TC CK 75 011

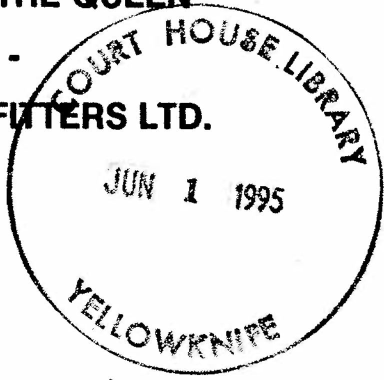
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

RAM HEAD OUTFITTERS LTD.

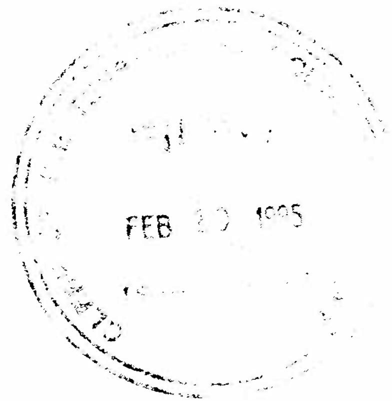


AND BETWEEN:

HER MAJESTY THE QUEEN

- and -

STANLEY D. SIMPSON



JUDGMENT

This is the second of five judgments resulting from the trials of numerous alleged contraventions of the *Wildlife Act*, R.S.N.W.T. 1988, c. W-4 by the corporate defendant, Ram Head Outfitters Ltd., and its operating mind, Stanley Simpson. Between August 29th and 31st, 1993 an American hunter, aptly named Jim August, killed a dall sheep. Ram Head provided the outfitting services for August's hunt, including his guide, Chad Taylor.

The Crown says those services, including the hunting and killing of the animal itself, occurred outside Ram Head's assigned area, contrary to s. 25(d) of the Wildlife Business Regulations and also that the company, after acquiring knowledge that the sheep had been "harvested" outside its area, contravened s. 26 of the same Regulations by failing to report that offence. Breaches of those Regulations become offences by virtue of s. 91 of the *Wildlife Act* .

Simpson is alleged to have aided, abetted or induced his company to provide the unlawful outfitting services and his guide, Taylor, to contravene the terms of his guiding licence by guiding outside Ram Head's Area. Aiding, abetting or inducing others to commit offences against the Act or any of its regulations is prohibited by s. 85 of the *Wildlife Act.*

The charges are framed in two separate informations containing two counts each. They were tried together pursuant to the agreements and the procedure outlined in the first of the judgments in this series ("judgment #1"). That judgment also examines the nature of the offences alleged there and the respective burdens of proof cast upon both Crown and defence. Since the same offences are charged here, there is no need to repeat what has already been said, save to confirm that the offences charged against Ram Head are strict liability offences casting a burden on that defendant to show due diligence on a balance of probabilities if the unlawful act is proven by the Crown beyond a reasonable doubt. The allegations of aiding and abetting being full *mens rea* offences, the burden remains with the Crown throughout to prove both the unlawful act and the required mental element to the usual criminal standard.

The evidence raises issues of both law and fact. In logical, if not chronological, order they are as follows:

(1) Where, in law, is the border at the place in question between area E/1-4 ("the Ram Head Area"} and area E/1-3 ("the Stevens Area")?

(2) Were the outfitting services, including the stalking and killing of the dall sheep ram by August, in fact provided within or without the Ram Head Area?

(3) If they were outside that area, is that due to mistake of law or mistake of fact and what effect do those concepts have on the defence of due diligence?

(4) If due diligence is available on the facts of this case, has it been shown here?

(5) Has the Crown shown the acquiring of "knowledge" sufficient to engage the duty to report imposed by s. 26 of the Regulations?

(6) Is the necessary mental element shown in the charges of aiding and abetting?

Where in Law Is The Border?

As the precise location of the border between the Ram Head Area and the Stevens Area is a necessary precondition to the proper consideration of several of the other issues raised in the trial, I deal with that question first. It is purely one of law. The legislature, by virtue of s. 1 of the Wildlife Management Outfitter Areas Regulations, R.R.N.W.T 1990, c. W-12, has fixed the border and indicated how it shall be ascertained. It reads:

> 1. The wildlife management outfitter areas shall be delimited in accordance with the descriptions in the Schedule and shall be known by the names respectively assigned to them.

