

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Martin,***  
2005 BCCA 355

Date: 20050624  
Docket: CA31544

Between:

**Regina**

Respondent

And

**Bryan Martin**

Appellant

Before: The Honourable Chief Justice Finch  
The Honourable Madam Justice Huddart  
The Honourable Mr. Justice Lowry

T.R. Buri, Q.C.

Counsel for the Appellant

J.C. Birnie

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia  
May 3, 2005

Place and Date of Judgment:

Vancouver, British Columbia  
June 24, 2005

**Written Reasons by:**

The Honourable Chief Justice Finch

**Concurred in by:**

The Honourable Mr. Justice Lowry  
on Counts 1 and 3

**Dissenting Reasons on Count 3:**

The Honourable Madam Justice Huddart (P. 12, para. 32)

**Reasons for Judgment of the Honourable Chief Justice Finch:**

[1] Mr. Martin appeals his conviction on two offences charged under the **Wildlife Act**, R.S.B.C. 1996, c. 488. The offences alleged arise from two separate events. The facts underlying both charges are set out in an agreed statement of facts. The issues are the interpretation of two definitions in the **Wildlife Act**, namely “guide” and “resident.”

[2] The appellant was charged under Count 1:

Bryan MARTIN, between the 25<sup>th</sup> day of August 1999 and the 1<sup>st</sup> day of September 1999, at or near Fort Ware, in the Province of British Columbia, did unlawfully guide for game without being the holder of a guide outfitter licence contrary to s. 48(1)(a) of the Wildlife Act, R.S.B.C., 1996, C. 488, as amended.

[emphasis added]

[3] “Guide” is defined in s. 1 of the **Act** to mean:

a person who, for compensation or reward received or promised, accompanies and assists another person to hunt wildlife ...

[emphasis added]

[4] It is admitted that the appellant did not hold a guide outfitter’s licence. The issue is whether the appellant was acting as a guide at the time in question. The learned provincial court judge convicted the appellant on this count, and he appealed to the Supreme Court of British Columbia. Mr. Justice Holmes described the basis of the conviction in Provincial Court as follows:

[25] The circumstances from which the charge arose were that Mr. Winjun contracted with Canadian Mountain Outfitters for a guided

hunting trip. It was intended by Canadian Mountain Outfitters that Mr. Birton, a pilot and licenced guide, would guide him. Mr. Birton flew Mr. Martin [the appellant] and Mr. Winjun to a lake in the hunt area. Mr. Birton left to attend to other matters and was to return to guide the hunt. Mr. Birton however became ill and went back to the main camp. Bad weather then prevented Mr. Birton returning to the lake for six days. Mr. Winjun wanted to continue the hunt when it was unknown if Mr. Birton would return, or if so, when, to supply guiding services.

[26] Mr. Winjun spent the six days seeking a mountain goat that could be stalked and killed with his bow and arrow. Unable to get a mountain goat with bow and arrow, he asked Martin to give him a rifle. Mr. Martin supplied a rifle to Mr. Winjun, they stalked a goat and Winjun shot it. Mr. Martin skinned and butchered the goat. Mr. Martin throughout supplied Mr. Winjun with advice as to the size and quality of the candidate goats that were hunted.

[27] The learned Provincial Court judge found that the appellant assisted Winjun to hunt by providing him with the rifle that he then used to kill the mountain goat. The hunt was payment for services Winjun had rendered to Martin's company. Mr. Martin had received an indirect benefit as owner of the company and the appellant placed himself in the position of the guide originally intending to assist Winjun. Mr. Martin performed services that fulfilled the company's obligation to Mr. Winjun.

[5] Mr. Justice Holmes took the view that the offence charged was a "strict liability" offence, and that the defence of "due diligence" was open to the appellant.

