

2000 ABPC 29
Alberta Provincial Court

R. v. Bear Paw Pawn Ltd.

2000 CarswellAlta 228, 2000 ABPC 29, [2000] A.W.L.D. 575, [2000] A.J. No. 284, 264 A.R. 247, 46 W.C.B. (2d) 186

Her Majesty the Queen and Bear Paw Pawn Ltd.

Plosz Prov. J.

Judgment: March 7, 2000

Docket: Doc. Wetaskiwin 81841470-P1-01-019, 81841306-P1-01-019

Counsel: *D. Labrenz*, for Crown.

M. Klaus, for Accused.

Subject: Public

Related Abridgment Classifications

Natural resources

I Fish and wildlife

I.5 Offences

I.5.d Illegal possession

I.5.d.ii Wildlife

Natural resources

I Fish and wildlife

I.5 Offences

I.5.d Illegal possession

I.5.d.iii Firearms

Natural resources

I Fish and wildlife

I.5 Offences

I.5.n Availability of defences

I.5.n.i Due diligence

Natural resources

I Fish and wildlife

I.5 Offences

I.5.n Availability of defences

I.5.n.iv Miscellaneous

Natural resources

I Fish and wildlife

I.5 Offences

I.5.p Miscellaneous

Headnote

Fish and wildlife --- Offences — Illegal sale of fish or wildlife

Defendant sold native ceremonial items made of feathers — Fish and Wildlife officers executed search warrant on premises of defendant and seized numerous native ceremonial items comprised mainly of feathers — Several items were displayed in business premises of defendant and had price tags on them — Crown alleged that feathers used in construction of items were from birds of prey — Defendant was charged with **trafficking** in wildlife contrary to **Wildlife Act** — Defendant convicted — Feathers belonging to birds of prey constitute wildlife unless feathers are exuviated — Crown witness testified that it was

extremely unlikely that feathers in question were naturally shed — Defence of officially-induced error was not available as director of defendant only sought opinion of officer about legal status of items in question after he had acquired them and put them on sale — Defendant did not take all reasonable steps to avoid purchasing or taking in pawn items that contained non-exuviated feathers — Defendant could not reasonably but mistakenly have believed that items contained exuviated feathers — Offences were strict liability offences — Defence of due diligence was not available — [Wildlife Act, S.A. 1984, c. W-9.1, s. 61\(1\), 61\(1.1\)](#) — [Wildlife Regulation, Alta. Reg. 143/97](#).

Fish and wildlife --- Offences — Availability of defences — Due diligence

Defendant sold native ceremonial items made of feathers — Crown alleged that feathers used in construction of items were from birds of prey — Defendant was charged with **trafficking** in wildlife, possession of wildlife for purpose of **trafficking** and possession of wildlife contrary to [Wildlife Act](#) — Defendant convicted — Defendant did not take all reasonable steps to avoid purchasing or taking in pawn items that contained non-exuviated feathers — Many items were not examined because they were encased in leather sheaths and were not extracted — Defendant failed to ask proper questions during transactions — Defendant did not consult with local fish and wildlife officer before transactions occurred when expert assistance was required — Defendant could not reasonably but mistakenly have believed that items contained exuviated feathers — Offences were public welfare offences — Defence of due diligence was not available for strict liability offences — [Wildlife Act, S.A. 1984, c. W-9.1, ss. 1\(3\), 54, 61\(1\), 61\(1.1\)](#) — [Wildlife Regulation, Alta. Reg. 143/97](#).

Fish and wildlife --- Offences — Availability of defences — Miscellaneous defences

Defendant sold native ceremonial items made of feathers — Crown alleged that feathers used in construction of items were from birds of prey — Defendant was charged with **trafficking** in wildlife, possession of wildlife for purpose of **trafficking** and possession of wildlife contrary to [Wildlife Act](#) — Defendant convicted — Defence of officially-induced error was not available — Director of defendant only sought opinion of officer about legal status of items in question after he had acquired them and put them on sale — [Wildlife Act, S.A. 1984, c. W-9.1, ss. 61\(1\), 61\(1.1\), 91\(3\)](#) — [Wildlife Regulation, Alta. Reg. 143/97](#).