Using the Schedule referred to in s. 1, a number of witnesses plotted the border between the two Areas in the district where Mr. August's hunt occurred. Their opinions were not the same. Mr. Ken John, for the Crown, drew his understanding of the boundary on exhibit #2. Beyond a familiarity with maps by reason of his training as a pilot, he has no special expertise in the plotting of boundaries. The defendant called Michael Puorylo, a land surveyor of some 25 years, and Andrew Brebner, a land surveyor and professional engineer of more recent vintage, to draw the boundaries as they saw them and to explain the difficulties in plotting inherent in the regulations as they relate to available maps.

While the evidence of all three is, in one sense, opinion evidence, I admitted it primarily because it was conceivably relevant to the Crown's burden of proving that the acts in question occurred outside Ram Head's assigned area and also because it might have affected questions of due diligence and mistake of fact. However, as opinion evidence of where the border is, it had no probative value. The location of the border being a question of law, opinion evidence, even expert opinion evidence, is not admissible to prove it: *R. v. Century 21 Ramos Realty Inc.* (1987), 32 C.C.C. (3d) 353 (Ont. C.A.); leave to appeal to S.C.C. ref'd. 56 C.R. (3d) xxviii (note). I might add that finding the border is not, in my view, a task so involved as to require expert assistance in any event. The average person should be able to discover it, armed with an appropriate map, the Regulations, a ruler and very basic knowledge about how to read a map.

The dispute in this case is caused by the following description of the relevant border of the Ram Head Area as it appears at p. 9 of the Regulations, beginning at the third paragraph from the bottom (ex. #3):

> thence easterly following the height of land that divides the Trout Creek, Deca Creek, Hay Creek and Twitya River drainage systems from the Carcajou River, Cache Creek and

Mountain River drainage systems to a peak at 64°24' N and 128°17' W;

thence easterly in a straight line to the source of an unnamed creek at approximately 64°24' N and approximately 128°14' W;

thence northeasterly following the west bank of said unnamed creek to its intersection with the south bank of the Carcajou River;

thence northeasterly following the south bank of the Carcajou River to its intersection with the west bank of Grotto Creek;

The difficulty with the description is that on a map drawn to a scale of 1:500,000 (the scale required by the Regulations) there is no peak precisely at the intersection of the named co-ordinates, though there is one near it. As well, there are two unnamed creeks near this peak. One flows in a more northerly direction, but directly into the Carcajou River; the other flows northeasterly merging into other streams before finally entering the Carcajou. The problem is said to be further complicated by the fact that the last of these merged streams is named Bolstead Creek on currently available maps of the required scale, though it was unnamed in earlier versions. The argument then is that the more easterly flowing unnamed creek is not the one referred to in the Regulations because it flows, not into the Carcajou River, but into Bolstead Creek. Instead, it is suggested that the one which flows north directly into the Carcajou forms the border.

Mr. John, who prepared from the Regulations a map (ex. #2) which shows the boundaries of all the outfitter areas in this region, chose the northeasterly flowing creek. He used a compilation of older maps, to the required scale, which are no longer in print and which are more detailed than the navigational charts (ex. #14) of the same scale now generally available. On John's map there are two unnamed creeks with sources to the east of the peak, though they soon merge into one creek. He chose the

southernmost of these arms because the other one did not produce the source co-ordinates indicated in the Regulations.

Mr. Puorylo, the land surveyor, used the creek flowing directly into the Carcajou River as the border. He rejected John's choice because that creek joins another (the northerly arm referred to above), the merged creeks join another and then they all join the Bolstead before entering the Carcajou. He says this makes it difficult to follow the west bank of the unnamed creek to its intersection with the south bank of the Carcajou as directed in the Regulations.

The confusion is more apparent than real. It is resolved by the simple expedient of tracing the same border with reference to its description in the Regulations which delimit the Stevens Area. They appear at page 7 of exhibit #3, beginning at the sixth paragraph from the bottom. If one follows the directions there, it becomes apparent that the creek chosen by Puorylo cannot be the correct one because it intersects the Carcajou River at co-ordinates far different from those indicated in that description. Nor can Bolstead Creek itself be the border because its source is also at the wrong co-ordinates, even though it joins the Carcajou at the right place.

Having plotted the border myself on both ex. #2 and ex. #14 using the Regulations, I find as a matter of law that the border between the Ram Head Area and the Stevens Area at this point is as drawn by the witness John on ex. #2 and as delineated by the yellow line which appears on ex. #14. I note in passing that the witness, Brebner, though also concerned that the unnamed creek which forms the border runs into the Bolstead before the Carcajou, concedes that the co-ordinates for the Stevens Area confirm that the border intersects the Carcajou River at the mouth of Bolstead Creek as drawn by Ken John. He also acknowledges, with reference to the two arms at the source of the unnamed creek, that he too would have chosen the more southerly arm as being closer to the co-ordinates named in the Regulations.

