IC CR 95 010

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

As its name implies, the defendant Ram Head Outfitters Ltd. provides outfitting services to hunters, particularly those seeking trophy animals. Mr. Simpson is the major shareholder and operating mind of Ram Head. The corporation, by virtue of a licence issued pursuant to the provisions of the Northwest Territories *Wildlife Act*, R.S.N.W.T. 1988, c. W-4, as amended, and the Wildlife Business Regulations, held exclusive outfitting rights in an area of the Mackenzie Mountains identified by regulation as Wildlife Management Outfitter Area E/1-4 ("the Ram Head Area").

Ram Head is accused of some 18 contraventions of the said Act arising from its activities during the 1993 hunting season, while Simpson is charged personally as an aider and abettor in 18 more. The allegations are spread over many informations and potentially created a procedural nightmare for the court. With the co-operation of the parties, those problems were resolved first by grouping the charges by time, incident and geography into five manageable units within which the issues pertinent to that group could be more easily isolated and addressed, and then by their further agreement that the informations comprising one group could be tried together pursuant to the procedure approved by the Supreme Court of Canada in *R. v. Clunas* (1992), 70 C.C.C. (3d) 115.

This judgment then is the first of five. It deals with the issues raised by the killing of a dall sheep by Jason Busat, who was, at the relevant time, both a guide for and a guest of Ram Head. As a result of that hunt, his employer is charged in Count #1 with providing outfitting services outside the area specified in its licence, contrary to s. 25(d) of the Wildlife Business Regulations and in Count #2 with failing to report an offence under the *Wildlife Act* within 10 days of "acquiring knowledge of it" contrary to s. 26 of the same Regulations. Both allegations, if proven, become offences by virtue of s. 91 of the Wildlife Act.

Mr. Simpson is charged with aiding, abetting or inducing his corporation to commit the first offence and also with aiding, abetting or inducing Busat's guide, Ed Kapala, to guide for money or money's worth outside the area for which the latter was licensed, contrary to s. 47(2) of those Regulations. Aiding, abetting or inducing another to commit any offence against the Act or the Regulations is itself made an offence by s. 85 of the *Wildlife Act*.

The trial raised a number of issues, which may be listed as follows:

A. Generally

(1) How should the offences be characterized, where do the burdens of proof lie and to what standard must they be satisfied?

B. Respecting Count #1 against Ram Head:

(1) What are "outfitting services"?

(2) Does proof of the *actus reus* of the offence include proof of actual knowledge by the company or its officers of the activities of its employees?

(3) What is the applicable test for due diligence and has it been met?

C. Respecting Count #2 against Ram Head:

(1) Has "knowledge", as that term is used in s. 26 of the Wildlife Business Regulations, been proven?

(2) What is the applicable test for due diligence and has it been met?

D. Respecting the charges against Simpson personally:

(1) Can an officer of a corporation be convicted of aiding and abetting it to commit an offence and if so, what is the *mens rea* required?

(2) Can an aider and abettor be convicted when the principal is neither charged nor convicted?

How should the offences be characterized?

Generally speaking, public welfare offences are considered "strict liability" offences unless the use of words like "wilfully", "knowingly", or "intentionally" in the provision creating the offence indicates a legislative intention that they be treated as full criminal offences: *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.) at p. 374.

In *Ram Head Outfitters Ltd. v. The Commissioner of the Northwest Territories et al* (Unreported, N.W.T.S.C., August 23, 1994) Vertes J. observed, as I have, that "... the Wildlife Act ... sets out an elaborate scheme of regulation and licensing of hunting-related activities." (Para. 4) Considering that legislative approach and in view of the wording of each of the statutory provisions underlying the charges against the corporation, I agree with counsel that the offences in question are strict liability offences and that accordingly "... the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care." (*City of Sault Ste. Marie, supra*, at p. 374)

On the other hand, both counts in the charge against Simpson himself use the word "knowingly", as does s. 85 of the *Wildlife Act*, which creates the offence. Consequently, they must be characterized as "full *mens rea*" offences.

Who Bears the Burden and to What Standard?

The Crown must prove the unlawful act in a strict liability prosecution beyond a reasonable doubt, as in other prosecutions: *Ibid.*, p. 373. However, when that is accomplished, the burden shifts to the defendant to prove reasonable care (due diligence) on a balance of probabilities. *R. v. City of Sault Ste. Marie, supra,* the seminal case, established that standard and, despite submissions to the contrary by counsel for

Ram Head, I know of no other authority by which I am bound which detracts from it. Quite the opposite. In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, a majority of the Supreme Court of Canada concluded that the burden cast upon defendants in *City of Sault Ste. Marie* had survived the subsequent implementation of the *Canadian Charter of Rights and Freedoms*. In the Northwest Territories the standard was recently reconfirmed by de Weerdt, J. in *R. v. Gold Range Investments Ltd.* (Unreported, N.W.T.S.C., December 17, 1993, para. 16): For the sake of clarity I take the defendant's burden then to be proof of due diligence "more probable than not" whether one uses the phrase "on the balance of probabilities", as in *City of Sault Ste. Marie,* or "beyond the balance of probabilities", as in *Gold Range Investments*.