Fish and wildlife --- Offences — Illegal possession — Wildlife

Defendant sold native ceremonial items made of feathers — Fish and Wildlife officers executed search warrant on premises of defendant and seized numerous native ceremonial items comprised mainly of feathers — Several items were displayed in business premises of defendant and had price tags on them — Crown alleged that feathers used in construction of items were from birds of prey — Defendant was charged with possession of wildlife for purpose of **trafficking** and possession of wildlife contrary to [Wildlife Act](#) — Defendant convicted — Defence of officially-induced error was not available as director of defendant only sought opinion of officer about legal status of items in question after he had acquired them and put them on sale — Defendant did not take all reasonable steps to avoid purchasing or taking in pawn items that contained non-exuviated feathers — Defendant could not reasonably but mistakenly have believed that items contained exuviated feathers — Offences were strict liability offences — Defence of due diligence was not available — [Wildlife Act, S.A. 1984, c. W-9.1, s. 61\(1\), 61\(1.1\)](#) — [Wildlife Regulation, Alta. Reg. 143/97](#).

Fish and wildlife --- Offences — Miscellaneous offences

Vicarious liability of corporation — Defendant sold native ceremonial items made of feathers — Crown alleged that feathers used in construction of items were from birds of prey — Defendant was charged with **trafficking** in wildlife, possession of wildlife for purpose of **trafficking** and possession of wildlife contrary to [Wildlife Act](#) — Defendant convicted — Director of corporation who directed, authorized, assented to, acquiesced in or participated in contravention of statute by defendant corporation was party to and guilty of each offence that corporation was guilty of — [Wildlife Act, S.A. 1984, c. W-9.1, s. 91\(3\)](#) — [Wildlife Regulation, Alta. Reg. 143/97](#).

Table of Authorities

Cases considered by *Plosz Prov. J.*:

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.) — referred to

R. v. Lambrinoudis (1978), 5 Alta. L.R. (2d) 180, 8 A.R. 158, 39 C.C.C. (2d) 12 (Alta. C.A.) — applied

R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 21 N.R. 295, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353 (S.C.C.) — applied

R. v. Steinhauer (1996), 187 A.R. 12, 127 W.A.C. 12, 40 Alta. L.R. (3d) 305, [1997] 1 W.W.R. 753 (Alta. C.A.) — applied

Statutes considered:

Ontario Water Resources Act, R.S.O. 1990, c. O.40

Generally — referred to

Wildlife Act, S.A. 1984, c. W-9.1

Generally — considered

s. 1(1)(a) "animal" — considered

s. 1(1)(s) "traffic" — considered

s. 1(1)(x) "wildlife" — considered

s. 1(3) — considered

s. 1(5) — considered

s. 54 — considered

s. 54(1) — considered

s. 61(1) — considered

s. 61(1.1) [en. 1996, c. 33, s. 47(a)] — considered

s. 91 — considered

s. 91(3) — considered

Regulations considered:

Wildlife Act, S.A. 1984, c. W-9.1

Wildlife Regulation, Alta. Reg. 143/97

Generally

Words and phrases considered

ANIMALS

Section 1(1) of the *Wildlife Act* [S.A. 1984, c. 19] defines animal as being a vertebrate, other than a human being or a fish. Birds are vertebrate. The Random House Dictionary of the English Language (2nd edition) defines "bird" as any warm-blooded vertebrate of the class Aves, having a body covered with feathers, forelimbs modified into wings, scaly legs, a beak, and no teeth, and bearing young in a hard-shelled egg.

Section 1(1)(x) defines wildlife, which include birds of prey. Therefore, for the purposes of the statute, birds of prey are animals encompassed in the definition of wildlife.

KNOWINGLY

This definition uses the word "knowingly" only to specify that the Crown must prove that the accused knows a thing is in the actual possession or custody of another person, or knows that it is in a certain place. Section 1(3) [*Wildlife Act*, S.A. 1984, c. 19] does not bring the charges under Section 54, Section 61(1) and Section 61(1.1) [of the Act] into full mens rea offences. The offences these three Sections create are strict liability offences.

WILDLIFE

[. . .] Fish and Wildlife officers executed a search warrant on the premises of the accused corporation and seized numerous native ceremonial items that were comprised mainly of feathers. [. . .] The Crown alleges that the feathers used in the construction of

the various exhibits were those of Golden Eagles, Bald Eagles, Northern Goshawk, Red-tailed Hawks, Swainson Hawks, and Sharpshinned Hawks, all of which are birds of prey as specified in the Wildlife Regulation A.R. 143/97.

