1997 CarswellSask 462
Saskatchewan Court of Queen's Bench

R. v. Charles

1997 CarswellSask 462, [1997] S.J. No. 515, [1998] 1 W.W.R. 515, [1998] 4 C.N.L.R. 172, 159 Sask. R. 126, 36 W.C.B. (2d) 5

# Mathew Alfred Charles, David Peter Charles, Anthony Naytowhow and Edwin J. Naytowhow, Appellants and Her Majesty The Queen, Respondent

Matheson J.

Judgment: August 25, 1997
Docket: Prince Albert Q.B.A. 6/97

Counsel: *D.J. Kovatch*, for the appellants.
*G.G. Mitchell*, for the respondent.

Subject: Criminal; Public; Constitutional
**Related Abridgment Classifications**
Aboriginal and Indigenous law
V Indigenous rights to natural resources and environmental protections
V.2 Right of access to natural resources
V.2.a Hunting
V.2.a.ii Application of provincial or territorial statutes
Criminal law
XXI Defences
XXI.8 Entrapment
XXI.8.a Availability of defence
Criminal law
XXI Defences
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XXI.16.b.i Kienapple principle
Natural resources
I Fish and wildlife
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I.5.m Arrest and detention
I.5.m.ii Power to seize upon arrest
Natural resources
I Fish and wildlife
I.5 Offences
I.5.o Sentencing
I.5.o.i Fines
**Headnote**
Criminal law --- Defences — Entrapment — Calculated inveigling or persistent importuning
**Trafficking**, illegal hunting and illegal possession of wildlife — Wildlife officers not inducing commission of offence — No entrapment — The Wildlife Act, S.S. 1979, c. W-13.1.
Criminal law --- Defences — Res judicata — Charges arising from same fact situation — Kienapple principle

  

Possession of wildlife not integral part of offence of illegally hunting wildlife — Illegal hunting and illegal possession are two separate and distinct offences — Kienapple principle not applying — The Wildlife Act, S.S. 1979, c. W-13.1, s. 31(1).

Fish and wildlife --- Practice and procedure — Arrest and detention — Power to seize upon arrest

Availability of protection under s. 8 of Canadian Charter of Rights and Freedoms — Wildlife officers entered band reserve to conduct undercover operation without permission of band members or federal government — Wildlife officers not intruding upon any reasonable privacy interest — No breach of s. 8 — Canadian Charter of Rights and Freedoms, s. 8 — Wildlife Act, S.S. 1979, c. W-13.1, s. 50.

Fish and wildlife --- Practice and procedure — Sentencing — Fines — General

Cruel and unusual punishment — Person guilty of **trafficking** in wildlife is liable to fine of not less than $1,000 and not more than $25,000 or to imprisonment of not more than two years less one day or both — Minimum fine not cruel and unusual punishment — Canadian Charter of Rights and Freedoms, s. 12 — Wildlife Act, S.S. 1979, c. W-13.1.

Native law --- Constitutional issues — Hunting and fishing — Hunting offences — Application of provincial statutes

Convictions under The Wildlife Act for **trafficking**, illegal hunting of wildlife and illegal possession of wildlife — Statute not ultra vires — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, ss. 91¶24, 92 — Indian Act, R.S.C. 1985, c. I-5, s. 81(1)(o) — The Wildlife Act, S.S. 1979, c. W-13.1.

The appellants were treaty Indians convicted of **trafficking**, illegally hunting and illegally possessing wildlife, contrary to the provisions of *The Wildlife Act*. The appellants appealed. The appellants admitted the facts upon which each of the convictions was based but contended that the statute did not apply to them as members of Indian Bands pursuant to the *Indian Act*. The appellants submitted that *The Wildlife Act* was ultra vires to the extent that it conflicted with the *Indian Act*. The appellants were of the view that undercover wildlife officers illegally entered the Indian reserve to gather the evidence which resulted in the charges. The appellants argued that the wildlife officers were guilty of entrapment. The appellants raised the defence that the Kienapple principle applied and that they could not be convicted of illegal hunting and illegal possession. The appellants opined that the minimum penalties specified in *The Wildlife Act* constituted cruel and unusual punishment.