The Facts

Apparently, Jim August was a difficult client. He knew what sort of animal he wanted and Ram Head was unable to provide it during the first part of his hunt in the area of the Keele River. Therefore, Stan Simpson suggested he try the area around mile 108 on the Canol Road. August having agreed, Simpson first flew his guide, Chad Taylor, to that area and then the hunter. They landed in turn at the airstrip shown on exhibit #4 by the circled letter E. When August arrived, he and his guide hiked to the spot marked there by the circled letter F.

The next day they hiked to the lake circled B on the map, a place which, according to Taylor, had been indicated by Simpson on the flight in as a likely place to hunt. According to the guide, his employer said there had been good sheep there all summer, "along the border there". Perhaps because this was Taylor's first year as a guide and his first visit to this area, Simpson gave him the map which is ex. #4. Although Simpson says he didn't, I accept the guide's evidence on this point, as I do generally where the evidence of the two conflicts. I found Taylor to be a neutral, honest, relatively artless witness. His employer, on the other hand, was wary and often unresponsive to the questions put to him in cross-examination.

In any event, while August rested on the southeast side of the lake, Taylor hiked to the western edge where he saw some rams. He waved the hunter over and when the latter arrived, Taylor was anxiously looking at the map because he was concerned about where the border was. The sheep appeared to be right on the boundary marked on his map. This problem resolved itself because the guide, while stalking them, scared the sheep away when he came upon them suddenly in the fog. Since all the other sheep they could see were clearly out of the area, they drifted southeast along a ridge which met the Canol road at mile 108 where Simpson was to

pick them up. Along the way, August shot the ram which is shown in the photographs entered as exhibits #7 & 8.

When Simpson picked them up, Taylor particularly remembers a conversation with his employer about August's apparent unhappiness with having been put in a corner of Ram Head's area "with nowhere to go". Simpson appeared to be annoyed that August realized this because he had seen the guide's map.

Where Were the Outfitting Services Provided?

It should be noted immediately that ex. #4, the map Taylor was given and on which the pertinent points are marked, is not drawn to the scale required by the Regulations. Nonetheless, it provides sufficient detail, when compared with exs. #2 and 14, for me to find, as a matter of law, that the border between the two Areas in question is marked by the unnamed creek whose source is within the circled A on that map. It will also be seen that the border marked by the yellow line, which was on the map when Simpson gave it to Taylor, is clearly wrong.

Without repeating the reasons given in judgment #1, I define "outfitting services" for the purposes of this prosecution as "the furnishing of those goods and services, including guiding, transportation and equipment, aimed at enabling and/or assisting hunters to pursue big game in specified areas". On that definition there can be no doubt that Ram Head provided those services to Jim August outside its own area. The airstrip where he was landed; the place where he camped the first night; and the lake to which he was guided and where Taylor stalked and eventually frightened off that first group of sheep are all in fact within the Stevens Area, notwithstanding that Taylor himself thought they were not by reason of the incorrectly marked map he had received.

Remembering the expansive definition of hunting contained in s. 1.3(1) of the *Wildlife Act*, August began that activity when he and Taylor set out for the lake from their camp that morning. Accordingly, the exact place where he killed the ram is irrelevant to the question of outfitting on the facts of this case. Nonetheless, the evidence shows that the ram was in fact killed in the Stevens Area. Without recounting in detail Officer Hagen's efforts, his use of the photographs (exs. #7, 8, 12 & 13) and the Global Positioning System satisfy me to the necessary standard that the co-ordinates of the kill were 64°24'17.1" N and 128°12'54.1" W., a position within the Stevens Area though close to the actual border. Albeit his was only an estimate and on a different scale map, Taylor's approximation of the kill site on ex. #4 was also within that area.

The unlawful act comprising Count #1 against Ram Head has thus been proven to the necessary standard, casting a duty on that defendant to show due diligence. The first consideration in that regard is the effect of the incorrect map.

Mistake of Law and Mistake of Fact: Their Effect on Due Diligence

I accept that Simpson actually, if not necessarily reasonably, believed the border between his area and Stevens' was as shown on exhibit #4. This is supported by Taylor's evidence that his employer, when flying him in over the lake marked B on that map, told him that there had been good sheep there all summer, "along the border there". A case can be made, then, that Ram Head mistakenly provided outfitting services outside its own area. If the mistake was reasonable, the company submits that it can rely on that branch of the due diligence test which absolves the defendant who reasonably believes in a mistaken set of facts which, if true, would render the act or omission innocent: see *R. v. City of Sault Ste. Marie,* (1978), 40 C.C.C. (2d) 353 (S.C.C.) at p. 374.