[. . .]

Section 1(1) of the *Wildlife Act* [S.A. 1984, c. 19] defines animal as being a vertebrate, other than a human being or a fish. Birds are vertebrate. The Random House Dictionary of the English Language (2nd edition) defines "bird" as any warm-blooded vertebrate of the class Aves, having a body covered with feathers, forelimbs modified into wings, scaly legs, a beak, and no teeth, and bearing young in a hard-shelled egg.

Section 1(1)(x) defines wildlife, which include birds of prey. Therefore, for the purposes of the statute, birds of prey are animals encompassed in the definition of wildlife.

Section (1)(5) of the *Wildlife Act* reads as follows:

Except where specified or where the context otherwise requires, a reference in this Act to an animal or any kind of animal shall be construed as a reference to an animal or to an animal of that kind whether it is alive or dead, and to include any part of the animal, including tissue or genetic material removed from the animal, and its eggs or any part of its eggs, but, except as prescribed, not to include exuviated parts of any kind of animal.

Therefore, feathers belonging to any of the above-mentioned birds of prey are defined as being wildlife, unless the feathers are exuviated.

TRIAL on charges under Wildlife Act.

Plosz Prov. J.:

1 There are two Informations before me. The first one charges Bear Paw Pawn Ltd. with 19 counts under the *Wildlife Act* consisting of six counts of **trafficking** in Wildlife contrary to [Section 61\(1\)](#), six counts of possession of wildlife for the purposes of **trafficking** contrary to [Section 61\(1.1\)](#) and 7 counts of possession of wildlife under [Section 54\(1\)](#).

2 The defence admitted that Bear Paw Pawn Ltd. is a corporation duly incorporated under the laws of the Province of Alberta and that Mr. Brian Zielke is a director of that corporation. Mr. Zielke is also charged, on a separate Information, with the same nineteen charges as the corporation. Both Crown and defence agreed to apply all the evidence, for both parties, plus all the exhibits on the 19 Count information against the accused Brian Wayne Zielke.

3 On April 17, 1998, Fish and Wildlife officers executed a search warrant on the premises of the accused corporation and seized numerous native ceremonial items that were comprised mainly of feathers. These items were a variety of dancing bustles, headdresses, dream catchers, hair drops, fans, among other things. A great number of these were tendered as exhibits at the trial. Photographs of these items were taken on April 14, three days before the search warrant was executed. The photographs show that these items were displayed in the business premises of the defendant corporation and a number of them had price tags on them. The Crown alleges that the feathers used in the construction of the various exhibits were those of Golden Eagles, Bald Eagles, Northern Goshawk, Red-tailed Hawks, Swainson Hawks, and Sharpshinned Hawks, all of which are birds of prey as specified in the Wildlife Regulation A.R. 143/97.

4 Based on the evidence of the witness Gordon Court, who was qualified, among other things, as an expert of identification of birds of prey, I am satisfied beyond a reasonable doubt that all of the exhibits he was given to view and inspect when testifying contained feathers of the various birds of prey which he identified. I accept his evidence regarding this.

5 Section 1(1) of the *Wildlife Act* defines animal as being a vertebrate, other than a human being or a fish. Birds are vertebrate. The Random House Dictionary of the English Language (2nd edition) defines "bird" as any warm-blooded vertebrate of the

class Aves, having a body covered with feathers, forelimbs modified into wings, scaly legs, a beak, and no teeth, and bearing young in a hard-shelled egg.

6 Section 1(1)(x) defines wildlife, which include birds of prey. Therefore, for the purposes of the statute, birds of prey are animals encompassed in the definition of wildlife.

7 Section (1)(5) of the *Wildlife Act* reads as follows:

Except where specified or where the context otherwise requires, a reference in this Act to an animal or any kind of animal shall be construed as a reference to an animal or to an animal of that kind whether it is alive or dead, and to include any part of the animal, including tissue or genetic material removed from the animal, and its eggs or any part of its eggs, but, except as prescribed, not to include exuviated parts of any kind of animal.

8 Therefore, feathers belonging to any of the above-mentioned birds of prey are defined as being wildlife, unless the feathers are exuviated.

