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

There are 12 contraventions of the *Wildlife Act*, R.S.N.W.T 1988, c.W-4 alleged against Ram Head Outfitters Ltd. and Stanley Simpson in this the fourth of a group of five trials involving the same defendants. The charges comprise six informations of two counts each. Although the events which ground them involve different hunts and different hunters, the informations were tried together pursuant to the agreements and the procedure outlined in the first of the judgments in this series (judgment #1) because the hunts took place, in time, one after the other and in the

same geographical area. They involve the killing of three moose in September, 1993 by John Connelly, Arlo Speiss, and Henry Young respectively.

In the result, Ram Head faces three counts of providing outfitting services outside the area specified in its license and three of failing to report an offence within 10 days of acquiring knowledge of it. Although they are technically breaches of the Wildlife Business Regulations, the delicts are made offences against the *Wildlife Act* by s. 91 thereof.

Simpson is charged with aiding, abetting or inducing his company to commit each of the three outfitting offences and one of his guides, Kevin Scherger, to guide each of the three hunters outside Scherger's assigned area. Section 85 of the *Wildlife Act* prohibits that sort of aiding and abetting.

The offences charged against Ram Head are all strict liability offences and I assign burdens to the Crown and the defendant in accordance with the principles discussed at length in earlier judgments in this series. I approach those in which Simpson himself is accused in the same way I have in the other trials.

Despite the large number of counts in this group, the issues are relatively narrow and straightforward. Given the definition of outfitting adopted in judgment #1, which includes the provision of guide services to a hunter, the only real issue in the illegal outfitting prosecutions is whether due diligence has been established by the defendant. In saying that, I acknowledge that a good deal of evidence was presented by both parties directed to the issue of where in law the border actually is, even though neither Simpson, his guides nor, for that matter, the Department of Renewable Resources, seem to have been at all confused by the fact that the southeastern fork of the Twitya River is renamed Caribou Cry on more recent maps (see exs. #8 and 16). The issue was raised on the possibility that everyone may have been mistaken about

where the border really was, which would in this case work in favour of the defendants by making legal the outfitting Ram Head's guide thought was illegal at the time.

I dispose of the matter briefly by confirming that in law the relevant border is as plotted by Ken John on exhibit #2, that is, along the Caribou Cry. I reach that conclusion after comparing in the Wildlife Management Outfitter Areas Regulations, R.R.N.W.T. 1990, c. W-12 (ex. #3) the relevant descriptions for that part of the border of both Area E/1-4 ("the Ram Head Area") and its neighbour, Area E/1-3 ("the Stevens Area").

Due Diligence

Outfitting services were without any doubt provided to all three hunters in the Stevens Area by paid employees of Ram Head acting sufficiently within the scope of their employment to bind it. Although it cannot be said that Simpson, the operating mind and will of Ram Head, had actual knowledge of what his guide was doing at the time, Scherger's acts were in law those of his employer. I adopt in that regard the reasons given in judgment #1 for making a similar finding there.

The unlawful acts having been proven, it falls to Ram Head to show due diligence in order to avoid liability for the offences. On the facts of this case, the applicable test is that branch of due diligence which requires the defendant to show that it "... took all reasonable steps to avoid the particular event": *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. 353 (S.C.C.) at p. 374.

More than in any of the other cases, the trials in this group demonstrate how that burden may change factually depending on the circumstances. The cases confirm a flexible standard; that is simply a recognition that reasonableness is not an

absolute concept. The very reason for the creation of strict liability offences is the attempt, where the public welfare is involved, to be fair to both the defendant and the public. That was expressed by Dickson, J. (as he then was) in *City of Sault Ste. Marie, supra,* as follows:

> Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent. (pp. 362-3)

The strict liability solution, if it is to maintain the balance aimed at, must inevitably be rooted in a recognition that changing circumstances require changing responses. What is morally innocent at one time may not be at another.