The charges against Simpson himself being full *mens rea* offences, the Crown, in its prosecution of this defendant, is put to the proof of both the unlawful act and the necessary *mens rea* to the usual criminal standard.

The Facts

Although he was employed by Ram Head as a guide at the time, Jason Busat was hunting between July 15th and 21st, 1993 because his employer had a policy that guides who had worked for three seasons be given a free hunt to get a trophy animal for themselves. Where sheep were concerned, the company restricted its guides to killing animals with horns no longer than 36", thus saving the larger rams for its paying customers. In this case Kapala, another of the company's guides, accompanied the guide-hunter because s. 44 of the *Wildlife Act* requires non-resident hunters like Busat to be so accompanied.

On July 15th the two were dropped off by a Ram Head pilot flying a Ram Head plane at Caribou Lake, a place to the knowledge of both within Wildlife Management Outfitter Area E/1-6 ("the Redstone Area"), which borders the defendant's

area to the east. Although there is a conflict in the evidence as to the instructions they were given, they immediately proceeded west toward the height of land which, according to the applicable Regulations, marks the border between the Redstone Area and the Ram Head Area. After walking for a few hours, they set up their camp well within the former. Kapala, a very credible witness, estimates they were 1 to 11/2 miles east of the height of land.

After supper, the two went for a hike to "look for sheep", taking with them binoculars, a spotting scope, skinning knives, *empty* packs, and, of course, their guns. Although Busat describes this expedition as looking for sheep and checking out the area "to see if they could find something that night", I am satisfied, considering the equipment they took with them, that they set out with the intention of shooting a ram if an acceptable one could be found. As it turns out, they did find rams on that outing and ultimately Busat shot one. He says they were in the Ram Head Area both when they first saw the sheep and when he shot his ram.

Kapala, on the other hand, says they were about 1 mile *east* of the height of land when they first saw the sheep above them. After climbing higher themselves to get closer, they saw the sheep again, this time east of them and at a time when they themselves had not yet reached the top of the height of land. In short, all of their activities to this point were, in his view, within the Redstone Area. Shortly after that, Busat shot a ram which then ran north and fell off a 1000 ft. drop. Although Kapala is less certain where they were when Busat actually pulled the trigger, he said in evidence, "In my heart, I thought we were in Redstone's area." Nevertheless, he concedes that they were very close to the height of land at the time and that it can be difficult to know exactly where the top is because of the ruggedness of the terrain.

Although I am unable to find beyond a reasonable doubt that the ram was shot within the Redstone Area, I am satisfied on a balance of probabilities that it was. That is sufficient since individual facts in issue need only be proven to that standard,

even though proof of the unlawful act itself must, on the totality of the evidence, be beyond a reasonable doubt: *R. v. Langevin*, (1993), 44 M.V.R. (2d) 30 (Alta. C.A.). In any event, the exact kill site is in my view considerably less relevant because I accept Kapala's evidence, unhesitatingly, that the first sighting of the sheep and the stalking which immediately followed occurred in the Redstone Area. Busat testified otherwise, but Kapala was much more credible. Both in the manner in which he gave his answers and in the answers themselves, he convinced me that he was attempting, without embroidery or exaggeration, to be both honest and objective. Busat, on the other hand, impressed me as being biased in favour of Ram Head and trying very hard to give evidence, on all the key points at least, favourable to his employer. His certainty about where he was when he shot the ram is belied by his concession that he did not fill out the kill co-ordinates on the hunter questionnaire (ex. #4) because they hadn't figured out the map co-ordinates where the animal was killed, which should have been a relatively easy task given his certainty about the kill site.

Remembering that "hunt" is defined by s. 1.3 of the *Wildlife Act* as "... to worry, lie in wait for, flush, follow on the trail of, chase, shoot at, capture, trap or kill or attempt to capture, wound trap or kill", the actual place from which the fatal shot is fired may not be determinative of the question of where the hunting occurred. In this case, on the basis of Kapala's evidence, I find that Busat began his hunt in the Redstone Area no matter where the animal was ultimately killed and that throughout, Kapala, a paid employee of Ram Head, was guiding him on instructions from his employer. Both men concede that their food and their transportation in and out of the area were provided by the defendant corporation. It is also uncontested that Ram Head had arranged to pick them up at Crowsnest Lake, a lake to the knowledge of all parties within the Redstone Area.