9 Gordon Court was a knowledgeable and credible witness in giving testimony in his area of expertise. I accept his evidence in this regard. He was shown Exhibit 2, which relates to counts 1, 2, and 3 in the Information. He identified the majority of the feathers in that exhibit as being the primary and secondary feathers of the Golden Eagle and testified that he thought that finding naturally shed feathers of these types would be extremely remote, especially in the numbers that are in that exhibit, and that he would be very doubtful that they would be exuviated. He was then asked by the prosecutor:

Q But by saying extremely remote you're saying also possible?

A Yeah. Well I visited ... mainly ... the only place you would probably find primary and secondary feathers of a Golden Eagle would be around a nest site, and I've been to maybe thirty in my life, and I found one secondary feather in my life, so it would be very very difficult.

10 So while testifying as to the extreme remoteness of these Golden Eagle feathers being exuviated, he also said it was possible. No statistics were given such as is in the case in DNA evidence where one hears that the chances of this DNA belonging to another individual is one in 40 or 80 million, etc. There is therefore no proof beyond a reasonable doubt that these Golden Eagle feathers in Exhibit 2 are non exuviated.

11 In examining Exhibit 3, which relates to counts 4, 5, and 6, Gordon Court testified that these were feathers from an adult Golden Eagle and the symmetry of molt pattern on both wings would suggest they came from a single bird, and he testified that single birds do not molt their feathers all at once, and certainly not at the age of this bird, and he did not believe that these were exuviated feathers. I accept his evidence on this point.

12 With respect to Exhibit 4, he testified that this exhibit was a complete tail of juvenile bald eagle, obviously from one bird and not exuviated. I accept his evidence on this point.

13 In examining Exhibit 5, he testified that these were secondary feathers of an adult bald eagle and stated, "I think it would be quite hard to say these were not collected ... hard but not unlikely collected from molted feathers, but impossible to tell."

14 He was then asked:

Q So maybe collected from molted feathers?

A Yeah. It would be again an extremely difficult thing to do, but it is possible with these particular feathers.

15 Accordingly the Crown has not proved beyond a reasonable doubt that Exhibit 5 has been constructed with non exuviated feathers.

16 Regarding Exhibit 6, Gordon Court testified that this was constructed entirely from the primary, secondary, and tail feathers of a juvenile bald eagle, perhaps more than one. He stated that it's the remnants of a little baby bald eagle, possibly just out of the nest for maybe a few months and these feathers would not be expected to be shed for several years. He then testified that these would not be exuviated feathers. I accept his evidence on this point.

17 He next examined Exhibit 7 and testified that this was a hand portion of the wing of an adult Golden Eagle and stated this is a portion of the eagle, not just the feathers, and therefore he anticipated the bones would still be in this exhibit. He testified this is a portion of a dead bird and therefore the feathers are not exuviated. I accept his evidence on this point.

18 For the remainder of the exhibits he examined, all relate to Count 19 on the Information, and I accept his evidence when he testified that Exhibits 8, 9, 10, 11, 12, 13, 14, 15 all contain non exuviated feathers from various birds of prey.

19 With respect to Exhibit 16, he could not say that this exhibit contained non exuviated feathers. In examining Exhibit 17 to 28, Mr. Court's opinion was that these exhibits contained non exuviated feathers of various birds of prey.

20 Regarding Exhibit 29, he stated that while it would be unlikely to find the particular Bald Eagle fluffy feathers this exhibit contains, he couldn't say for sure that that could be the case.

21 Regarding Exhibit 30, he believed this unlikely to have been shed feathers, but no definite opinion was given as to whether or not they were exuviated. Regarding Exhibits 31 and 32, he was not confident to say that these were non exuviated feathers.

22 "Traffic" is defined in Section 1(1)(s) and means "sell, buy, barter, solicit or trade, or offer to do so." Section 1(3) of the statute determines what constitutes "possession" within the meaning of the *Wildlife Act*.

23 The Crown is not required to prove the age of the wildlife contained in the exhibits, nor is the Crown required to prove that the birds of prey from whom the feathers were obtained resided in Alberta while they were still attached to the bird. The leading authority in this regard is the case of *R. v. Steinhauer*, a decision of the Alberta Court of Appeal, dated June 8, 1996, reported at (1996), 40 Alta. L.R. (3d) 305 (Alta. C.A.).