He reasoned as follows:

[35] In my view, the phrase "for compensation or reward" in the definition of "guide" in relation to an offence under s.48 of the *Wildlife Act* does not denote the need for the Crown to prove Martin had the subjective intention of receiving compensation in return for his personal services on the hunt. What is required is that it is established that the compensation received does relate to the guiding service that was rendered. The hunting trip that Winjun was to receive and for which he had given value was to be with a licenced guide. Martin was acutely aware of the need that Winjun hunt only with the services of a licenced guide and that supply of a guide was a provision of the contract. However, when the licenced guide was not available, Martin agreed to continue the hunt, in his assistance he assumed functions associated

to that of a licenced guide, and filled a void caused by the absence of that guide. The performance of the contract for which the company was obliged and for which Martin had been indirectly compensated was continued. Martin's role was no longer as an unpaid hunting companion for a person accompanied by a licenced guide. He became a substitute for the guide services that the company was under obligation to provide, a service he was not licenced to provide.

[36] The appellant did not make out a defence of due diligence. Absent a licenced guide, the hunt as contracted for could not legally proceed. Martin did not end or suspend the hunt until a replacement guide was provided. He both acquiesced and facilitated its continuation. In doing so, he acted, at least in part, as a guide and certainly did not act with due diligence to avoid a breach of the *Act*.

[6] In my view, the learned summary appeal court judge did not err in reaching this conclusion. The use of the word "for" in the context of "for compensation or reward ..." indicates that there must be a relationship between the compensation paid and the guiding services provided. In other words, the compensation must have been received in return for a guided hunting trip, and not for something else. It does not however require that the Crown establish that the recipient of the payment had the "subjective intention" of receiving compensation in return for his personal services. Although evidence with respect to intention may be relevant, it is not determinative.

[7] In this case, on the agreed facts, the Crown did establish a purposive connection between the compensation received and the assistance the appellant provided to the hunter, Mr. Winjun. Mr. Martin did not establish a defence of due diligence.

[8] I would dismiss the appellant's appeal from the summary conviction appeal court's affirmation of his conviction in Provincial Court on Count 1.

[9] The second appeal is from the appellant's conviction entered under Count 3:

Bryan MARTIN, between the 1<sup>st</sup> day of August, 2001 and the 19<sup>th</sup> day of October, 2001, at or near Fort Ware, in the Province of British Columbia, did unlawfully hunt for wildlife without holding a hunting licence issued to him, contrary to Section 11(1)(a)(i) of the Wildlife Act R.S.B.C., 1996, C. 488.

[10] On June 15, 2001, the appellant applied for a hunting licence for the 2001 hunting season. In the application he certified he was a "resident" of British Columbia, as defined in the **Wildlife Act**. A licence was issued to him based on that application.

[11] Resident is defined in the **Act**:

"resident" means

(a) a person who

(i) is a Canadian citizen or a permanent resident of Canada, whose only or primary residence is in British Columbia, and

(ii) has resided in British Columbia for 7 months in the 12 months immediately before making an application under this Act or the regulations or doing another thing relevant to the operation of this Act, or ...

[emphasis added]

[12] Section 105 of the **Wildlife Act** provides:

In a prosecution for an offence under this Act or the regulations, if it is alleged that the defendant was not a Canadian citizen or a resident, the onus is on the defendant to prove that he or she was a Canadian citizen or a resident at the time of the offence.

[13] Paragraphs 43 and 44 of the Agreed Statement of Facts say:

43. Mr. Martin had been physically present in British Columbia for a total of 143 days during 7 of the 12 months before June 15, 2001, and he had been traveling on business in the US during most of the other time that he was outside the province during those 12 months.

44. In particular, Mr. Martin had been physically present in British Columbia on at least the following dates:

June 13 – 30, 2000  
all of July, August, September, October, 2000  
December 6 – 8, 2000  
June 13 – 15, 2001

[14] The learned provincial court judge held on those admitted facts that the appellant satisfied the definition of “resident,” and that the licence he obtained on 15 June 2001 was therefore valid.

[15] On appeal to the B.C. Supreme Court, the learned summary conviction appeal court judge held that the provincial court judge’s application of “resident” to the admitted facts was in error. He said:

[12] The definition of “permanent resident” in the *Wildlife Act* contemplates that one may have a primary residence in British Columbia which does have a qualitative aspect but that is not of itself sufficient, and a quantitative test of residency in the province of 7 months is a further requirement to gain the right to hunt. It is clear that persons who absent themselves for more than 5 months in the year

preceding a licensing application are not accorded the privilege of hunting. There is compelling logic that it is a significant physical presence in the province that the legislation seeks to require. There is no basis to suggest a rationale for some minimal presence in each of 7 months of the preceding 12. Why would a residency restriction permit someone who was physically present in the province only a day or two in each of the 7 months preceding a licence application the privilege to hunt, but deny a licence to a resident who was physically absent from the province for only one day in each of 6 months of the preceding year?