Pursuant to that arrangement, the two men hiked there with Busat's trophy and the meat of the ram that had provided it. When the defendant Simpson picked them up, he neither asked nor was told where the animal had been killed or where they had

been hunting. Instead, a disagreement arose over the penalty to be imposed on Busat because it turned out that the ram he had taken had horns considerably longer than the 36" restriction imposed on guide-hunters by Ram Head. This was ultimately resolved by Busat's agreement to pay $1000, which money was deducted from his pay in the fall.

What Are "Outfitting Services"?

Against this factual background, the first question which arises is whether the services provided by Ram Head within the Redstone Area were "outfitting services" as alleged. Although s. 25(d) of the Wildlife Business Regulations uses the verb "outfit", I am satisfied that the verb means "to provide outfitting services". In any event, neither term is specifically defined anywhere in the *Wildlife Act* or the Regulations. Accordingly, one must look elsewhere for clues as to its intended meaning. S. 65 of the Act provides one such clue. By its terms,

> No person shall provide for money or money's worth or in the hope or expectation of money or money's worth provide or agree to provide guides or equipment to persons hunting or wishing to hunt big game or upland game birds unless he or she holds an outfitter licence and all such guides are licensed as guides.

In the same vein, s. 22 of the Wildlife Business Regulations permits

> The holder of an outfitter licence...to let out for money or money's worth equipment to be used in the hunting of big game and provide guides to hunters of big game in the areas designated in the licence.

In *R. v. Sievers* (Unreported, July 16, 1987, Whitehorse No. S.C. 1229.86) Kerans, J., sitting as a judge of the Yukon Territory Supreme Court, had to determine the

meaning of the phrase "outfitting business". Although it too was undefined in the applicable statute, His Lordship concluded, relying on other sections of the pertinent legislation, that

> "... the outfitting business is the supply of guide services, transportation services, camping equipment and hunting equipment for non-resident hunters - for a given "concession." (p. 2)

He went on to find that "... the law regulates not just the service provided to non-resident hunters when they are in the bush, but also the business organized for the purpose of getting them there." (*Ibid.*).

I have reached the same conclusions here with one major difference: the Northwest Territories legislation specifically relates the provision of regulated outfitter services to the question of payment. Accordingly, I am satisfied that in general terms the phrase "outfitting services" comprises the furnishing of those goods and services, including guiding, transportation and equipment, aimed at enabling and/or assisting hunters to pursue big game, or where appropriate upland game birds, in specified areas. Although the Northwest Territories legislation, unlike that in *Sievers*, does not specifically mention transportation services, they are in my view necessarily included considering the inaccessibility of the terrain in question. Having heard the evidence of many witnesses, including other outfitters, during the course of these trials, it is clear to me that the furnishing of outfitting services in those regions would be virtually impossible without the provision by the outfitter to his clients of transportation to and from the actual hunting areas.

Remembering the expansive definition of hunting in the *Wildlife Act* and the necessary connection between that activity and outfitting services, there can be no doubt that Ram Head provided a form of such services in the Redstone Area on the date in question. Busat was hunting there with a guide, food and some equipment provided by the defendant; it transported him to and from the area.

Nevertheless, the Northwest Territories legislation specifically includes the phrases "for money or money's worth" and "in the hope or expectation of money or money's worth". Consequently, my view is that the provision of "outfitter services", to come within the offence charged here, must have been for or in the hope or expectation of money or money's worth. That raises an interesting question on the facts of this case.

At the time Busat was actually hunting in the Redstone Area, his employer clearly had no "hope or expectation of money or money's worth" for the services it was providing to him. On the contrary, those services were knowingly being supplied free as a reward for his service over the previous three years. Accordingly, on that branch of the definition, it cannot be said that Ram Head was providing outfitting services to Busat, even if it might be guilty, as a party, to the illegal hunting in which he was engaged.

However, the Crown takes a different tack and suggests that Ram Head had already received "money's worth" from their guide by reason of his service to it over the previous three seasons. Attractive as that argument may seem at first blush, it is not supported by the evidence. The only reasonable inference to draw from the testimony I heard was that Busat was paid by Ram Head for the services he rendered during those years. There is nothing to suggest any contractual obligation by the company to also provide a free hunt as part of its payment to him. On the evidence, that bonus or perk was solely at the option of the company, to be given or withheld as it chose. Therefore, it cannot be said that Ram Head had already received money's worth for the hunt it was providing. I note also that Busat was still being paid his regular wage by Ram Head during his hunt. In the final analysis, then, the defendant would necessarily have been acquitted on Count #1 had matters ended there.