24 The defence argues that the charges before the Court are full mens rea offences, and not strict liability offences because the definition of "possession" in Section 1(3) has the word "knowingly" in it. Section 1(3) states as follows:

For the purposes of this Act (a) a person has a thing in his possession when he has it in his personal possession or knowingly (i) has it in the actual possession or custody of another person, or (ii) has it in any place whether or not that place belongs to or is occupied by him, for that use of benefit of himself or of another person and (b) when one of two or more persons, with the knowledge and consent of the rest has anything in his custody or possession, it shall be deemed to be in the possession of each and all of them.

25 This definition uses the word "knowingly" only to specify that the Crown must prove that the accused knows a thing is in the actual possession or custody of another person, or knows that it is in a certain place. Section 1(3) does not bring the charges under Section 54, Section 61(1) and Section 61(1.1) into full mens rea offences. The offences these three Sections create are strict liability offences. When one examines the case of *R. v. Lambrinoudis*, a decision of the Alberta Supreme Court Appellate Division rendered February 6, 1978, reported at (1978), 5 Alta. L.R. (2d) 180 (Alta. C.A.), Mr. Justice Morrow at page 190 categorizes three types of offences. They are group 1 — mens rea offences, group 2 — strict liability offences, and group 3 — absolute liability offences. These categories of offences were approved by The Supreme Court of Canada later that year in the case of *R. v. Sault Ste. Marie (City)*, rendered May 1, 1978 and reported at (1978), 40 C.C.C. (2d) 353 (S.C.C.).

26 In that case, Chief Justice Dixon, writing the judgment for the Court, held that public welfare offences would prima facie be strict liability offences, and are not subject to the presumption of full mens rea. Such offences would only fall into mens rea offences if words such as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statute section creating the offence.

27 At page 373, he states:

The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to *Pierce Fisheries (R. v. Pierce Fisheries Ltd., S.C.C. (1970) 5 C.C.C. 193)* and to the virtual impossibility in most regulatory cases approving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with evidence of due diligence.

28 He further ruled that:

In this doctrine, it is not up to the prosecution to prove negligence. Instead, it is open to the defendants to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies any accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited acts, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

29 The offences with which both accused before me are charged with are public welfare offences. Chief Justice Dixon stated at page 362 in the *Sault Ste. Marie* case:

Public Welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety.

(*Sault Ste. Marie* dealt with a case from Ontario of pollution under the [Ontario Water Resources Act](#).)

30 At page 364 he further stated,

Public Welfare offences involve a shift of emphasis from the protection of the individual interests to the protection of public and social interests.

31 That is clearly what is involved in this case, as it is in the public interest to ensure the preservation and conversation of our wildlife, and consequently, to prohibit in its unlawful **trafficking**. I therefore find that all the offences referred to in the two Informations against both accused in this case are strict liability offences.

32 I do not accept the defence argument that there is any officially induced error in this case. Mr. Zielke testified that he received a letter that has been marked as Exhibit 34 from someone who he said stated got it from a Fish and Wildlife officer named Ron Wiebe at St. Paul, Alberta. The unsigned letter is dated August 12, 1966. We do not know when Mr. Zielke got this letter. Exhibit 34 simply outlines definition of "traffic" and "wildlife" under the [Wildlife Act](#) as well as indicating the following:

Should any wildlife in your possession be considered exuviae, the onus will be placed on you to prove it is not wildlife.

33 This should have been a notice to anyone wishing to engage in such an activity.

34 There is nothing in Exhibit 4, in my view, that would constitute officially induced error. Mr. Zielke also testified that Mr. Wiebe attended at the premises of Bear Paw Pawn Ltd. and viewed certain items, some which were, according to Zielke's evidence, the ones seized and tendered as exhibits in this case. There was also no evidence to indicate when exactly it was that Mr. Wiebe went to the premises of the defendant corporation. This evidence came through Mr. Zielke, and not through Mr. Wiebe. Wiebe was not called as a witness. Nothing in the evidence of Mr. Zielke, or any other witness in this case for that matter, suggests that there was any evidence or even a hint of officially induced error occurring. In fact, Mr. Zielke did not contact the local Fish and Wildlife office in Wetaskiwin, which is in charge of the area where the defendants live and carry on business because he stated he had heard some terrible stories about the local Fish and Wildlife officer in this area and that he was hard to deal with and hard to talk to, although he also testified that he was not fearful that by contacting him, he would be charged for any offence relating to these exhibits. The whole tenor of Mr. Zielke's evidence in this regard implied that he thought he may not get the answers he hoped for from the local Fish and Wildlife officer, and therefore avoided contacting him

for that reason. As well, the evidence clearly indicates that these exhibits before the Court, and similar exhibits, were already in the possession of Bear Paw Pawn Ltd. This means that the accused corporation was seeking advice and direction such as it was, after having the items in its possession, and not before. This is an extremely important point. The evidence of this comes out in the following questions and answers in direct examination between Mr. Zielke and his own counsel.