**Held:** The appeals were dismissed.

Band reserves were not enclaves withdrawn from the application of provincial legislation. If provincial legislation within the scope of s. 92 of the *Constitution Act* is not construed as being legislation in relation to Indians and Indian reserves, it is applicable anywhere in the province, including reserves, even though Indians or reserves might be affected by it. The *Wildlife Act* is not ultra vires. Section 81(1)(o) of the *Indian Act* provides that a band council may make by-laws for the preservation, protection and management of game on the reserve. Neither the federal government nor the band council has enacted a game or wildlife statute. Thus, there was no inconsistency, nor did the provincial wildlife legislation purport to invade a field already occupied by federal legislation.

The wildlife officers entered the reserve to conduct their undercover operation without receiving permission from any member of the band occupying the reserve or from any representative of the Department of Indian Affairs. Section 50 of *The Wildlife Act* provides that wildlife officers may enter upon or pass over any land whether enclosed or not, and while so engaged they are liable only for any damage that they may wilfully cause. Indians and reserves are subject to the provisions of the statute, thus, wildlife officers were legally entitled to enter the reserve to conduct their investigation. Only when investigations by the state constitute an intrusion on some reasonable privacy interest of individuals will the government action constitute a "search" within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms*. There was no "search or seizure" by the wildlife officers in the ordinary sense of those words. There was no evidence that the officers intruded in any manner upon any reasonable privacy interest of the appellants.

There was no entrapment. The agreed statement of facts did not show that the officer induced the commission of the offences of which the appellants were convicted, nor was there any persistent importuning of the appellants by the officers. If anything, the appellants persistently importuned the officers to purchase wildlife meat on several occasions and most of the offers were rejected.

The Kienapple principle, which states that an accused person is not subject to multiple convictions as a result of one crime, did not apply in the circumstances. Possession of wildlife is not an integral part of the offence of illegally hunting wildlife. It is not necessary that wildlife be killed in order that the offence of hunting be committed. Unless it is first established that the elk possessed by the appellants were taken in contravention of the Act, the appellants could not be convicted of illegal possession

  

under s. 31(1) of *The Wildlife Act*. The legislators intended that illegal hunting and illegal possession should constitute separate and distinct offences, and that illegal possession of wildlife is not an integral part of the offence of illegally hunting wildlife. The minimum fine in the amount of $1,000 for **trafficking** in wildlife is not cruel and unusual punishment. The general test for determining whether punishment is cruel and unusual within s. 12 of the *Charter* is one of gross disproportionality. The test considers: the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case. Other factors include whether the punishment is necessary to achieve a valid penal purpose; whether the punishment is founded on recognized sentencing principles, whether there is a valid alternative to the punishment imposed, and whether in comparison with punishments imposed for other crimes in the same jurisdiction, it reveals great disproportion. *The Wildlife Act* addresses the conservation and management of wildlife. The statute prohibits selling, trading or bartering wildlife for profit. The most serious impediment to conservation of wildlife is **trafficking**. When individuals engage in the **trafficking** of wildlife for personal profit, regardless of the amount of the profit, the legislature has deemed it appropriate that they be severally penalized if detected.

**Table of Authorities**

**Cases considered by *Matheson J.*:**

*Cardinal v. Alberta (Attorney General)*, [1974] S.C.R. 695, [1973] 6 W.W.R. 205, 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553 (S.C.C.) — applied

*Four B Manufacturing Ltd. v. U.G.W.*, [1980] 1 S.C.R. 1031, [1979] 4 C.N.L.R. 21, 80 C.L.L.C. 14,006, 102 D.L.R. (3d) 385, 30 N.R. 421 (S.C.C.) — referred to

*R. v. Badger*, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321 (S.C.C.) — referred to

*R. v. Evans*, 45 C.R. (4th) 210, 191 N.R. 327, 104 C.C.C. (3d) 23, 131 D.L.R. (4th) 654, 33 C.R.R. (2d) 248, 69 B.C.A.C. 81, 113 W.A.C. 81, [1996] 1 S.C.R. 8 (S.C.C.) — applied

*R. v. Francis*, [1988] 1 S.C.R. 1025, [1988] 4 C.N.L.R. 98, 51 D.L.R. (4th) 418, 85 N.R. 3, 85 N.B.R. (2d) 243, 41 C.C.C. (3d) 217, 5 M.V.R. (2d) 268, 217 A.P.R. 243 (S.C.C.) — referred to