[13] In my view, logic compels the view that it is only a quantitative aspect of physical presence in the province that is intended in the use of the term “has resided in British Columbia” in s.1(a)(ii) and a substantial physical presence that is the intended standard.

...

[22] I find the evidence therefore did not establish that the respondent, Martin, was physically present in the province for 7 of the 12 months preceding his application for a hunting licence. His certification as to residency was inaccurate, and as in *Hrelja*, pursuant to s.82(2) the licence was issued contrary to the Act. The appeal is allowed, and a verdict of guilty is entered on Count 2.

[16] On appeal to this court, the appellant contends that the learned summary conviction appeal court judge erred in giving a solely “quantitative” meaning to the words

... for seven months in the twelve months immediately before making an application ...

He says the provincial court was correct in ascribing to these words a qualitative or subjective aspect that took into account the appellant’s settled intention concerning residence in addition to the quantitative aspect requiring the appellant’s physical presence in the province.

[17] There are three aspects to the definition of “residence” in this **Act**. To be a resident the person must be:

1. A citizen or permanent resident of Canada;
2. Whose primary residence is British Columbia; and
3. Who has resided in British Columbia for seven months in the twelve months immediately preceding the application for a licence.

[18] The Crown concedes that the evidence established Mr. Martin had a primary residence in the province. And I did not understand the Crown to dispute that Mr. Martin was also a permanent resident of Canada. The issue is whether he “had resided in British Columbia for seven months” of the twelve preceding months.

[19] The appellant contends that the third part of the definition of “resident” has a subjective aspect to it. The appellant says the “seven in twelve months” criterion cannot be tested solely on the basis of the appellant’s physical presence in the province during the seven months relied on but also imports the appellant’s intention to be a resident during the times when he says he “has resided” in the province. At best, the appellant contends that the statutory definition is ambiguous and that as a penal statute, the **Act** must be interpreted in a way most favourable to him.

[20] The Crown says, applying ordinary principles of statutory interpretation, that all words of the definition must be given meaning. It says that to make sense of the distinction between “primary residence” and “residing in” the latter requires physical presence. Any other interpretation of “residing in” collapses any real difference

between the requirement to have one's primary residence in the province and also to reside in the province for the requisite seven month period. It says the definition would effectively become "a permanent resident of Canada whose primary residence is in British Columbia."

[21] In my respectful opinion, the summary conviction appeal court judge did not err in holding that, in the context of this section, and having in mind the purpose of the statute as a whole, the phrase "has resided" contains no element of subjective intention, but is to be evaluated objectively on the basis of "physical presence."

[22] The question then is, what physical presence is sufficient to meet the test of residence "for seven months"? To repeat paragraph 44 of the Agreed Statement of Facts:

In particular, Mr. Martin had been physically present in British Columbia on at least the following dates:

June 13 – 30, 2000  
all of July, August, September, October, 2000  
December 6 – 8, 2000  
June 13 – 15, 2001

[23] Residence "for 7 months" indicates residence for or during a period of time. The word "month" must take its meaning from the phrase "the 12 preceding months." "Month" in this context can only mean a calendar month, whether of 31, 30, 29, or 28 days duration.

[24] The appellant contends that physical presence in B.C. for any part of a month should count as residence for a month. So he contends that his presence in B.C. for

three days in December 2000 and presence for three days in June 2001 should each count as residence “for a month” in calculating his 7 of 12 months residency. If that were so, one might ask whether one day or one hour in each of the 7 months might satisfy the “has resided” in B.C. requirement. Such an interpretation in my view does violence to the language of the section, and is untenable.

[25] Similarly, one need not be physically present in British Columbia every day or every hour of a month in order to “have resided” in the province for that month. If that were the case, one could not obtain a hunting licence if one were away from the province for only one day a month for six months of the year (a mere six days per year).