Therefore, a specific factual standard, of necessity, will have to be set in each case. What it is precisely will depend on a number of factors. Among them will be any special duty cast upon the defendant by reason of his special relationship to the legislation involved and the gravity of the potential harm posed by his activities. Those factors, as they relate to Ram Head, have been explored in earlier judgments in this series. I will not repeat those comments here, save to reiterate that a very high duty of care was cast upon the company by virtue of both the special benefit and the special trust it received with its outfitters licence.

On a more mundane level, any special knowledge the defendant has which would trigger in a reasonable person the taking of special precautions is relevant. That is particularly so when, as here, the defendant is engaged in a very specialized business with very specialized clients. Ram Head is not only in the business of providing hunts. The company promotes the expectation in its clients that they will kill, not just any

animal, but trophy animals. Its advertisements suggest it; its fees confirm it. It must realize that there will be, in consequence, tremendous pressure on its guides in the field to provide the prize those advertisements and fees impliedly promise. As a result, there is a corresponding duty to take reasonable steps to ensure that its agents in the field will comply with the company's obligation to confine its activities to its own area despite that pressure. That duty, and what is required to meet it, rises when to the knowledge of, and indeed on the orders of, the company it chooses to site a hunt virtually on its border with an adjoining area, as occurred here. It rises even further when the directing mind of the company is advised by the assigned guide before the hunt, as Simpson admits he was, that the moose are across the river in the adjoining area. It matters not whether he said "all of the moose", as the Crown suggests, or "most of the moose", as Simpson remembers it. Either way a reasonably diligent employer would have realized the increased likelihood that its guides would come under pressure to hunt outside the company's area and that they would probably be tempted to do so. In the result, what was predictable is exactly what happened.

Considering that it made no effort to bring the risk within acceptable limits, Ram Head must bear responsibility for the offences which resulted. It could have done many things "... to avoid or prevent the offence taking place" to quote de Weerdt, J.: see *R. v. Gold Range Investments Ltd.* (Unreported, N.W.T.S.C., December 17, 1993) at para. 15. Primarily, it could have avoided placing the hunters in a border area where, on the information it had, the most sought after animals would likely be across the river in the other area. If it thought that hunting there was the only feasible alternative, it could have given specific instructions and explanations to its guides, and in their presence to its client hunters, so that all were aware of the heavy, and separate, legal obligation each had to confine his activities to the Ram Head Area. Instead, the company did essentially nothing. While it took pains to demonstrate through the witnesses called by the Crown that Simpson did not tell his guides to cross the river to hunt, he created a situation which was, in effect,, a silent invitation to do so.

It will be apparent from my remarks that due diligence, in my view, has not been demonstrated by the corporate defendant and that it should therefore be convicted of the three allegations of outfitting outside its area.

Knowledge

I have already referred, in two of the other judgments in this series, to the unfortunate wording of s. 26 of the Wildlife Business Regulations ("the Regulations"), which requires outfitters to report offences within 10 days of acquiring "knowledge" of them. In those other cases the Crown stumbled on the "knowledge" precondition and its prosecution failed accordingly. These cases are different. Whatever "knowledge" may mean and however it may theoretically be obtained, Ram Head, through Simpson, knew by September 30th, 1993 that three moose had been taken illegally by the hunters in question here. He admits in cross-examination that his guides told him about two of them; I accept the evidence of the guide, Dan McLeod, that he was told about the third one also. The evidence is also clear that no attempt was made to report these offences until Ram Head's letter of November 4th, 1993 ((ex. #15), well beyond the 10 day period prescribed by the Regulation.

Ram Head's primary defence is that it thought there was no need to report because the matter had already, to its knowledge, been reported by its guide-employees. That in my view is no defence at all. The outfitter is deemed to know the law, especially that by which it particularly is governed; Simpson conceded in cross-examination that he did know it. The Regulations, by s. 42, impose a separate and distinct duty on guides to report offences. Applying Lord Denning's metaphor of a company as a human body, quoted in judgment #1, the duty cast upon the company by s. 26 was cast upon its mind and will (Simpson), not on the hands that do the work (its guide employees). Knowledge comes to the mind, not the hands. In my view, Simpson, knowing the law,

cannot reasonably have thought that Ram Head's obligation had been discharged by its guides. The very fact of his letter in November to Mark Hoppe (ex. #16) confirms that he didn't think it had.