*R. v. Goltz*, 8 C.R. (4th) 82, 5 B.C.A.C. 161, 11 W.A.C. 161, [1991] 3 S.C.R. 485, 7 C.R.R. (2d) 1, 67 C.C.C. (3d) 481, 61 B.C.L.R. (2d) 145, 131 N.R. 1, 31 M.V.R. (2d) 137 (S.C.C.) — applied

*R. v. Horseman*, [1990] 4 W.W.R. 97, [1990] 1 S.C.R. 901, 108 N.R. 1, 73 Alta. L.R. (2d) 193, 108 A.R. 1, 55 C.C.C. (3d) 353, [1990] 3 C.N.L.R. 95 (S.C.C.) — referred to

*R. v. Isaac* (1975), 13 N.S.R. (2d) 460, 9 A.P.R. 460 (N.S. C.A.) — considered

*R. v. Kienapple* (1974), [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 (S.C.C.) — applied

*R. v. Mack* (1988), [1989] 1 W.W.R. 577, [1988] 2 S.C.R. 903, 90 N.R. 173, 67 C.R. (3d) 1, 37 C.R.R. 277, 44 C.C.C. (3d) 513 (S.C.C.) — applied

*Stone v. R.* (October 1, 1990), Doc. Q.B. Cr. Ap. 9/90 (Sask. Q.B.) — considered

**Statutes considered:**

*Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11

s. 8 — considered

s. 12 — considered

*Constitution Act, 1867*, (U.K.), 30 & 31, Vict. c. 3

s. 91(24) — considered

s. 92 — referred to

*Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (U.K.), c. 11

s. 52(1) — referred to

*Indian Act*, R.S.C. 1985, c. I-5

Generally — referred to

s. 81(1)(o) — considered

  

s. 88 — considered
*Lands and Forests Act*, R.S.N.S. 1967, c. 163
Generally — referred to
*Natural Resources Agreement*, R.S.C. 1970, Appendix II, No. 25
¶ 12 — considered
*Wildlife Act*, S.S. 1979, c. W-13.1
Generally — considered

s. 2(l) "hunting" — considered

s. 2(y) "traffic" — considered

s. 31 — considered

s. 50 — considered

s. 57(3) — considered

**Words and phrases considered**

**ENTRAPMENT**

Entrapment occurs when a peace officer goes beyond providing an accused with an opportunity to commit an offence and actually induces the commission of an offence: *R. v. Mack*, [1988] 2 S.C.R. 903 (S.C.C.).

The agreed statement of facts does not reveal that [the undercover wildlife officer] induced the commission of the offences of which Mathew Charles was convicted. Nor was there any persistent importuning of Mathew Charles by [the undercover wildlife officer]. The facts reveal, if anything, that Mathew Charles persistently importuned [the undercover wildlife officer] to purchase wildlife meat on several occasions. Most of the offers were rejected.

**SEARCH**

An investigation by peace officers does not necessarily entail a "search". As was pointed out in *R. v. Evans*, [1996] 1 S.C.R. 8 (S.C.C.), at 16, the purpose of s. 8 of the *Charter* is to preserve the privacy interest of individuals; to protect individuals from unjustified state intrusions upon their privacy. Only when investigations by the state constitute an intrusion upon some reasonable privacy interest of individuals will the government action constitute a "search" within the meaning of s. 8 of the *Charter*.

The agreed statement of facts does not reveal any "search or seizure" by the wildlife officers in the ordinary sense of those words. Nor do the facts reveal that the wildlife officers intruded, in any manner, upon any reasonable privacy interest of any of the appellants.

[The undercover wildlife officer] held himself out to be an avid hunter who was interested in purchasing wild animal horns and, later in the investigation, in purchasing wildlife meat. The appellants willingly catered to those expressed interests.

APPEAL from convictions and sentences of **trafficking**, illegally hunting and illegally possessing wildlife contrary to the *Wildlife Act*, S.S. 1979, c. W-13.1.

***Matheson J.*:**

1 The appellants have appealed their convictions, and sentences, for **trafficking**, illegally hunting, and illegally possessing wildlife, contrary to provisions of *The Wildlife Act*, S.S. 1979, c. W-13.1 (the "Act").