The success of that approach depends on the proper characterization of the mistake Ram Head made. The due diligence test is predicated on belief in a mistaken set of facts. The cases make it clear that a mistake of law affords no defence: see *R. v. Bob,* [1984] 2 C.N.L.R. 107 (B.C. Cty. Ct. per McTaggart C.C.J.]; *Weston v. R.,* [1986] N.W.T.R. 145 (N.W.T.S.C. per de Weerdt J.). The problem is that most citizens consider the law a fact and consequently the legal distinction is somewhat difficult to understand. It might be explained in this case as follows: if Ram Head, knowing the border was the unnamed creek, mistook the landmarks and outfitted in an area which turned out to be over that border all the while thinking it was within it, that would be a mistake of fact which, if reasonable, would absolve the company. However, when it provides services in an area fully known to it in the mistaken belief that the border is not where it actually is, that is a mistake of law which can provide no defence. In the second case there is no mistake about where the act occurs, only about the significance of its occurring there. In the first case, the act itself is an innocent one because the actor is not where he thinks he is.

There can be no doubt that the mistake here was a mistake of law, not fact. Simpson knew exactly where he was and he intended to be there. His explanations to Taylor as he flew him over the lake on the way in and his directions, after they had landed, about how long it would take to hike there, as well as his comments about good sheep having been there all summer, make that clear. His error was in believing that the border went through the lake marked B on the map when it fact it was further south along the unnamed creek.

There is a suggestion by de Weerdt, J. in *R. v. Weston, supra*, that mistake of law can be a defence if the defendant shows either officially induced error or the unavailability of the relevant legislation. He explains it in this way:

> Nothing in the evidence at trial suggests that the appellant was misled into error by incorrect information or

> instructions from his superiors or from official sources. No case of officially induced error is supportable on the evidence. Nor is it a case that the regulations were not available. They had been published in the Northwest Territories Gazette at the time of the flight in question. It was the duty of the appellant to know them and obey them, as the trial judge took pains to point out. If one could believe that the appellant did not know them or had forgotten them, it was his duty to exercise proper inquiry and become familiar with them. As the text of the regulations reveals, they are short and simple to understand. Any pilot should be able to remember them. Failure to do so cannot avail him if he should commit a breach of them. (p. 152)

Those comments are equally applicable to the facts of this case. The *Wildlife Act* and its Regulations were available. To Ram Head's knowledge, the outfitting business generally was governed by them and its business in particular was restricted by them to a particular area. Despite this, Simpson, on his own evidence, plotted this part of his border using a map of the wrong scale after finding the 1:500,000 scale map prescribed by the Regulations "no good". He gives no reason for that assessment. This happened in 1988 when, on the evidence, the map on which Ken John had no difficulty plotting the border was still in print and available.

Much has been made by the defendant of the fact that that older map is no longer available and that apparently only navigational charts like ex. #14 are now able to be purchased by the general public at the required scale. Again the problem is more apparent than real. As was demonstrated during the trial, plotting the border on the newer maps is both possible and in some ways easier since they show fewer geographical features than the older ones. Thus, John's problem of the two arms at the source of the unnamed creek disappears on the newer map. Unnamed on the older map, Bolstead Creek is clearly identified on ex. #14, so one could not possibly confuse it with the "unnamed creek" referred to in the Regulations. The only problem which still remains is the fact that the unnamed creek flows into Bolstead Creek before entering the

Carcajou. That is as easily resolved on ex. #14 as it was on ex. #2 by reference to the Regulations delimiting the border of the Stevens Area.

Before moving on, brief mention should be made of that branch of the due diligence test which makes the defence available to the defendant who "... took all reasonable steps to avoid the particular event": *R. v. City of Sault Ste. Marie, supra.* Even though that branch of the test is not specifically related to a mistake of fact, it will be apparent from my review of the evidence that due diligence is not available to the defendant on this score either. Not only did he not take steps to avoid the event, Simpson caused it by setting down an inexperienced guide in the wrong area with an incorrect map. That the border was drawn incorrectly was the direct result of what might be described at best as his own negligence, at worst as his wilful blindness to the requirements imposed by the Regulations. It is conceded that Simpson was throughout the directing mind and will of the corporation.

In the result, then, I find Ram Head guilty of providing outfitter services outside the area specified in its licence.

<u>The Question of Knowledge</u>

My concern with the wording of s. 26 of the Wildlife Business Regulations has already been documented in judgment #1. By making the acquisition of knowledge a pre-condition of the duty to report, the question of knowledge becomes in one sense a part of the *actus reus* of the offence, to be proven by the Crown before any duty of care on the part of the defendant arises. The particular knowledge to be established in this case is knowledge that Jim August had shot his ram outside the defendant's area. The Crown must, in one way or another, be able to impute that knowledge to Ram Head if it is to succeed.