Fortunately for the Crown and unfortunately for Ram Head, Mr. Busat shot an animal with horns too long for the defendant's liking. Because of this, the company, after negotiation with Busat, turned a free hunt into a $1000 hunt. It sought and received

money for the services it had provided. I see no requirement in either s. 65 of the Act or s. 25(d) of the Business Regulations that the money be received before the services are provided to bring the outfitting within the purview of those sections. Although the use of the words "in the hope or expectation of" in s. 65 import some agreement or at least some reason to believe payment will be forthcoming before the services are provided, that section also uses the phrase "for money or money's worth", which makes clear the legislative intention that the furnishing of any outfitting services for some form of payment will be governed by the legislation. That in my view would include *ex post facto* payment, irrespective of the hope or expectation of such payment prior to the provision of the services.

Accordingly, I am satisfied that the unlawful act was complete when Ram Head, through its operating mind, Simpson, demanded and received from Busat payment for the services it had provided during his hunt. Even though the money was not actually deducted from his wages until the fall and the amount received was less than the "going rate", the services then became outfitting services of the type governed by the statutory provisions in question here. Nor can the fact that payment, on the evidence, was received outside the dates specified in the information assist the defendant. By virtue of s. 2 of the *Summary Conviction Procedures Act,* R.S.N.W.T, 1988, c. S-15, the provisions of the *Criminal Code* applicable to summary convictions apply to this prosecution. Section 601(4.1) of the *Code* states that

> A variance between the indictment or a count therein and the evidence taken is not material with respect to
>
> (a) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any;

As the relevant information was sworn well within the one year limitation period prescribed by s. 97 of the *Wildlife Act* even if the unlawful act was not complete until fall,

1993, the limiting condition in the section has been satisfied. Although the section will not apply where the time of the offence is critical and the defendant is misled to the prejudice of his or her defence, that is not the situation here: *R. v. B(G.)* (1990), 56 C.C.C. (3d) 200 (S.C.C.), affirming (1988), 35 C.C.C. (3d) 385 (B.C.C.A.). In the result, then, I find that the unlawful act has been proven to the necessary standard.

Is Proof of Actual Knowledge Part of the Proof of the *Actus Reus*?

Before passing on to the question of due diligence, it is necessary to say a few words on the question of knowledge as part of the *actus reus* of Count #1. I do so out of an abundance of caution because of this submission made by Mr. Butlin for the defendant:

> However, I'm submitting to you that we must be clear that Mr. Simpson had no knowledge of that. And I'm submitting that from the actus reus - - there are some old cases that say an actus reus has to be a will act and that encompasses some knowledge or consciousness. If I'm being followed, an actus reus in itself isn't all just a physical element. So part of the actus reus which would form factually part of the due diligence argument would suggest that did Mr. Simpson have any knowledge or give any instructions or, as Mr. Bayly will advocate, turn a blind eye to their culpable conduct on the hill. (Transcript, p. 15, ll. 12-22)

If that is a submission that the Crown must show, as part of the onus upon it to prove the unlawful act, actual knowledge of that act by an officer or some other person who could be said to be the directing mind and will of the company, I am unable to accept it. While there are strict liability offences where knowledge, as opposed to intention, can be an element of the unlawful act itself, this is not one of them. Whatever effect lack of knowledge might have on the question of due diligence, it cannot forestall

a finding that the company committed the unlawful acts unless in some way the person actually committing them cannot be said in law to bind the company.

While that may sometimes be a fine line, Mr. Kapala has not crossed it here. Throughout this hunt he was acting as an employee of Ram Head. He was placed in the Redstone Area by it for the sole purpose of guiding Busat and was being paid to do so. In those circumstances his acts were the acts of the company. Corporations, of necessity, act through employees; they are bound by those actions. It will be rare indeed when the actions of an employee will be so beyond the terms of his or her employment that they cease to be the actions of the employer. When that does happen, it is, in my view, tantamount to a finding that the actor was in reality no longer an employee at the relevant time. The evidence here does not support such a finding.

Due Diligence

The unlawful act having been proven, it falls to the company to show due diligence. That means establishing either that it reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent or that it took all reasonable steps to avoid the particular event: *R. v City of Sault Ste. Marie, supra,* p. 374.

It will be seen at once that the hallmark of the defence is reasonableness and that it casts a duty to act upon those who would rely on it. Even on the first branch of the test, it will be difficult to demonstrate a reasonable belief in a mistaken set of facts without showing plausible efforts to ascertain the true facts. The defence, then, will rarely be established by what I might call "passive proof". That is no more than saying that usually defendants will have to show what they did, not what they didn't do.