  

2 The facts upon which each of the convictions was based have been admitted. The appellants have submitted, however, that the provisions of the Act do not apply to them as members of Indian Bands pursuant to the *Indian Act*, R.S.C. 1985, c. I-5; the Act is *ultra vires* to the extent that it conflicts with the *Indian Act*; wildlife officers, acting in an undercover capacity, illegally entered those portions of the Little Red Indian Reserve occupied by the Lac La Ronge and Montreal Lake bands to gather the evidence which resulted in the charges; and the wildlife officers were guilty of entrapment.

3 In the event that the convictions should not be set aside, the appellants have also argued that the minimum penalties specified in the Act constitute cruel and unusual punishment.

**Facts**

4 In 1995 a wildlife officer received information from various sources, which he believed to be accurate, that Mathew Charles, David Charles, and Charlie Goertzen had been engaged in illegally **trafficking** in white-tailed deer, deer and elk antlers, and moose. An investigation was thereupon commenced which lasted approximately six months.

5 As a result of the investigation, seven treaty Indians, including the appellants, and four individuals who were not treaty Indians, were charged with a variety of offences contrary to the Act.

6 Melvin Koehler ("Koehler") was a member of the special investigation unit of Saskatchewan Environment and Resource Management. He managed to ingratiate himself with the appellants and other individuals charged as a result of his investigative activities. The first transaction which resulted in a charge of violating the Act was the purchase by Koehler of a set of deer or elk antlers from Charlie Goertzen on August 26, 1995.

7 The first transaction involving the appellants was the purchase by Koehler, on October 17, 1995, of a deer head from Mathew Charles. The following day Mathew Charles offered to sell another deer head to Koehler for the sum of $150.00. Koehler accepted the offer. Those transactions resulted in two **trafficking** charges.

8 In early December, 1995, Mathew Charles took Koehler to a site on the Candle Lake Game Preserve and showed to him elk which Mathew Charles had shot a day or two before. He subsequently sold to Koehler one-half of one of the elk. Mathew Charles was charged with illegal hunting, illegal possession of elk, and **trafficking** in elk.

9 In March, 1996, Mathew Charles again took Koehler to a location on the Candle Lake Game Preserve where, he informed Koehler, he had shot several elk the previous Thursday. He retrieved two elk head from the bush, which he sold to Koehler, resulting in a further **trafficking** charge.

10 Between November 1, 1995, and February 1, 1996, Mathew Charles admittedly sold to Charlie Goertzen, on four or five occasions, a total of 150-200 pounds of elk and moose meat, which resulted in another **trafficking** charge.

11 David Charles was convicted of but one offence-**trafficking** in white-tailed deer antlers. He admitted that he had, in January, 1996, sold a set of locked white-tailed deer antlers to Charlie Goertzen.

12 Edwin Naytowhow had accompanied Michael Charles onto the Candle Lake Game Preserve on December 5, 1995. They spotted a herd of elk. Two elk were killed and two were crippled. The two dead elk were left at the scene, but later that day Edwin Naytowhow and Mathew Charles, accompanied by Anthony Naytowhow and John Halkett, returned to the scene. The two dead elk were gutted and taken away. The elk heads were left behind. Edwin Naytowhow was charged with one count of illegally hunting elk and one count of illegal possession of elk.

13 As a reward for assisting Mathew Charles and Edwin Naytowhow in butchering and retrieving the two elk, Anthony Naytowhow received one-half of an elk carcass. He subsequently sold a hind quarter of that carcass to Charlie Goertzen. Anthony Naytowhow was charged with one count of illegal possession of, and one count of **trafficking** in, elk meat.

**Application of Act to Indian Reserves**

  

14 The evidence in support of all convictions was obtained as a result of Koehler entering upon an Indian reservation to conduct his undercover operation. Koehler was acting throughout pursuant to the powers vested in him by the Act. But the appellants have asserted that the Act cannot apply to Indian reserves because the provincial government has no power to enact legislation "in relation to Indians and land reserved for Indians", a power expressly granted to the Parliament of Canada by ss. 91(24) of the *Constitution Act, 1867* (*U.K.*), 30 & 31, Vict. c.3.

15 The *Indian Act* was enacted by Parliament pursuant to that power, and s. 88 thereof states:

> *88* Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

16 Notwithstanding that s. 88 expressly declares, subject to the stated exceptions, that provincial laws of general application shall apply to Indians, the appellants have argued that the Act falls within the exceptions because it is not legislation relating to the conservation and management of wildlife, but legislation in respect of Indian lands when it purports to apply to activities conducted on Indian reservations.

