

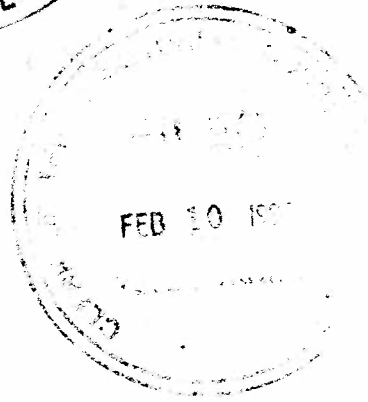
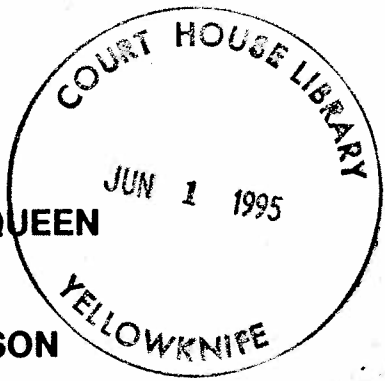
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**HER MAJESTY THE QUEEN
- and -
RAM HEAD OUTFITTERS LTD.**

AND BETWEEN:

**HER MAJESTY THE QUEEN
- and -
STANLEY D. SIMPSON**



JUDGMENT

In this, the third in a group of five trials involving the same defendants, Ram Head Outfitters Ltd. is charged with abandoning moose meat fit for human consumption contrary to s. 57(1)(a) of the *Wildlife Act*, R.S.N.W.T. 1988, c. W-4, as amended. Stanley Simpson is charged with aiding, abetting or inducing the corporation to commit that offence, contrary to s. 85 of the same Act. Even though the defendants are charged in separate informations, the parties agreed, as they did with each group, that the trials

could proceed together pursuant to the procedure approved by the Supreme Court of Canada in *R. v. Clunas* (1992), 70 C.C.C. (3d) 115. Accordingly, the Crown presented one case on both charges and then Mr. Simpson testified, both for himself and for Ram Head.

At issue here is whether the defence of due diligence applies; if it does, where and to what extent the burden of proving or negating due diligence lies; and whether that burden has been discharged. The unlawful act itself is, for all intents and purposes, admitted. In respect of the defendant Simpson there is the added question, assuming the commission of the underlying offence has been proven, whether the necessary intention to aid, abet or induce has been shown to the required standard.

Does Due Diligence Apply ?

By the emphasis he placed in his submissions on the proof that his client had shown due diligence, counsel for Ram Head, by implication at least, concedes that the principle applies to this prosecution. Likewise, Crown counsel began his argument with the suggestion that this is "... an uncomplicated due diligence case".

Without repeating what I said in the first of this series of five judgments, suffice it to say that I am satisfied that the *Wildlife Act* in general terms should be considered public welfare legislation and that accordingly, the offences it creates will usually be strict liability offences relieving the Crown of the burden of proving full *mens rea* and permitting the defence of due diligence. Having regard particularly to the wording of s. 57, I am satisfied that the offence it creates clearly falls into that category.

On the other hand, the use of the word "knowingly" in s. 85 of the *Wildlife Act* makes the charge Mr. Simpson faces a "full *mens rea*" offence, requiring proof by the

prosecution of a guilty state of mind beyond a reasonable doubt: *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 per Dickson, J. at pp. 373-374).

Who Bears the Burden and To What Standard?

Decisions subsequent to *City of Sault Ste. Marie* have not changed the burden cast by that case upon defendants to prove due diligence where strict liability offences are charged, assuming the unlawful act itself has been proven by the prosecution to the usual criminal standard. Nor have they reduced the measure of proof from the balance of probabilities to simply raising a reasonable doubt, as suggested by counsel for Ram Head. On the contrary, as I indicated in earlier judgments in this series, both the majority opinion on this point in *R. v. Wholesale Travel Group Inc.* (1991) 3 S.C.R. 154 and, in the Northwest Territories, the subsequent decision of de Weerd, J. in *R. v. Gold Range Investments Ltd.* (Unreported, December 17, 1993, para. 16) confirm that the burden remains proof on a balance of probabilities, notwithstanding the rights now guaranteed by ss. 7 and 11(d) of *The Canadian Charter of Rights and Freedoms*. I repeat here that I take that to mean simply proof of due diligence "more probable than not" in case some confusion might be said to arise from the substitution in the *Gold Range* case of the word "beyond" for the word "on" in the phrase "on the balance of probabilities" as it appears at p. 373 of *City of Sault Ste. Marie, supra*, .