I make that last observation because Ram Head took great pains during the trial to show that Simpson, as the mind and will of the company, did not tell Busat to hunt in the Redstone Area; that he did not instruct Kapala to provide guiding services there; that he did not ask and therefore did not know where the hunt had taken place and where precisely the ram had been killed. Although the evidence supports those propositions, they have little relevance to the due diligence issue. As de Weerdt, J. observed in *R. v. Gold Range Investments Ltd., supra,* at paragraph 15, "Due diligence means the absence of negligence. In other words, it means *the taking of all due care in the circumstances, to avoid or prevent the offence taking place*: ...." (Emphasis mine) The real question then is not whether Ram Head instructed Kapala and Busat to break the law, but whether it made reasonable efforts to comply with its duty to ensure that they would conduct Busat's hunt in a manner consistent with the company's obligation to provide outfitting services only in its own area.

What is reasonable in any particular case will depend on the circumstances and will be influenced by a variety of factors: *City of Sault Ste. Marie, supra*, p. 374; *Gold Range Investments Ltd., supra*, para. 29; *R. v. Gonder* (1981), 62 C.C.C. (2d) 326 (Yukon Terr. Ct.) at p. 332. Among the latter will be the gravity of the potential harm (see *Gonder, ibid.*) and, in my view, any special relationship the defendant might have to the legislation involved.

The *Wildlife Act* regulates both the harvesting and the conservation of wildlife, a precious, if renewable, resource. Accordingly, the gravity of the potential harm must be measured against the observation of Vertes, J. at paragraph 3 of *Ram Head Outfitters v. The Commissioner of the N.W.T. et al, supra*, that

> Wildlife management, indeed environmental policy in general, takes on a special significance in the Northwest Territories. The legislature has deemed the collective interest of the people of the Territories in the quality of the environment and the protection of the environment for future

generations to be a "public trust": see s. 1 of the Environmental Rights Act, R.S.N.W.T. 1988, c. 83 (Supp.)

Pursuant to that trust and for the better regulation of the wildlife harvest there, the legislature has divided this region of the Northwest Territories into defined areas within which one person only might engage for profit in the business of assisting others to kill wildlife. Related provisions help to ensure the success of those businesses by preventing non-resident hunters from hunting there at all without the services of an outfitter or guide to whom the area is assigned. (*Wildlife Act*, s. 44) In effect, the legislature has passed on some of the responsibility for its public trust to the outfitter; in return the latter receives what amounts to a business monopoly in the affected area. Ram Head, by seeking, obtaining and using that monopoly for profit, accepted the burden. Considering the rugged terrain and consequent enforcement difficulties, it was a heavy one; with the special privilege comes the special responsibility. Iacobucci J. pointed out in *Wholesale Travel Group, supra* that "Those who choose to participate in regulated activities must be taken to have accepted the consequential responsibilities and their penal enforcement." (p. 191) That its obligation should be greater, so far as a duty of care is concerned, than for others like the hunter and the guide-employee should come as no surprise. By virtue of its outfitters licence Ram Head had the ultimate control over which non-residents would hunt within its area; by virtue of the terrain involved, the equipment it controlled and the exclusive services it provided, it was the company who decided how, when and where hunts would take place.

Mr. Simpson says his company discharged its duty because before the hunt he showed both Kapala and Busat where the border was on a map. He remembers instructing them to head west "into our area" from their drop-off point at Caribou Lake in the Redstone Area, a four hour walk. He says he reminded them of the "12 hour rule", which apparently prohibits a hunter from hunting within that period of time after entering an area to hunt. Merv Grunow, the pilot who flew the two to Caribou Lake, said that he had flown Kapala along the height of land and pointed it out as the border on the way

in. He testified that he too had reminded Kapala and Busat of the "12 hour rule" and pointed the way to the Ram Head Area.

Neither witness was convincing. Both are contradicted on all the salient points by one or both of the Crown witnesses. Simpson himself was a wary witness, often unresponsive to the questions put to him in cross-examination. Grunow was simply not credible. He himself admits that 1993 was his first year as a Ram Head pilot and that he had never been to Caribou Lake before. His familiarity with the area was demonstrated in court by his inability to even find that lake on the map when asked to do so. Kapala, whose reliability has already been noted, denies that he was shown the border on the flight in. Busat, despite his bias in favour of Ram Head, disavowed any conversation with Grunow about the "12 hour rule".

