Most Negative Treatment: Distinguished
Most Recent Distinguished: R. v. Campeau | 2011 SKPC 168, 2011 CarswellSask 800, 386 Sask. R. 261, 98 W.C.B. (2d) 553 | (Sask. Prov. Ct., Nov 15, 2011)

2009 ABPC 296
Alberta Provincial Court

R. v. Cardinal

2009 CarswellAlta 1559, 2009 ABPC 296, [2009] 4 C.N.L.R. 276, [2009] A.W.L.D. 4031, [2009] A.W.L.D. 4081, [2009] A.W.L.D. 4087, [2009] A.W.L.D. 4105, [2009] A.W.L.D. 4106, [2009] A.J. No. 1083, 46 C.E.L.R. (3d) 146, 470 A.R. 57, 85 W.C.B. (2d) 72

Her Majesty the Queen and Ernest Cardinal and William James Cardinal

P. Ayotte Prov. J.

Heard: June 26, 2009; August 28, 2009
Judgment: October 5, 2009
Docket: Fort Saskatchewan 071127021P1

Counsel: Ms D. Drissell, Mr. T. Rothwell for Crown
Ms Priscilla Kennedy for Defendants

Subject: Natural Resources; Public; Evidence; Criminal
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.b Fishing
V.2.b.iv Licences
Criminal law
XXII Sentencing procedure and principles
XXII.4 Purposes of sentencing
XXII.4.b Deterrence
Evidence
VI Witnesses
VI.4 Credibility
VI.4.a Duty of judge in assessing
Natural resources
I Fish and wildlife
I.5 Offences
I.5.o Sentencing
I.5.o.i Fines
Natural resources
I Fish and wildlife
I.5 Offences
I.5.o Sentencing
I.5.o.iii Imprisonment

2009 ABPC 296, 2009 CarswellAlta 1559, [2009] 4 C.N.L.R. 276, [2009] A.W.L.D. 4031...

Headnote

Natural resources --- Fish and wildlife — Offences — Sentencing — Imprisonment

Following undercover operation, aboriginal accused EC was convicted of six counts of unlawfully selling fish and of one count of attempting to commit same offence — Crown sought term of imprisonment of four to six months and three years of probation for EC plus $7,500 fine — EC sentenced to imprisonment for 90 days on each count concurrent, plus three years' probation — Deterrence, both specific and general, is paramount principle to be applied in sentencing for these kinds of offences — Deterrence was especially important in province where resource is fragile and important both as food source for native people, and as recreational and commercial option — Defence counsel's implied proposition that s. 718.2(b) of Criminal Code mandated fines in this case because that had been sanction of choice in most other reported cases was rejected — EC's conduct involved numerous transactions over 18 months, and number of fish involved totalled 509 — It was especially aggravating factor that he used his treaty rights to facilitate what he knew was illegal activity — He showed complete contempt for both conservation of fish he was netting and for any interpretation of his fishing rights other than his own — His involvement in offences was for sole purpose of increasing his income — Nothing in wording of s. 718.2(e) of Code would support sanction other than imprisonment in his case by reason of his aboriginal status — Mitigating factor of remorse was completely absent — Fit sentence, considering all of aggravating circumstances involved and that there were no mitigating or other factors which would justify different sanction, should include term of imprisonment.

Aboriginal law --- Aboriginal rights to natural resources — Fishing offences — Licences — Unlawfully selling fish

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Natural resources --- Fish and wildlife — Offences — Sentencing — Fines

Following undercover operation, aboriginal accused EC was convicted of six counts of unlawfully selling fish and of one count of attempting to commit same offence — His son WC was convicted as party to one of selling offences — WC sentenced to $2,300 fine — Deterrence, both specific and general, is paramount principle to be applied in sentencing for these kinds of offences — Deterrence was especially important in province where resource is fragile and important both as food source for native people, and as recreational and commercial option — Amount of fine proposed by Crown for WC was inappropriate — On evidence, WC did nothing more than help load fish during one transaction and receive some small reward for that effort — It could not be concluded that he actively assisted his father throughout 18 months during which EC committed offences in question or that he was provably involved in extensive **trafficking** himself — Given that deterrence is important, even for those who help others to deplete resource illegally, fine of $2,300 including victim fine surcharge was imposed, in default of which three months' imprisonment and probation for three years on same conditions as imposed on EC.

Evidence --- Witnesses — Cogency — Credibility — Duty of judge in assessing

Evasiveness in cross-examination is factor to be taken into account in assessing credibility of story told by witness and in assisting trier of fact to get sense of kind of person witness really is.

Criminal law --- Sentencing — Principles — Deterrence — General

Deterrence attempts to discourage repetition of illegal conduct by offender or others inclined to do same thing — Its purpose is preventative as well as punitive.