Has the Burden Been Discharged?

The defendants concede, by the admissions filed as exhibit #1, that Ram Head is an outfitter operating under a licence issued pursuant to the applicable provisions of the Northwest Territories *Wildlife Act* and that Simpson is the major shareholder and operating mind of Ram Head. The moose meat which forms the subject of the charge was abandoned on the shore of the South Nahanni River in an area

assigned by the Wildlife Business Regulations to the exclusive use of Ram Head for outfitting activities.

It was pursuant to that authority that Ram Head provided a guide and related outfitting services to one Sam Birkee for the purpose of enabling him to shoot a moose. He killed one on September 25th, 1994 and that is the meat which forms the subject of the present charge. Both Fred Chantler, Birkee's guide, and Jim Fink, the pilot who picked them up, acknowledge that the meat they left behind was fit for human consumption and that the law prohibited its abandonment. They justify leaving some of the meat behind by constraints of space in the aircraft, the need to leave the area quickly and get back to their base camp at O'Grady Lake on account of approaching bad weather, and the assumption, by Fink at least, that he would return when the weather cleared to pick up the meat.

As it turned out, the bad weather prevented further flights for a day and a half, that is, until the 27th of September. Although it is unclear from the evidence precisely when and by whom Simpson was informed about the abandoned meat, it is clear that he was aware by the time the weather cleared that edible moose meat from the Birkee hunt had been left on the bank of the South Nahanni River on September 25th.

Since it was late in the season and because he had had problems two years before when he stayed too long at his base camp, Simpson took the bad weather as his sign to begin its evacuation. Accordingly, on September 27th he devoted his energies and those of his employees to that task and to providing Birkee and his companion with the second part of their contracted hunt, which was for caribou. Because of that decision, neither Fink nor Simpson himself, the only available pilots, were free to return to the South Nahanni to pick up the meat left from Birkee's moose. Late in the afternoon, Fink was instructed by Simpson to fly the float plane to Watson Lake, Yukon, as the final act in closing down the camp. Sometime before the pilot left,

the question of the moose meat came up. At this point, the evidence, perhaps not surprisingly, conflicts.

Fink says that he offered to pick up the meat and either bring it back to O'Grady Lake or take it to Watson Lake, but Simpson refused, saying he wanted to get his float plane out before freeze up. As an experienced pilot in the area, the witness testified that in his opinion there were at that time still 4 or 5 flying days left on O'Grady Lake. His recollection of the conversation in cross-examination was that Simpson said, "Don't worry about the meat on the river. I want the plane out." To Fink's suggestion that he could stop on the way and pick the meat up, Simpson's reply was, "No, I would rather abandon it than export it without a permit."

Simpson has quite a different recollection of the conversation. He agrees that he did not want the meat taken to Watson Lake without an export permit, but says that he instructed Fink to check from the air to see if the meat was still there. If the meat was not there, Fink was to proceed to Watson Lake; if it was there, he was to pick it up and bring it back either to O'Grady Lake or Island Lake. The pilot emphatically denies any such conversation.

I resolve this conflict in the evidence in favour of Mr. Fink. I was impressed with the way in which he gave his evidence and especially with his responses to questions put to him in cross-examination. His version of events is much more consistent with the admitted facts than is Simpson's. For example, there can be no doubt that the matter of the meat concerned the pilot enough to bring it to the attention of his employer. Even Simpson agrees that it was serious enough to provoke a discussion before Fink left. He also agrees that Fink suggested picking up the meat and taking it to Watson Lake. In those circumstances, I find it inconceivable that the pilot would ignore specific instructions to check on the meat and pick it up if it was there. He would have had every reason to do so: his own concerns and the direction of his employer. In addition, the two witnesses agree that the kill site was not very far out of

the way to Watson Lake and that the weather had cleared and was in fact quite good at the time.

On the other hand, Mr. Simpson concedes in cross-examination that he did not even question Fink about the meat when he picked him up at Watson Lake the next day, a strange omission considering his supposed instructions, his alleged concern and his acknowledged legal duty to ensure that it was not abandoned. Fink's version is much more consistent with Simpson's concern to get the O'Grady camp closed, as evidenced by the latter's testimony about his activities on September 27th. In short, the pilot's description of the events of that day had the ring of truth; Simpson's did not.

Against this background, its counsel submits that Ram Head has shown on a balance of probabilities that it took all reasonable steps to avoid abandoning the moose meat. In my view it has not.