I believe Kapala when he says that Simpson told him to go to the "faces" of the ridge, not to the ridge itself, to look for rams and to chase any rams he saw into Ram Head's Area. Busat remembers the latter instruction too. The location Kapala identified on the map (ex. #2) as the one where Simpson said rams could be found is partially, if not totally, in the Redstone Area. Neither of the two acknowledge having been shown the border on a map, as Simpson says they were. Kapala doesn't remember even any discussion about boundaries. This was, in a fashion, confirmed by Simpson himself who first testified that he "thought they knew the height of land was the border" and only later recollected that he had shown them a map and pointed it out to them. On all of the evidence, I am satisfied that they were neither shown the border nor instructed to proceed to Ram Head's Area to hunt as alleged by the defendants. In the circumstances that was the very least that should have been done. Simpson himself acknowledged that the closer to one's own border one is hunting the greater the responsibility to ensure that border is respected.

Instead, without giving them specific instructions, he chose to transport both hunter and guide into the neighbouring area to hunt in a place known by him to

mark the border and where, on his own evidence, the sheep go "back and forth across the ridge". To his knowledge, the guide, Kapala, had never been in the area before, though the hunter, Busat, apparently had been to Caribou Lake before. Even then, the best Simpson could say was that he "thought" Busat knew where the border was. He didn't know whether either man had a map of the area and made no effort to provide them with an accurate one, even though he was aware that from time to time inaccurate maps floated around among his guides. In short, he created a situation which invited a breach of the regulations. It was one which cried out for specific and firm explanations and for explicit instructions. None were forthcoming. Leaving aside for a moment the question of alternatives, it is clear that Simpson, and through him Ram Head, did not take even basic steps to avoid contravening the law considering the surroundings into which the former was thrusting its employees.

Although it is not strictly necessary to do so, I note that *R. v Gonder, supra*, p. 333 lists the alternatives available to the accused as one of the things to be taken into account in determining whether reasonable care has been exercised. In this case Mr. Simpson concedes that he could have sent Busat by horseback to the Ram Head side of the border area via the Parallel Creek drainage, thus avoiding the obvious dangers presented by the course of action he did choose. In short, he had safer options.

Finally, there is the other branch of the due diligence test, that is, did Ram Head reasonably believe in a mistaken set of facts which, if true, would have made its actions innocent? I consider it because Simpson's evidence might be taken as an assertion that he reasonably believed that the hunting and attendant outfitting services would take and had taken place only in the Ram Head Area. If that is the thrust of his evidence, it is blunted by his own testimony.

He cannot have reasonably believed that the activities of his employees would comply with the regulations considering the area into which he was transporting them and the complete absence of meaningful instructions about where to hunt. If

anything, the situation into which he was putting them, without those instructions, was, as noted, an invitation to breach the regulations. Simpson never directly said he had a mistaken belief in anything. On the contrary, the totality of his evidence suggests that he took some pains to remain ignorant of what had happened during the hunt. Even though he conceded in cross-examination, for example, that it was important for him to know where in his area there were good huntable rams and even though in examination-in-chief he remembers telling them to check the area out, Simpson acknowledged that he didn't ask Busat or Kapala a single question about what they had seen during their expedition or even where Busat had shot his ram, a strange omission considering the size of the latter's trophy. Busat not only confirmed the absence of questions, he also agreed that Simpson usually asks where the sheep was killed after a hunt and marks it on the hunter questionnaire, something he didn't do in this case.

Finally, there was Simpson's concession that he was angry about his employees telling another pilot about Busat's ram over the radio. His explanation for this reaction was less than convincing; the more logical one was his own suspicion that the ram had been shot outside his area and a consequent desire that the fact of the kill not be broadcast over the air waves where it might provoke questions by the wrong people.

In the result, Ram Head has not satisfied the second branch of the test either. Accordingly, I find the company guilty as charged on Count #1.

Has "Knowledge" Been Proven?

The second offence charged against the corporation is created by s. 26 of the Wildlife Business Regulations in the following words:

> 26. An outfitter who has knowledge of the commission of an offence under the Act or these regulations by a person

> outfitted by the outfitter shall, within 10 days of acquiring the knowledge, report the offence to an officer.

The section is unusual because its peculiar, and unfortunate, wording makes knowledge, a concept usually associated with the *mens rea* of an offence, part of the *actus reus* of this one in the sense that the possession of certain information is a pre-condition to the duty imposed by the section. Since this is a strict liability offence, that casts a duty on the prosecution to prove "knowledge" *before* any question of due diligence arises. To hold otherwise is to find that the law requires outfitters to make all reasonable efforts to acquire knowledge for the sole purpose of engaging a duty to report it. That is a proposition I am unable to accept without some clearer legislative intention than is present here.