17 Hunting, it has been submitted, is inextricably bound up with land. Wildlife live on the land and the hunting thereof must, of course, occur on the land on which wildlife exists. To the extent that the land consists of Indian reservations, provincial legislation relating to the use of the land has no force or effect.

18 The appellants have acknowledged that paragraph 12 of the "*Natural Resources Agreement*" (R.S.C. 1970, Appendix II, No. 25) is now a part of the Constitution of Canada by virtue of ss. 52(1) of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (*U.K.*), 1982, c. 11. Paragraph 12 states:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

19 The first aspect of the appellants argument that provincial game laws cannot apply to Indians on Indian reservations is, admittedly, substantially the same as the assertion that Indian reservations constitute "enclaves" withdrawn from the application of provincial legislation. That proposition was rejected by the Supreme Court of Canada in *Cardinal v. Alberta (Attorney General)*, [1974] S.C.R. 695 (S.C.C.). In particular, it was stated, at p. 703, that if provincial legislation within the limits of s. 92 of the *Constitution Act* is not construed as being legislation in relation to "Indians and Indian reservations", it is applicable anywhere in the province, including Indian reservations, even though Indians or Indian reservations might be affected by it.

20 The appellants have suggested that the decision in *Cardinal* was erroneous. However, it is not necessary to consider the merits of that assertion because the decision has been consistently endorsed by the Supreme Court of Canada: *Four B Manufacturing Ltd. v. U.G.W.*, [1980] 1 S.C.R. 1031 (S.C.C.), at 1049; *R. v. Francis*, [1988] 1 S.C.R. 1025 (S.C.C.), at 1028; *R. v. Horseman*, [1990] 1 S.C.R. 901 (S.C.C.), at 931; and *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.), at 796.

21 The appellants have argued that, even if *Cardinal* was correctly decided, the Act is, in essence, when it purports to relate to activities of Indians and Indian reservations, legislation which is within the exclusive jurisdiction of Parliament by virtue of ss. 91(24) of the *Constitution Act*.

22 It has not been suggested that the matters governed by the Act are "in relation to Indians". But it has been submitted, as previously stated, that the pith and substance of the Act relates to the use of land, and insofar as it purports to affect land within Indian reservations it is beyond the powers of the provincial legislature.

 

23 The appellants have referred, in support of this proposition, to *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (N.S. C.A.), wherein the *Lands and Forests Act* of Nova Scotia, referred to in the judgment of MacKeigan C.J.N.S. as a "hunting and game law", was nevertheless categorized as law relating to the use of land, and, insofar as it sought to regulate Indian reserves, it was beyond the power of the province of Nova Scotia.

24 The same argument was advanced in *Stone v. R.* (October 1, 1990), Doc. Q.B. Cr. Ap. 9/90 (Sask. Q.B.), an unreported judgment of Wimmer J. of the Saskatchewan Court of Queen's Bench, who disposed of the argument as follows:

> Whatever may be the position in Nova Scotia, it is not so in this province. Here, as in Alberta and Manitoba, it is settled law that under natural resources transfer agreements made between Canada and the three provinces, provincial game laws govern the activities of Indians on reserves except when hunting or fishing for food: *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695. Chief Justice MacKeigan acknowledges this in his reasons for judgment...

25 The final aspect of the appellants' submission that the Act does not apply to Indians on Indian reservations is that Parliament has already "occupied the field" of game management with respect to Indian lands by virtue of ss. 81(1)(o) of the *Indian Act*, which states:

> *81* The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> . . . . .
>
> (o) The preservation, protection and management of fur-bearing animals, fish and other game on the reserve.

26 The trial judge correctly addressed this submission, in his judgment relating to the charges against Mathew Charles, when he stated, at p. 4:

> It is true that the parliament has provided a "mechanism by which band councils can assume management over certain activities within the territorial limits of their constituencies", as Iacobucci, J. stated in referring to Section 81 in *R. v. Lewis*; (1996) 133 D.L.R. (4th) 700.
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> But providing of a mechanism whereby a field might be occupied is a different thing than actually occupying the field. The fact is that neither the federal parliament nor the band council has enacted a game or wildlife Act. There is, therefore, no inconsistency, nor does the provincial wildlife legislation purport to invade a field already occupied by federal legislation.