[26] Somewhere between these two extremes lies the correct meaning of “resident” for the purpose of this Act. I agree with the summary conviction appeal court judge (at para. 12) that “There is compelling logic that it is a significant physical presence in the province that the legislation seeks to require.”

[27] On the agreed facts there is no doubt that the appellant resided in British Columbia for the months of July, August, September and October, 2000. But he was in British Columbia for only 17 of the 30 days in June 2000. And in both December 2000 and June 2001 he was present in B.C. for only three days each month.

[28] Leaving aside the month of June 2000, I am satisfied that the appellant’s presence for three days in each of December 2000 and June 2001, are insufficient to show that he resided here for each of those months. Thus the appellant has not

met the requirement of having resided in British Columbia for seven of the twelve previous months.

[29] In my respectful opinion, the learned summary conviction appeal court judge did not err in his interpretation of the definition of “resident” or in its application to the agreed facts.

[30] I would dismiss the appeal against conviction on this count as well.

[31] In the result, I would dismiss the appeal.

“The Honourable Chief Justice Finch”

I Agree:

“The Honourable Mr. Justice Lowry”

**Reasons for Judgment of the Honourable Madam Justice Huddart:**

[32] In her reasons for granting leave to appeal convictions on charges of unlawfully guiding for game without being the holder of a guide outfitter licence and hunting without holding a valid licence, Southin J.A. noted the importance generally, and to the appellant specifically, of the interpretation of the definitions of “guide” and “resident” necessary to the application of the provisions of the **Wildlife Act**, R.S.B.C. 1996, c. 488, under which the charges were laid. The convictions may affect the appellant’s livelihood. They render him subject to discipline proceedings that could result in the loss of his guide-outfitter licence.

[33] While it is not appropriate for a judge to comment on the exercise of prosecutorial discretion, those responsible for the discipline of the appellant will be able to take the underlying exceptional facts into account in their assessment of the effect of these convictions on that licence.

[34] With respect to the conviction for unlawfully guiding under s. 48(1)(a) of the **Act**, I agree with the reasoning of the Chief Justice. The plain facts are that the appellant accompanied and assisted his company’s client to hunt a mountain goat for compensation, and that, at the time, he did not have a guiding licence. He does not suggest he made out a due diligence defence. His point on appeal was that the compensation paid to his company “was not made for the purpose of having [him] accompany and assist the non-resident”, but for the purpose of having a licenced guide do so. In making this submission, the appellant suggests the interpretation of the summary conviction appeal court judge would subject shareholders of

companies operating guiding businesses to sanction under s. 48 if they accompanied a non-resident hunter on a guided hunt during which they provided assistance. I cannot accept the logic of that submission. The essential finding of fact here is that the appellant assumed the role of guide in the absence of a licenced guide. If one hunter assists another during a hunt guided by a licenced guide, the compensation will have been received for the services of that licenced guide, not for whatever help the shareholder might have provided to his companion on the guided hunt. I hold that to be the effect of the Chief Justice's approach and support it.

[35] The conviction for unlawful hunting turns on the construction of the definition of "resident" in s. 1 of the **Wildlife Act**. The problem that definition poses to a person wishing to hunt in British Columbia is well-evidenced by the Crown's submissions to the trial judge and the summary conviction appeal court judge, and their reasons. Each exposes a different understanding of the definition. This may be because terms of common usage, like "resident", and "has resided", have no precise and clear meaning. Yet they are used in different contexts to express a concept of vital importance to many regulatory, taxation and other statutes where a person's status determines their rights and obligations under them.

[36] In the absence of a clear and precise definition of residence, Rand J. in **Thomson v. The Minister of National Revenue**, [1946] S.C.R. 209 at 225, an oft-quoted leading authority, wrote that residence is:

... [C]hiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in

the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited...

The fluidity of this general concept is exemplified by *Denise M. Lee v. The Minister of National Revenue* (1990), 90 D.T.C. 1014 (T.C.C.), where Teskey T.C.J. identified 34 non-exclusive indicia of residency for Canadian income tax purposes.