While the phrase "due diligence" may be slightly obscure to the layman, the ideas of which it is comprised are not. Without repeating the analysis of that phrase which appears in the first of the five judgments in this series, suffice it to say that the law simply requires those bound by regulatory laws to make reasonable efforts to comply with them. What will be required in any particular situation will vary with the facts: *R. v. City of Sault Ste. Marie, supra*, at p. 374; *R. v. Gold Range Investments Ltd., supra*, at para. 29; *R. v. Gonder* (1981), 62 C.C.C. (2d) 326 (Yukon Terr. Ct.) at p. 332. For the reasons stated in that earlier judgment referred to above, that includes here the special duties cast upon the defendant by virtue of the special trust and the unique privileges accorded to it when it received a business monopoly in area E/1-4 by the issuance to it of the outfitters licence for that area.

Thus, Ram Head, as opposed to its guide, its pilot or the hunter, Birkee, occupied a special position *vis-à-vis* the legislation and by virtue thereof was required, in my view, to do considerably more than they to satisfy the due diligence requirement.

Although it might be said that each of the others was a party to some extent to the commission of the unlawful act, it was Ram Head, both legislatively and practically, who controlled their activities. By virtue of its outfitters licence it had the ultimate control over the hunt in which Birkee engaged. By virtue of the terrain involved, the equipment it controlled and the exclusive services it provided, Ram Head made the ultimate decision how, when and if the meat in question would be retrieved. In saying that, I make it clear that I am satisfied that the original abandonment of the meat was reasonable, considering that that decision was made "in the field" and under the pressure of imminent bad weather: see *R. v. Thompson*, unreported, August 22, 1990, Yukon Registry No. 87-01113, per Lilles, Terr. Ct. Judge.

I accept that Simpson had honestly decided on September 27th to close down the O'Grady Lake camp immediately. In view of his legal duty not to abandon the moose meat, I do not accept that it was necessary, or reasonable, for him to proceed as he did. He says, in effect, that his actions were prompted by the fear of more bad weather which would have made evacuation of the camp difficult if not impossible. However, speculation is not necessity, nor is convenience. The bad weather was not so imminent as to preclude his diversion of some of his resources, including his pilot, to the completion by Birkee and his friend of the second leg of their hunt. That was no doubt a wise business decision, but one taken in the face of his primary duty to see to the retrieval of the meat. There was time, according to Fink, for him to have picked up the meat and returned it to O'Grady Lake that day, thus obviating any concern about taking it to Watson Lake without an export permit. Simpson agrees that this is so. He also concedes that by reason of the other activities he chose for his employees and himself, nobody paid attention to the float plane until later in the afternoon, by which time it was too late to retrieve the meat and still get the float plane to Watson Lake. In that setting I accept Fink's testimony that Simpson directed his pilot to take the plane to Watson Lake without picking up the meat.

As I indicated earlier, Ram Head, and only Ram Head, had control of the necessary resources to accomplish the recovery of this moose meat. It chose through Simpson, its operating mind, to divert them elsewhere to the detriment of its legal duty not to abandon the meat. In doing so it failed to use the due diligence required of it by law and completed the commission of the offence. I therefore find the corporation guilty as charged.

As regards the charge against Simpson personally, he may in law be convicted as an aider and abettor of the corporation even though he acted at the time also in his capacity as the operating mind of the corporation: *R. v. Fell* (1981), 64 C.C.C. (2d) 456 at p. 461 (Ont. C.A.).

In this case Simpson was both the senior officer and directing mind of Ram Head. It is clear that he himself made the decisions which precluded the corporation from discharging the legal obligation he knew it had. The *mens rea* required for conviction as an aider and abettor is "... knowledge of the circumstances which make up or constitute the offence,"; it is "... not necessary for the prosecution to prove that the respondent knew that those circumstances constituted an offence": *Ibid.* p. 463.

The proof here goes beyond that requirement. Simpson admitted in cross-examination, not only that he personally directed the company's activities on September 27, but also that he was aware of the obligation on the outfitter to retrieve the edible meat which had been left at the site by its employees on September 25th. Despite this, he personally diverted its resources elsewhere and eventually gave instructions to Fink, as I have found, to proceed directly to Watson Lake without picking up the meat. In those circumstances his guilt is proven beyond a reasonable doubt and I accordingly convict him of the offence with which he is charged.

DATED this 10th day of February, A.D. 1995 at the City of Yellowknife
in the Northwest Territories.

"Peter Ayotte"

Peter Ayotte, Deputy Judge
Territorial Court of the Northwest Territories

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