Q: Did Mr. Wiebe attend at your store?

A Yes.

Q: Can you tell me whether or not he had any criticism of how you had the feathered items out for display and for sale?

A He looked at the display. It was probably almost exactly the same as what Jason Hanson had seen, the Wildlife Officer Jason Hanson had seen, and he had absolutely no concerns whatsoever that we were actually breaking the law. There was absolutely no indication whatsoever.

Q: Now when did you have this meeting with this particular officer? Was it before or after you dealt with Officer Hanson?

A Before.

35 This evidence was led by the defence as hearsay evidence. The following questions and answers relate to this in direct examination.

Q: Okay. Now did you have any other discussions with this Fish and Wildlife officer concerning feathers?

A Yes we did. Yeah.

Q: What did he tell you?

MR. LABRENZ: Sir, I object. This appears to be hearsay to me.

MR. KLAUS: I would suggest sir, it goes to state of mind. I think state of mind is important in these circumstances.

THE COURT: Well, not for the truth of what was told, but what he did as a result, is that...

MR. KLAUS: That's in essence it, sir.

THE COURT: Mr. Labrenz?

MR. LABRENZ: On the face of it, sir, that sounds to be all right. If I have any further objection, I'll raise it, sir.

THE COURT: I will not certainly treat what was told to him as being the truth, but I will hear what he did as a result of being told certain things.

MR. KLAUS: Thank you, sir.

Q: So in terms of what was related to you, Mr. Zielke, what was your understanding you could do?

A Understanding was that I could — we could take in on pawn and sell feathers that had been shed from birds of prey.

36 As I had mentioned before, the evidence clearly indicates that the accused corporation through its director, Brian Wayne Zielke, only sought the opinion of a Fish and Wildlife officer about the legal status of the exhibits after he had purchased them or taken them in on pawn. Based on the question asked him by his own counsel in direct examination, the exhibits were already for sale at the time they were viewed by Mr. Wiebe. There is also no evidence as to how closely these items were examined by Mr. Wiebe, or whether he has any knowledge or expertise as to whether any or all of these items were constructed with exuviated feathers. It is obvious from the evidence of Officer Hanson, who executed the Search Warrant on April 17, that he was not in a

position to make such a determination and that is why he first photographed the exhibits and then took them to Mr. Tom Packer who was a forensic biologist from the Natural Resources Service for his expert opinion. On the date when the Search Warrant was executed, he had Mr. Court attend with him to determine which, if any, of the exhibits contained wild life. There is no evidence before me to indicate that Mr. Wiebe made any such inquiries from experts in his own department. Therefore, there is no basis whatsoever for the defence argument that there was officially induced error. On the evidence, it simply does not exist.

37 Mr. Zielke testified that when a person brought in to sell or to pawn one of the exhibits, they were questioned as to how they acquired the feathers. That was his evidence when he was taken through each of the exhibits and questioned on them. However, before that was done, in direct examination by his own counsel, he was asked the following questions by his counsel.

Q Now, of the items that have been introduced as exhibits with feathers today, Mr. Zielke, can you tell me whether you saw any signs of how the birds or the feathers came to be in your shop, whether the birds were killed, whether the birds had met with death accidentally, or whether the feathers fell out of the sky? Did you get any indications in that regard?

A On almost every item that was brought in, or almost every item that's been brought in, we questioned the people that bring them in as to how they acquired the feathers. The condition of the feathers, we look at that, whether there be — if there was actually holes in the feathers from maybe being shot or such, we'd look over that type of thing and look for that sort of thing to try and determine whether they were shed or not.

Q Now, a lot of these things are, if you will, encased in some artwork. Did you do anything to take apart the artwork to check the bottoms where the feathers would attach to the birds?