If the question of due diligence can be said to arise at all on the facts here, Ram Head has not shown it. Although Simpson had time to contact Sam Stevens to attempt to "smooth over" the incident, he took none to comply with his duty, as the mind and will of Ram Head, to report the offences of which he had been made aware. Even when he finally did report it, the use of the phrase "I have recently become aware of this matter" in the letter to Hoppe makes it clear that he was prepared, even then, to attempt to leave a misleading impression about when he actually acquired his knowledge.

Finally, to the extent that Ram Head says that its obligation to report did not arise at all until Simpson was "sure" that an offence had been committed, I must respectfully disagree. While the use of an imprecise word like "knowledge", unmodified by even one adjective, is unfortunate, I think the only sensible meaning to be given to it in the context of s. 26 is "who has acquired reasonable and probable grounds to believe". That pre-condition was met on September 30th when Scherger and McLeod told Simpson about the illegal kills.

It follows, then, that I find Ram Head guilty on all three counts of failing to report.

"Knowingly"

There remain to be considered only those charges in which Simpson is charged personally as an aider and abettor. I conclude, for the reasons already given in judgment #1, that he can be charged personally even though his actions also ground

the company's liability and that he can be convicted notwithstanding that a principal actor like Scherger has been neither charged nor convicted. The only real issue is whether I am satisfied on the evidence that the mental element, the "knowingly" of the charges against him, has been proven beyond a reasonable doubt.

I have already referred, in earlier judgments in this series, to the content of the *mens rea* requirement for an aider and abettor, i.e. — that the defendant have knowledge of the circumstances which make up or constitute the offence whether or not he knew that it was an offence: *R. v. Fell* (1981), 64 C.C.C. (2d) 456 (Ont. C.A.) at p. 463; *R. v. F.W. Woolworth Co. Ltd.* (1974), 18 C.C.C. (2d) 23 (Ont. C.A.) at p. 32. That means in this case that he knew that services, outfitting or guiding, would be provided outside the Ram Head Area when he did the acts which aided and abetted the provision of those services.

The cases here are slightly different from those in the earlier groups in that it cannot reasonably be said that Simpson actually knew what Scherger and his hunters would do nor even that he was wilfully blind to what they were about to do. "Wilful blindness" applies to those situations where a person remains ignorant of what is happening by deliberately refraining from asking the appropriate questions: see *F.W. Woolworth, supra*, at p. 30. If he had asked, the response would almost certainly have been that they would remain in the Ram Head Area since, on the evidence, the decision to do otherwise was made in the field as the hunt progressed. Accordingly, it cannot really be said that he "deliberately refrained from inquiries, the result of which he did not care to have": *ibid.*.

However, the necessary *mens rea* can be shown in another way. The Supreme Court of Canada made it clear in *Sansregret v. The Queen* (1985), 18 C.C.C. (3d) 223 that the mental element of a criminal offence may sometimes be imputed to an accused as the result of his or her recklessness. McIntyre, J., for the court, explained it thus:

> ... In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is a danger that his conduct could bring out the result prohibited by the criminal law, nevertheless persists despite the risk. It is, in other words, the conduct of one who sees the risk and takes the chance. It is in this sense that the term "recklessness" is used in the criminal law and it is clearly distinct from the concept of civil negligence. (p. 233)

Although those comments were aimed at *mens rea* in the more usual sense of intentionally bringing about a result, I see no reason in principle why they should not be extended to include *mens rea* of the type which is required here. Where knowledge of the acts is required, there is in my view nothing unfair in imputing to an accused knowledge of the conduct his actions are likely to bring about.

That is essentially what happened here. Though Simpson didn't ask if his employee/guide would guide, and thus outfit, outside the Ram Head Area, he gave instructions by which services were provided which were likely to, and in fact did, produce that result. That in my view was sufficient to establish the necessary *mens rea* and I therefore find him guilty on all six counts of aiding and abetting.

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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