27 The appellants have argued that the foregoing conclusion means that if an Indian band enacts a bylaw relating to the preservation, protection and management of game on the reservation, the bylaw would be viewed as paramount to provincial wildlife conservation laws, thereby equating the doctrine of federal paramountcy to Indian band council bylaws.

28 But that is not what the trial judge concluded. He did not state that an Indian band council bylaw would be paramount to the Act. He merely stated that the paramountcy argument was inapplicable because there did not exist any federal legislation relating to the preservation, protection and management of game on the Indian reservation in question, nor any bylaw enacted pursuant to the power delegated to band councils.

**Unlawful Entry onto Reservation**

29 The wildlife officers-and, in particular, Koehler-entered the Little Red Indian reservation to conduct their undercover operation without receiving permission to do so from any member of the Lac La Ronge or Montreal Lake Indian bands which occupied the reservation, or from any representative of the Department of Indian Affairs. That entry clearly constituted, it is alleged, a violation of the territorial jurisdiction of the Indian bands involved. The invasion of Indian properties is more serious than a search of a private dwelling and should therefore, it has been submitted, be viewed as a violation of the right, guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (*U.K.*), 1982, c. 11 (the "*Charter*"), not to be subjected to unreasonable search and seizure.

  

30 The wildlife officers purported to enter the reservation, to conduct their investigation, pursuant to s. 50 of the Act:

> *50* A wildlife officer, a deputy wildlife officer and any person or persons lawfully accompanying him may, for the purposes of carrying out his duties, enter upon or pass over any land, whether enclosed or not, and while so engaged he is liable only for any damage that he may wilfully cause.

31 Because Indians, and Indian reservations, are subject to the provisions of the Act, the wildlife officers were legally entitled to enter the reservation to conduct their investigation.

32 An investigation by peace officers does not necessarily entail a "search". As was pointed out in *R. v. Evans*, [1996] 1 S.C.R. 8 (S.C.C.), at 16, the purpose of s. 8 of the *Charter* is to preserve the privacy interest of individuals; to protect individuals from unjustified state intrusions upon their privacy. Only when investigations by the state constitute an intrusion upon some reasonable privacy interest of individuals will the government action constitute a "search" within the meaning of s. 8 of the *Charter*.

33 The agreed statement of facts does not reveal any "search or seizure" by the wildlife officers in the ordinary sense of those words. Nor do the facts reveal that the wildlife officers intruded, in any manner, upon any reasonable privacy interest of any of the appellants.

34 Koehler held himself out to be an avid hunter who was interested in purchasing wild animal horns and, later in the investigation, in purchasing wildlife meat. The appellants willingly catered to those expressed interests.

**Entrapment**

35 Mathew Charles has asserted that the persistent actions of Koehler and his repeated requests of Mathew Charles constituted entrapment. In particular, it has been asserted that Koehler's request of Mathew Charles to show Koehler where he had left two elk head in the bush, to which request Mathew Charles agreed, and Mathew Charles thereupon dragging the elk heads out of the bush, constituted entrapment.

36 Entrapment occurs when a peace officer goes beyond providing an accused with an opportunity to commit an offence and actually induces the commission of an offence: *R. v. Mack*, [1988] 2 S.C.R. 903 (S.C.C.).

37 The agreed statement of facts does not reveal that Koehler induced the commission of the offences of which Mathew Charles was convicted. Nor was there any persistent importuning of Mathew Charles by Koehler. The facts reveal, if anything, that Mathew Charles persistently importuned Koehler to purchase wildlife meat on several occasions. Most of the offers were rejected.

**Kienapple Principle**

38 An accused person is not subject to multiple convictions as a result of but one "crime": *R. v. Kienapple* (1974), [1975] 1 S.C.R. 729 (S.C.C.).

39 It has been argued that two of the charges against Mathew Charles-illegally hunting elk and illegally possessing elk, on December 5, 1995-arise from the same facts. Similarly, it has been asserted that the two charges of which Anthony Naytowhow was convicted-illegal possession of elk, and illegal **trafficking** in elk, both on December 5, 1995-arise from the same circumstance.

40 Mathew Charles and Anthony Naytowhow shot and killed two elk and crippled two others. The two slain elk were not retrieved at that time. The hunters returned later in the day, accompanied by two other persons, to take possession of the elk. Those facts formed the basis of the charges against both Mathew Charles and Anthony Naytowhow.