[37] On this appeal we are concerned with this definition of “resident”:

"resident" means

- (a) a person who
  - (i) is a Canadian citizen or a permanent resident of Canada, whose only or primary residence is in British Columbia, and
  - (ii) has resided in British Columbia for 7 months in the 12 months immediately before making an application under this Act or the regulations or doing another thing relevant to the operation of this Act...

The Legislature amended this definition in April 2004 to introduce more clarity to the second element, possibly in response to the reasons of the trial judge. It now reads:

- (ii) has been physically present in British Columbia for the greater portion of each of 6 calendar months out of the 12 calendar months immediately preceding the date of making an application under this Act or doing another thing relevant to the operation of this Act...

[38] In the circumstances that existed before this amendment, I do not find it surprising that the appellant certified himself as a “resident” when he applied for a hunting licence on 15 June 2001. It was entirely reasonable for a person not well acquainted with the niceties of statutory interpretation and the need to give every word a meaning, to have done so. When the appellant applied for a hunting licence,

he was effectively seeking to renew a licence he had held the previous year. He was a permanent resident of Canada with his primary residence in British Columbia. He had spent some time in the province in seven of the preceding 12 months, whether those “months” were considered by the calendar or more colloquially as month-long periods counting backwards from the date of his application to 15 June 2000. Most of his time outside the province was spent in pursuit of clients for his guide-outfitter business.

[39] What the appellant may not have understood is that residency requirements vary from statute to statute and within statutes. My review of provincial legislation suggests that anyone who must construe “resident” or its relatives would be well-advised to seek a legal opinion before certifying residency status, and never do so without considering carefully the words of the relevant provision and definition.

[40] The *Wildlife Act* appears to be the only statute in British Columbia that required an individual, for purposes of meeting residency requirements, to prove both that British Columbia is his or her “primary residence” and that he or she “has resided” in the province for a particular number of months. The difficulty, of course, is that “has resided” to a reasonable person could include a qualitative aspect similar to that to which regard is had in determining “primary residence”. Where a person “has resided” in common parlance will normally include a significant element of subjective intention. “Where do you live? I live in B.C.” The response may ignore an absence of several months caring for an ill parent or child, traveling by back-pack around the world, taking a computer course, or any of a myriad of other reasons for absences that cumulatively may total more than five months annually, including for

business purposes. The qualifier “I’ve been away a lot in the last year”, however, may not suggest to a person called upon to certify B.C. residency, even one aware of the precise words of the definition we are charged with interpreting, that those absences meant he was no longer a “resident” or that he no longer “resided in” British Columbia. There is nothing in the definition, as worded prior to the amendment, to specify physical presence was required for any particular period of time during the seven months. Common sense precludes any thought the Legislature would have intended to exclude Canadian citizens or permanent residents whose only or primary residence is British Columbia, who seek a hunting licence from leaving the province even briefly during those seven months.

[41] The words “resides,” “has resided,” “residing in” or “resident” are ambiguous terms whose meaning will vary with their context. The question of residency is one of fact. However, authorities that have considered these general terms agree that physical presence cannot be equated with residency nor can physical absence be equated with non-residency. None to which we were referred has considered a provision similar to the definition in issue.

[42] I agree with the Crown and the Chief Justice that, where the Legislature includes both “primary residence” and “has resided in” as requirements a person must meet to obtain statutory benefits as a “resident”, both parts must be considered and given meaning. However, I am not persuaded it is necessary to read “has resided in” to require significant physical presence without regard to subjective-qualitative factors in order to give those words meaning. I cannot accept the Crown’s premise that to consider any subjective-qualitative aspect is to collapse the

two requirements, so that the definition becomes effectively “a permanent resident of Canada whose primary residence is in British Columbia”. Quite simply, I do not see the two requirements as mutually exclusive.