Remembering the approval given by the Ontario Court of Appeal in *R. v. F.W. Woolworth Co. Ltd.* (1974), 18 C.C.C. (2d) 23 to the division of knowledge into three types or "degrees", quoted in judgment #1, the Crown must rely on knowledge imputed by reason of wilful blindness since no actual knowledge is shown and constructive knowledge "... in criminal law is not knowledge at all.". (*Ibid.,* p. 30). While I have conceded in the judgment preceding this one that there is no reason in principle to preclude the use of wilful blindness to impute knowledge as part of the proof of the *actus reus*, I say again that care must nonetheless be taken to determine precisely what knowledge is to be imputed, especially where that knowledge is inextricably bound up in the Crown's duty to prove the unlawful act beyond a reasonable doubt.

The Crown set great store both by Simpson's admission in cross-examination that he had heard from other hunters that August was telling them that he had shot his ram in Stevens' area. It emphasized the fact that he did not pursue this with Chad Taylor, even though August himself had denied any illegal kill, according to Simpson, when the latter confronted him. This is rather flimsy evidence upon which to base a submission that knowledge that August's ram was killed outside its area should be imputed, through Simpson, to Ram Head. Neither August nor any of the other hunters gave evidence. The Crown relies totally on Simpson's account in cross-examination. There is nothing about that testimony which suggests that I should accept only that part of it which is favourable to the Crown's submission, nor is that suggested. Accordingly, I accept that Simpson confronted August about his loose talk and the latter denied any illegal hunting.

If, as the Crown urges, Simpson should nonetheless have discussed the matter with his guide just to be sure, what is it reasonable to assume he would have learned? Considering the evidence Taylor <u>did</u> give, Simpson would have been told that the kill occurred in the Ram Head Area because that is what Taylor himself thought at the time. It was only later that he plotted the border as it related to the kill site with Ken John. Even if Simpson had been more persistent and obtained the co-ordinates of the

kill site from Taylor, he still would have thought the animal had been shot in the Ram Head Area by reason of his own mistake about where the border was.

That mistake of law was no defence, as we have seen, to the charge comprised in Count #1. Here, however, we are dealing, not with a defence to the commission of an unlawful act, but with whether the act itself has been proven. Knowledge is a part of that proof. On the facts here, it should only be imputed if there was wilful blindness on Simpson's part. Mistake of law is relevant to that issue. That mistake is wilful blindness only where the defendant deliberately refrained from making the necessary inquiries, not where he merely neglected to make them. In the latter case, which is supported by the evidence here, any imputed knowledge is constructive knowledge, in criminal law "... not knowledge at all." (*Ibid.*) Accordingly, Simpson's negligent mistake of law would have precluded the imputation of knowledge of the illegality to Ram Head even if he had obtained the precise co-ordinates of August's kill from Chad Taylor.

On all the evidence, then, I am of the view that the Crown has failed to prove knowledge of the commission of the underlying offence as charged, and this count must, as a result, be dismissed.

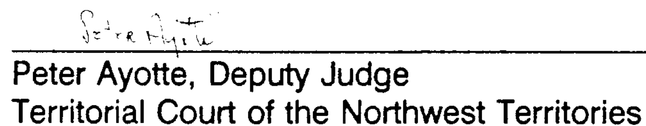
***Mens rea* and aiding and abetting**

The only real issue with respect to the charge against Simpson personally is whether his mistake of law can be a defence to charges which use the word "knowingly". I have concluded that it can. The *mens rea* for an aider and abettor, as noted in judgment #1, was explained by the Ontario Court of Appeal in *R. v. Fell* (1981), 64 C.C.C. (2d) 456 when it said:

> ... *Mens rea* in this context means knowledge of the circumstances which make up or constitute the offence, ... It was, of course, not necessary for the prosecution to prove that the respondent knew those circumstances constituted an offence: ... (p. 463)

I take that to mean, in this case, his knowledge that the outfitting and guiding services were being provided outside Ram Head's area, even if Simpson didn't know that providing such services outside one's area constituted an offence. For the reasons given above, the mistake of law made by Simpson was not, in my view, the result of wilful blindness, but rather negligence on his part. Accordingly, any imputed knowledge that the services were provided outside the Ram Head Area would be, at best, "constructive knowledge" with no probative value in a criminal prosecution. He has therefore raised a doubt about whether he "knowingly" aided and abetted the commission of the offence and is entitled to an acquittal on both counts.

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



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