  

41 It has been pointed out that an individual cannot be convicted of breaking, entry and theft, and also be convicted of possession of the property which was stolen as a result of the breaking and entering. Consequently, it has been argued that an individual should not be convicted of illegally hunting wildlife and at the same time be convicted of the illegal possession of the product of the hunt.

42 Theft is an integral part of the offence of breaking, entry and theft. Breaking and entry alone is not an offence. Thus, when facts reveal breaking and entry and theft, the accused must have taken possession of the stolen property. But possession of wildlife is not an integral part of the offence of illegally hunting wildlife. "Hunting" is defined in ss. 2(l) of the Act as including "chasing, pursuing, following after or on the trail of, searching for, stalking or lying in wait for any wildlife". It is not necessary that wildlife be killed in order that the offence of hunting be committed.

43 The "illegal possession" charges arise by virtue of ss. 31 of the Act:

> *31* No person shall knowingly possess any wildlife taken in contravention of this Act or the regulations.

44 Unless it is first established that the elk possessed by these appellants were "taken in contravention of the Act", the appellants could not be convicted of illegal possession. It is therefore evident that the legislators intended that illegal hunting and illegal possession should constitute separate and distinct offences, and that illegal possession of wildlife is not an integral part of the offence of illegally hunting wildlife. Consequently, the *Kienapple* principle has no application in these circumstances.

**Cruel and Unusual Punishment**

45 A person who is guilty of **trafficking** in wildlife is, by virtue of ss. 57(3) of the Act, liable "to a fine of not less than $1,000.00 and not more than $25,000.00 or to imprisonment of not more than two years less a day or both".

46 It has been submitted that the minimum penalty of a $1,000.00 fine contravenes the right, guaranteed by s. 12 of the *Charter*, not to be subjected to cruel or unusual treatment or punishment.

47 The general test for determining whether punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is one of gross disproportionality, which must consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case. Other factors which may legitimately form an assessment are whether the punishment is necessary to achieve a valid penal purpose; whether it is founded on recognized sentencing principles; whether there exist valid alternatives to the punishment imposed; and to some extent whether, in comparison with punishments imposed for other crimes in the same jurisdiction, it reveals great disproportion. The test is not one which is quick to invalidate sentences crafted by legislators. It will only be on rare occasions that a court will find a sentence so grossly disproportionate that it violates s. 12 of the *Charter*: *R. v. Goltz*, [1991] 3 S.C.R. 485 (S.C.C.).

48 David Charles' conviction on the charge of **trafficking** in wildlife resulted from the sale by him to Charlie Goertzen of a set of antlers for the sum of $100.00. Anthony Naytowhow's conviction resulted from the sale, also to Charlie Goertzen, of a hind quarter of elk for the sum of $45.00. It has therefore been asserted that the minimum monetary penalty cast too wide a net when it encompasses relatively minor acts of **trafficking** involved in these two charges and it is therefore offensive to society's sense of decency.

49 **Trafficking** in wildlife is defined in ss. 2(y) of the Act to mean to "offer for sale, expose for sale, advertise for sale, sell, buy, barter, exchange, deal, solicit or trade". The prohibition is against selling, trading or bartering wildlife for profit; it does not extend to "giving". The purpose of *The Wildlife Act* is the conservation and management of wildlife. The most serious impediment to conservation of wildlife is **trafficking** therein. If wildlife could be sold, without penalty, it is difficult to imagine that very many species would not very quickly become endangered, a result which would certainly be offensive to most members of society. Thus, when individuals engage in **trafficking** of wildlife for personal profit-whatever the amount thereof - the legislature has deemed it appropriate that they be severely penalized, on a monetary basis, if detected. To conclude that a minimum fine of $1,000.00, in those circumstances, is cruel and unusual punishment, would be totally unjustified. Such a

 

conclusion might itself be considered as offensive in view of the nature of the proscribed activity-an egregious type of offence in the minds of most citizens.

50 As a result of the foregoing, the appeals must be dismissed.

51 Mathew Charles, who has apparently not paid any of his fines, nor yet been accepted in the fine/option program, will be entitled to a period of three months within which to pay the fines imposed upon him, or arrange substitution thereof.

*Appeals dismissed.*