[43] Physical presence or absence will be an important feature of the analysis as to whether a person “has resided in” this province. But it is not enough, nor can it be the controlling feature. If it were, the Legislature would have said so, as it now has in the **Wildlife Act**, and as it did in the definition of “resident” in the **Medicare Protection Act**, R.S.B.C., 1996, c. 286. It would not have enacted a provision that uses a common expression about the interpretation and application of which reasonable people may differ reasonably. When the Legislature chooses to use the general term “has resided in”, it must anticipate and thus intend that regard be given to indicia commonly considered in determining residency. These indicia include subjective intention and other qualitative factors. At the very least, regard must be had to the reason for any absence from the province, and that factor balanced with the indicia that led to the finding of primary residency. For example, six months spent in a secondary residence in another province or country would be powerful evidence to meet a claim to have “resided in” the province for seven of the preceding 12 months. But it would not necessarily be inconsistent with a finding that British Columbia is the same person’s primary residence.

[44] In my view, the summary conviction appeal court judge erred when he held (at para. 10 of his reasons) that the seven out of 12 month residency requirement was intended to be solely quantitative. Important to this conclusion was his consideration of the object of the **Wildlife Act** and the purpose of the definition in

issue. He saw the seven month requirement as “the quantitative restriction imposed upon a person who first meets the earlier qualitative residency of the definition of ‘permanent resident of Canada’ whose only or primary residence is British Columbia” (at para. 14) and commented that the use of a qualitative interpretation of the definition “leads to an inability to have a reasonably understood standard for entitlement that can be understood and determined readily by applicants who are being asked to certify their status when making application for a licence” (at para. 15).

[45] I acknowledge these are important factors to be considered in coming to an understanding of legislative intention. This is because a statute must be interpreted to ensure the attainment of its objects and common words take on specific meaning only in the context of their use. But I cannot accept either proposition. The first ignores the quantitative aspect of the “primary residence” requirement. The second is a consequence of the Legislature’s choice of language, to be regretted as it was by the trial judge, but not to be laid at the feet of an applicant for a licence who responds reasonably to the words of the definition of those who qualify.

[46] The trial judge also paid significant attention to the purpose of the **Act** and the function of the residency requirement in concluding that the appellant had established he qualified as a resident within the definition. She saw the second element as having both a qualitative and quantitative dimension, with the quantitative dimension being fulfilled by presence in the province in at least seven of the preceding 12 months. At paras. 30 and 31 of her reasons, she explained:

... If I take the phrase “for 7 months in the 12 months immediately preceding has resided”, that means that the person has had their residence in British Columbia for seven months, that he has returned to that residence for seven months of the twelve months in that year, that we do not have somebody who has been gone for eight months somewhere else, and the seven months makes it a majority of the months.

... I think that having a presence in the community for ‘7 months of the 12 months immediately preceding it’ was what was intended, at least that is my interpretation of it. That there was a presence in British Columbia, and that it can be answered by that physical quality of being here, and that is where we come to the quantitative and qualitative part.

[47] The teleconference malfunctioning during which the trial judge gave her reasons made the record of them somewhat disjointed, but it is clear she was influenced by the fact she was interpreting language establishing a strict liability offence. She saw her task as choosing from possible interpretations the one that made most sense in the context of a statute designed to regulate hunting for the purpose of conservation.

[48] I prefer the approach of the trial judge. It serves the purpose of the legislation and makes sense of all the words of the definition. It respects the purpose of the statute and of the definition. It acknowledges the particular use of the definition in the creation of a regulatory offence, to which lack of guilty intent is not a defence.

[49] The object of the definition as applied to a hunting licence is to give non-guided hunting rights only to British Columbia residents who have resided in the province during seven of the 12 months immediately preceding the making of an application for a licence. The presence sufficient to establish the applicant has met that requirement is best seen as a question of fact to be determined by a trial judge

who can ask whether the applicant's certification of residency is supported on an objectively reasonable view of the evidence provided to the court. It is not for the court to establish criteria to make a statutory definition more certain when the Legislature chose a common term to serve its purpose, a term it has used with and without modifiers in many other statutes. It is for the court to assess the relevant criteria and determine whether the test has been met. A trial judge is in the best position to make that assessment, whether she is determining the first or second element of the test.

[50] Having found no error in the trial judge's assessment, I would allow the appeal from the conviction for unlawful hunting, set aside the conviction, and restore the acquittal at trial on that count.

“The Honourable Madam Justice Huddart”