The provision is further complicated by the very use of the word "knowledge", a most imprecise term covering in its dictionary definition everything from "acquaintance with facts" to "clear and certain mental apprehension" (see Webster's Encyclopedic Unabridged Dictionary, 1989, dilithium Press Ltd.). The Concise Oxford Dictionary, Fourth Edition, well demonstrates the problem by defining knowledge as a "person's range of information". The question for both prosecution and court, then, is what information must be possessed to engage the duty. Is suspicion enough? If not, how certain must the outfitter be before it must act? Must the information be credible? If the outfitter is a corporation, whose knowledge will bind the company to act?

That last question is particularly applicable to this case where only Kapala and Busat, employees of the company, can possibly be said to have had any actual knowledge that an offence had been committed. Is that enough? I my view it is not. While I said earlier that the acts of its employees are, for the most part, the acts the company in law, it does not necessarily follow that the knowledge of its employees must in law be taken to be the knowledge of the company. To hold so in cases like this one, where the evidence is that the knowledge was never communicated to any person who

could be considered a part of the defendant's "directing mind and will", is tantamount to casting absolute liability on the defendant, a concept all the parties concede is not applicable here.

Lord Denning's is the better approach. It is quoted by Bourassa, T.C.J. in *R. v. Panarctic Oils Limited* (1983), 44 A.R. 385 at p. 389:

> A company may in many ways be likened to a human body. It has a brain and nerve center which control what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents, who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors or *managers* who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. (*Bolton (H.L.) Engineering Company Ltd. v. T.J. Graham & Sons Ltd.*, [1956] A.L.&T. 1044.)

Applying that approach, the Crown has not shown, to the requisite standard, any actual knowledge by the defendant Ram Head that an offence had been committed. In saying that, I concede that a corporation can have more than one directing mind and will and, depending on the facts, that even an employee, if sufficient authority is delegated, can for a time be that mind and will for purposes of criminal liability: *Rhone (The) v. Peter A.B. Widener (The), sub nom. Great Lakes Towing Company v. North Central Maritime Corp.* (1990), 67 D.L.R. (4th) 646 (F.C.A.). On the facts of this case, I am unconvinced that Kapala, by reason of his duties at the time, was a part of the company's mind and will and, applying the doctrine of identification, that his knowledge of the commission of the offences should be considered Ram Head's knowledge: see *Canadian Dredge & Dock Company Ltd. v. The Queen* (1985), 19 D.L.R. (4th) 314 (S.C.C.).

There remains to be considered whether knowledge sufficient to engage its duty to act can be imputed to the corporation in some other way. There are, in my view, two possibilities: wilful blindness or constructive knowledge. The distinction between the two is discussed by the Ontario Court of Appeal in *R. v. F.W. Woolworth Co. Ltd.* (1974), 18 C.C.C. (2d) 23 at p. 30:

> Devlin, J., in *Roper v. Taylor's Central Garages (Exeter), Ltd.*, [1951] 2 T.L.R. 284, described three degrees of knowledge --- first, actual knowledge; second, the situation where the person to whom the knowledge is imputed deliberately refrains from making inquiries, the result of which he might not care to have, and third, constructive knowledge often described by the words "ought to have known" meaning that the person had in effect the means of knowledge. He stated at p. 289:
>
> > There is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make. If that distinction is kept well in mind I think that justices will have less difficulty than this case appears to show they have had in determining what is the true position. The case of shutting eyes is actual knowledge in the eyes of the law; the case of merely neglecting to make inquiries is not knowledge at all --- it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law.
>
> Since there is no foundation for the conclusion that Fawcett deliberately refrained from making inquiries as to McPhee's conduct in making sales, the finding of the trial Court was one of constructive knowledge which in criminal law is not knowledge at all.

I have already referred to what I consider Simpson's deliberate refusal to ask the questions which would have given him some knowledge at least of what

happened during Busat's hunt. His actions amounted, in my view, to "wilful blindness". Clearly, that concept may be used to impute knowledge sufficient to deflect a defence of lack of *mens rea*: *Sansregret v. The Queen* (1985), 18 C.C.C. (3d) 223 (S.C.C.); *R. v. F.W. Woolworth Co. Ltd., supra*. Considering the statement of Devlin, J. above that "The case of shutting eyes is actual knowledge in the eyes of the law;...", I see no reason in principle why a court would be precluded from imputing such knowledge as part of the *actus reus*, as opposed to the *mens rea*, of the offence. On the other hand, I think courts must be precise in stating exactly which knowledge is to be ascribed to the accused, especially when the *actus reus* has been particularized in the charge, as it has here.