A No, I did not. That would be awful rude of me to do that in front of the person that was — we would ask them if there was, you know, where the feathers were shed, or how they received the feathers, who they got them from, if they got them from someone else, and a lot of cases they were passed down from their father or an elder. Some people indicated that they found them, leading us to believe that they were shed feathers.

Q Did you receive any different information from any of your customers that you dealt with, other than what you described to me?

A No.

38 It will be noted that Mr. Zielke used the words "on almost every item that was brought in, or almost every item that's been brought in." Therefore, he is indicating that some of the persons pawning or selling certain of the exhibits were not asked any questions. It is also noted in his evidence that he was not present for each and every transaction so that the Court is asked to assume that some other employee of the corporate accused asked questions as to how the person acquired the feathers.

39 Based on the decision in the case of *Queen v. City of Sault Ste. Marie*, the accused must show that he took all reasonable care to determine whether or not, in this case, the feathers were exuviated. This involved consideration of what a reasonable man could have done in the circumstances. The defence will be available if the accused reasonably but mistakenly believed in a set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. In my view, the accused, through its corporate officer, Brian Zielke, did not take all reasonable steps to determine whether or not the feathered exhibits which were either purchased or taken in pawn by the accused corporation were exuviated. Mr. Zielke testified that he certainly was no expert in this area, and so any examination that he himself made of any exhibit would not be of any particular value.

40 He was asked the following:

Q Now in terms of all the items we've gone through, did you yourself make any determination of the type of bird feathers that were used in the items?

A Could I identify them basically?

Q Yes.

A To be positive to tell you the honest — no.

Q Okay.

A I was taking the word of the people coming in, that were bringing them into me as to the type of feather they actually were. From what I — pictures and so on, they looked like eagle feathers, or they looked like a hawk feather, but I'm not an expert. I don't know.

41 Mr. Zielke was asked what inquiries were made of the various people who brought in feathered items. I find his answers did not even come close to amounting to an exercise of due diligence, or a mistaken but honest belief on his part. Many of the exhibits were not examined because they were encased in leather sheaths and he did not extract them. He said that this would be rude. He therefore had an option of not accepting the item if there was no way of properly examining it without dismantling it. As well, if he was no expert in making the determination as to whether the feathers were exuviated, he should have taken further steps with the Fish and Wildlife office to have them examined by their experts. He chose not to do that either. The only steps he took were to obtain the letter, Exhibit 34, which basically told him what the law was as well as what onus there was on him in dealing with such items. This alone should have alerted him to the dangers of dealing in such items that obviously needed to be properly examined by an expert. The onus is on the accused to exercise due diligence, and if that requires the use of an expert, then so be it. He then stated that he had Mr. Wiebe come and look at the items as they were displayed on his wall, but by that time they were already in the possession of the defendant corporation, either as purchased or pawned items. So this is after the fact. Mr. Zielke never made any contact with the local Fish and Wildlife officer for the reasons mentioned above.

42 In examining the whole of the evidence of Mr. Zielke in this regard, I do not find that he took all reasonable steps to avoid purchasing or taking in pawn exhibits that contained non exuviated feathers. As well, based on Mr. Zielke's evidence, it cannot be said that he reasonably but mistakenly believed that the exhibits that have been identified as being constructed with non-exuviated feathers, were exuviated. Based on all the evidence, he did not exercise due diligence, to say the least, in accepting for pawn or purchase, such items.

43 [Section 91 of the Wildlife Act](#) deals with vicarious liability and subsection 3 of that section states as follows:

Where it is proved to the satisfaction of the Court trying a case that a corporation has contravened any provision of this Act, whether or not it has been prosecuted for the contravention, an officer with executive authority or a director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the contravention by the corporation is also a party to and guilty of the offence relating to the contravention and is separately liable to the penalty provided for the offence.

44 That is the situation Brian Wayne Zielke finds himself in. He was a director of the company and based on all of the evidence, clearly directed, authorized, assented to, acquiesced in, or participated in the contravention of this statute by the corporation. He is therefore a party to and guilty of each of the offences that the corporation is guilty of.

Counts 1, 2 and 3

45 The Crown has not proved these three counts beyond a reasonable doubt as Gordon Court testified that although he was very doubtful that the feathers in exhibit 2 would be exuviated, he also acknowledged that it was possible that they were, even though that may have been extremely remote. The accused must be given the benefit of the doubt. Accordingly, counts 1, 2 and 3 are dismissed against both Bear Paw Pawn Ltd. and Brian Wayne Zielke.

