of the Ontario Court of Appeal, the headnote is as follows:

> On a charge of obstructing a peace officer in the execution of his duty it is no defence to the charge that the officer was not completely frustrated in carrying out his duty. All that is required in proof of the charge is that the officer was obstructed, that the obstruction affected him in the execution of a duty he was then performing and that the accused acted wilfully in obstructing the officer. Accordingly, an accused is properly convicted where it is proved he assaulted an officer in an attempt to prevent the arrest of another person, notwithstanding the officer was able to effect the arrest.

It is not clear whether the conduct of the accused in blocking the path actually affected the officers in the execution of their duties. Officer Woroniuk did not seem to be affected at all; he ignored the actions of the accused and was easily able to step around him. Here I note that at the trial, counsel for the Crown (who was not the same as counsel on the appeal) viewed the actions as an attempt to obstruct, rather than an obstruction. He stated:

> Obstruction can amount to something very minimal or something very serious, such as assault, and I would submit that what we have from the evidence of Cst. Woroniuk and the evidence of Cst. Sinclair is with regard to the access, perhaps as an attempt to obstruct.
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> I don't think Cst. Woroniuk or the officer was really obstructed at that time because he was able, as he said, to get around. It is a fact he wasn't prevented from accomplishing his duty, but at the same time there was an attempt by the accused.

I am in agreement with this, and would hold that what occurred was probably only the included offence of attempt to obstruct, rather than obstruction itself, and I would at least give the accused the benefit of the doubt.

Crown counsel submitted that the accused was guilty of an obstruction by refusing to identify himself to the officers. I do not agree with this submission.

The governing principle is set out in *R. v. Moore,* [1979] 1 S.C.R. 195, [1978] 6 W.W.R. 462, 90 D.L.R. (3d) 112, 43 C.C.C. (2d) 83, 5 C.R. (3d) 289, 24 N.R. 181, per Dickson J. (as he then was):

> There is no duty at common law to identify oneself to police. As was stated by Lord Parker in *Rice v. Connolly,* [1966] 2 All E.R. 649 at 652 (Q.B.D.):
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> > It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and a refusal to accompany those in authority to any particular place, short, of course, of arrest.
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> The case stands for the proposition that refusal to identify oneself to the police could not constitute obstruction of the police. The Court distinguished a refusal to answer, which is legal, from a "cock and bull" story to the police, which might constitute obstruction. No other distinction was made. Lord Parker said:
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> > In my judgment there is all the difference in the world between deliberately telling a false story, something which on no view a citizen has a right to do, and silence or refusing to answer, something which he has every right to do.

The one exception to the principle is where the police see the accused actually committing an offence. That was the situation in *Moore* where a police officer observed the accused riding his bicycle through a red traffic light.

Moore was commented on in *R. v. Guthrie* (1982), 69 C.C.C. (2d) 216 (Alta. C.A.) where the accused had refused to identify herself to police officers who had observed her acting suspiciously on a parking lot where break ins of police officers' private vehicles had been occurring. She refused to say what she had been doing in the parking lot, and the police subsequently found a vehicle in the lot with its door open, although it had not been forcibly entered, and nothing had been removed from it. The accused refused to comment about her possible involvement with that vehicle. She was charged with obstruction by refusing to identify herself to the police. In dismissing that charge, the Alberta Court of Appeal, per McClung JA., stated at p. 219:

> The learned provincial court judge felt obliged to follow *Moore v. The Queen, supra,* in equating the appellant's silence to a wilful obstruction. But critical to the result in *Moore* was the fact that a constable on duty had witnessed the commission of a statutory infraction - the running of a red light - and the fact that the constable had no power to arrest the suspect for any offence unless and until he had attempted to identify him so that he might be the subject of summary conviction proceedings: *Criminal Code,* s.450(2)(d)(i). The authority of *Rice v. Connolly, supra,* was neither doubted nor diminished by Spence J. who wrote for the majority of the Supreme Court of Canada in holding that Moore's silence during his interrogation amounted to an act of obstruction. Spence J. said, referring to *Rice v. Connolly* [at p.891: "It is paramount to note that the appellant there had not committed any offence in the presence or view of a police officer." That is what happened, or more precisely, what did not happen here.

In my opinion, in the instant case, Crown cannot bring itself within the exception to the general rule. The Crown has not proved beyond a reasonable doubt that the officers actually observed an offence under the Act or the Regulations. The officers did not find the accused in possession of any migratory birds, and did not observe the accused actually hunting such birds. The evidence they did see was as consistent with the accused preparing to hunt as it was with a hunt having occurred. Furthermore, at the most, the officers could only have had reasonable grounds to believe that they were witnessing an offence against the game laws if the accused, or any of his companions, had appeared not to be Aboriginal, or had acknowledged they had no Aboriginal or treaty rights to hunt and the Crown has not proved that this was apparently the case.

Counsel for the Crown submitted that the accused may have been required to provide information regarding the identity in view of s. 10 of the Act which reads:

> 10. No person shall wilfully refuse to furnish information or wilfully furnish false information to a game officer or peace officer with respect to the contravention of this Act or the Regulations, the existence of or the place of concealment of any bird, nest or egg, or any portion thereof, captured, killed or taken in contravention of this Act or the Regulations.

I do not think this assists the case for the Crown. The Crown elected not to charge the accused under this section and, in any event, in my opinion, it is not sufficiently clear and specific to deprive the accused of his common law right not to identify himself to peace officers. The refusal to identify was not obstruction.

The Crown submitted that the threat to seize the helicopter amounted to an obstruction of the officers in the discharge of their duties. I am not in agreement with this submission either. There may have been greater force to the submission if the threat had occurred at an earlier stage; for example, prior to the officers having had an opportunity to look around the camp, observe who was there and asked their questions. However, by the time the accused made the threat, it is not clear that the officers intended to carry out, or could have carried out, any further investigation at the site. They had looked around, they had seen who was there, and they had asked their questions. They may have had in their minds to search the camp, but, as I have indicated, there was no evidence that this was their intention. In my view, it has not been proved beyond a reasonable doubt that the threat obstructed, or was itself an attempt to obstruct, the officers in the execution of any particular duty.

For all of these reasons I have concluded that the accused is not guilty of obstructing, but is guilty of the included offence of attempting to obstruct natural resource officers in the discharge of their duties under the Act. The appeal is allowed; the conviction is quashed and a conviction for attempting to obstruct is substituted.

Counsel may arrange a date to speak to the appeal as to sentence.