For reasons best known to the Crown, it charged Ram Head in Count #2 with acquiring knowledge that a dall sheep had been harvested outside Outfitter Area E/1-4. Even though outfitting includes more than hunting and hunting includes more than actually killing an animal, indeed need not even include the latter, the Crown has chosen to equate the unlawful act specifically to the sheep and where it was killed. The knowledge it must then prove in the defendant is knowledge of that specific unlawful act and, as already indicated, it must do so beyond a reasonable doubt before any question of due diligence arises.

On the evidence here, I am not prepared to impute to the company, simply because Simpson refused to ask questions, knowledge so specific. The evidence as to where the ram was actually taken is conflicting, enough so that I could not find, were I required to do so, beyond a reasonable doubt that it was killed in the Redstone Area. In the result, even with the benefit of the wilful blindness doctrine, the Crown has failed to establish to the necessary standard that Ram Head, through Simpson, knew the ram had been unlawfully killed outside its area, a necessary part of the *actus reus*, and accordingly the company must be acquitted on this charge.

Can Simpson Be Convicted of Aiding and Abetting and What Is the *Mens Rea* Required?

The second information charges Simpson personally in two counts with aiding, abetting or inducing his company to commit one offence and his guide, Kapala, to commit another. The company, by this judgment, has been convicted of the underlying offence; Kapala has, so far as I am aware, never even been charged.

The first question which arises with respect to Count #1 is whether a principal, especially in a closely held company, can be convicted as an aider and abettor when the liability of the corporation is grounded on the self-same acts. The short answer is yes. That was confirmed by the Ontario Court of Appeal in *R. v. Fell* (1981), 64 C.C.C. (2d) 456:

> ... the fact that the acts of the respondent were at law those of the corporation for the purpose of imposing liability on it did not prevent the conviction of the respondent as a principal or as an aider and abettor as the facts might warrant. (p. 461)

Given that aiding and abetting is a full *mens rea* offence, the next consideration is what will be required to prove that element. *Mens rea* may take different forms; what is required in any particular case will depend on the wording of the provision which creates the offence as interpreted by the case law. In this context, *Fell*, relying on *F.W. Woolworth, supra,* again provides the answer:

> The trial Judge correctly held that even where the offence is one of strict liability in so far as the liability of the principal is concerned, the liability of an aider and abettor to be convicted of the offence requires the existence of *mens rea* on the part of the aider and abettor. *Mens rea* in this context means knowledge of the circumstances which make up or constitute the offences, that is, in this case, knowledge on the part of the respondent that the representations were

> made and knowledge of the true facts. It was, of course, not necessary for the prosecution to prove that the respondent knew that those circumstances constituted an offence: ... (p. 463)

Applying that test to Count #1, the necessary *mens rea* is, in my view, present. Not only did Simpson know that Ram Head was flying a hunter and guide into the Redstone Area in circumstances where it was inevitable that outfitting services would be provided there, he arranged it. I reiterate here that where his version of the instructions that were or were not given before the hunt differs from Kapala's, I accept that of the guide. To the extent that "knowledge of the circumstances" requires proof that Simpson knew of Busat's and Kapala's activities, short of knowing precisely where the ram was killed, I apply the doctrine of wilful blindness discussed above to impute that knowledge to him. I emphasize, in saying that, that the underlying offence in this count is the provision of outfitting services outside the area, not just the killing of a ram. It follows then that I am satisfied of his guilt on Count #1 and convict him accordingly.

Can an Aider and Abettor Be Convicted If the Principal Is Neither Charged Nor Convicted?

The allegation in Count #2 is complicated by the fact that Kapala was not charged with guiding hunters outside the area for which he was licensed, even though, on his own evidence in this trial, he committed that offence. Despite that, Simpson is properly convicted as an aider and abettor if the requisite *mens rea* is proven. In circumstances where an accused was convicted as a party to an offence even though the same charge was withdrawn against his two confederates, the Supreme Court of Canada held that

> There is no requirement in s. 21(2) of the *Cr. Code* that the active participant or participants must have been convicted of the offence. .... There is no principle of law that unless there

is a conviction of the confederates for the possession offence, the appellant cannot be convicted for that offence.: *Zanini v. The Queen,* [1968] 2 C.C.C. 1 at p. 4.

I am satisfied, for the same reasons I gave above regarding Count #1, that the requisite mental element has been proven. Accordingly, I find Mr. Simpson guilty on Count #2 as well.

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

COUNSEL:

J. Bayly, Esq.
J. Donihee, Esq.
FOR THE CROWN

J. Butlin, Esq.
A. Marshall, Esq.
FOR THE DEFENDANTS