Count 4

46 I am satisfied that exhibit 3, which relates to these three counts, was constructed of non exuviated feathers and are therefore wildlife. The evidence on count 4 is that the accused corporation purchased exhibit 3, along with exhibit 8 from Lars

Roan in approximately March 1998 for \$600.00. That constitutes **trafficking** and accordingly, both accused were found guilty on count 4.

Count 5

47 on the date that the search warrant was executed, Officer Hanson could not testify that exhibit 3 was for sale as he found no price tag on it. Accordingly, both accused are found not guilty on count 5.

Count 6

48 Both accused had exhibit 3 in their possession and accordingly both accused are found guilty of count 6.

Count 7

49 Exhibit 4 relates to Counts 7, 8 and 9. It was pawned to the defendant corporation by Clayton Saskatchewan for \$80.00 on December 22, 1997. Mr. Saskatchewan had until February 22 of 1998 to retrieve the item by paying back \$104.00 to the defendant corporation. That constitutes buying back or trading the exhibit. Exhibit 4 was determined to be wild life based on the testimony of Gordon Court as it was constructed of non exuviated feathers. Both accused are therefore found guilty on count 7.

Count 8

50 Exhibit 4 had a price tag of \$350.00 on it on April 17 when it was seized under the Search Warrant. Accordingly, it was possessed for the purposes of **trafficking**. Therefore, both accused are found guilty of count 8.

51 This Count 9 is an included offence to count 8 and a judicial stay of proceedings is entered on count 9, therefore, pursuant to the case of *R. v. Kienapple* [(1974), 15 C.C.C. (2d) 524 (S.C.C.)].

Counts 10, 11 and 12

52 Exhibit 5 relates to counts 10, 11 and 12. In final argument, the Crown submitted to the Court that reasonable doubt could exist here based on the evidence of Gordon Court in relation to whether exhibit 5 was constructed with exuviated or non exuviated feathers. I agree with his submission on this point based on the evidence of Gordon Court. Both accused are found not guilty of counts 10, 11 and 12.

Count 13

53 Exhibit 6 relates to counts 13, 14 and 15. Gordon Court's opinion was that this was constructed of non exuviated feathers. I accept his opinion evidence on this point. This item was pawned by Abel Lagrelle on November 4, 1997 for \$750.00. Mr. Lagrelle was able to retrieve it by December 5, 1997 if he paid back \$975.00 to the defendant corporation. The accused corporation did traffic in this exhibit on December 5, 1997 as that was the last date upon which Mr. Lagrelle could have purchased back this exhibit by paying \$975.00 for it. This constitutes **trafficking**. Accordingly, both accused are found guilty of count 13.

Count 14

54 Officer Hanson found no price tag on this item on April 17, 1998 when he seized it. Therefore, the Crown has not proved beyond a reasonable doubt that on or about that date, the defendants possessed it for the purposes of **trafficking**. Accordingly, both defendants are found not guilty on count 14.

Count 15

55 I am satisfied beyond a reasonable doubt that both accused were in possession of exhibit 6 and both accused are found guilty of count 15.

Counts 16 and 17

56 Exhibit 7 relates to counts 16, 17 and 18. Gordon Court testified that this is a portion of a dead bird, it is not just feathers. Therefore, it constitutes wild life. This exhibit was pawned by David Crier on November 4, 1997 for \$50.00 to the defendant corporation. He could have retrieved it on or before December 5, 1997 by paying back the defendant corporation \$65.00. With respect to count 16, that constitutes **trafficking** by both accused. They are both found guilty on count 16.

57 With respect to count 17, Officer Hanson testified that on April 17, 1998 when he seized this item, it had a price tag of \$199.00 on it. Therefore, both accused are found guilty on count 17.

Count 18

58 this is an included offence to count 17 and once again, the Kienapple provision applies and a stay of proceedings is entered on count 18.

Count 19

59 The remainder of the exhibits apply to count 19 and based on the evidence of Gordon Court, a number of the remaining exhibits are constructed from non exuviated feathers and accordingly, are wild life. All such items were in the possession of the defendant corporation on April 17, 1998 when they were seized. Accordingly, both accused were found guilty of count 19.

Defendant convicted.