Table of Authorities

Cases considered by *P. Ayotte Prov. J.*:

R. v. Couillonneur (2002), 2002 SKPC 60, 2002 CarswellSask 434, 225 Sask. R. 44 (Sask. Prov. Ct.) — followed

R. v. Gladue (1999), 1999 CarswellBC 778, 1999 CarswellBC 779, 23 C.R. (5th) 197, 238 N.R. 1, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, 171 D.L.R. (4th) 385, 121 B.C.A.C. 161, 198 W.A.C. 161, [1999] 2 C.N.L.R. 252 (S.C.C.) — followed

R. v. Kinghorne (2002), 2002 CarswellNB 557, 2002 NBPC 32 (N.B. Prov. Ct.) — referred to

R. v. Lamouche (2000), 2000 ABQB 461, 2000 CarswellAlta 707, 267 A.R. 347, 86 Alta. L.R. (3d) 330 (Alta. Q.B.) — followed

R. v. Rideout (2005), 2005 CarswellNS 409, 2005 NSCA 122, 236 N.S.R. (2d) 354, 749 A.P.R. 354 (N.S. C.A.) — referred to

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

s. 718(a) — referred to

s. 718.1 [en. R.S.C. 1985, c. 27 (1st Supp.), s. 156] — referred to

s. 718.2(b) [en. 1995, c. 22, s. 6] — considered

s. 718.2(e) [en. 1995, c. 22, s. 6] — considered

SENTENCING of accused convicted of six counts of unlawfully selling fish and one count of attempting to commit same offence, and of accused convicted as party to one of selling offences.

***P. Ayotte Prov. J.*:**

1 Having pleaded not guilty, Ernest Cardinal was convicted on March 27, 2009 of six counts of unlawfully selling fish and one count of attempting to commit the same offence. His son, William James Cardinal, was convicted at the same time as a party to one of the selling offences. The case was then adjourned to June 26th for submissions to sentence and then again to August 28th at the request of the Defendants to allow them to attend to pressing family matters.

2 The parties take widely disparate positions on sentence. The Crown seeks a term of imprisonment of four to six months together with a three-year term of probation for Ernest Cardinal and a $7500 fine plus the same probationary term for William. Defence counsel submits that on the basis of the decided cases either a conditional discharge or a fine on each count is appropriate for the father and, given his limited involvement, an even smaller fine for his son. In the particular circumstances here I agree with the Crown that a term of imprisonment and probation is the appropriate sanction for Ernest Cardinal unless mitigating and/or other relevant factors would justify a different sentence.

3 The prior decisions upon which the parties rely make it clear that deterrence, both specific and general, is the paramount principle to be applied in sentencing for these kinds of offences: see e.g. - *R. v. Rideout*, 2005 NSCA 122 (N.S. C.A.); *R. v. Kinghorne* [2002 CarswellNB 557 (N.B. Prov. Ct.)], in the defence submission. The real question is what form deterrence should take. Ernest Cardinal says that with very few exceptions fines, admittedly sometimes very high ones, have been the means chosen to express that principle and supports his stance with three volumes of authorities which his counsel assures me represent all the reported cases she could find on the subject. Accordingly, relying on s. 718.2 (b) of the *Criminal Code*, he takes the position that, at most, fines should also be used in his case.

4 While conceding that only one of the Alberta decisions to which she has referred me resulted in a gaol sentence, Crown counsel advocates that sanction in Ernest Cardinal's case for a number of reasons. She points first to the fact that his conduct involved numerous completed transactions and another attempted one over a significant period of time, that is, some 18 months. She notes that the number of fish involved is large, totalling 509 in all. She reminds me that Cardinal's expressed concern that the undercover agent keep their dealings quiet shows that he was well aware that his actions were illegal. She says that his purchase and possession of a 4" mesh net, when even his domestic treaty licence only allowed for a 51/2" mesh, shows a

complete disregard for both the conservation of the species he was poaching and the law itself. She cites his use of his treaty rights as a cover for his activities as a further aggravating factor. Finally, she relies on his conversations with Agent #288 as evidence that he had a history of engaging in this illegal activity even before he was ensnared by this undercover operation. That inference is also supported by the uncontradicted evidence at trial that Cardinal's was one of the names specifically mentioned in the complaints that were received by Fish & Wildlife which led to the implementation of the operation in the first place.

5 I begin by noting that s. 718.2 (b) of the *Criminal Code* cannot be used to support the implied proposition in defence counsel's submission that fines are for all intents and purposes mandatory in this case because that has been the sanction of choice in most of the other reported cases. The principle outlined in that sub-section is simply *one* of those which must be taken into account in arriving at an appropriate sentence. It was never intended to bind one court's discretion because other courts have concluded that a particular kind of sentence was appropriate in the specific cases with which they were dealing. Every case must be decided on its own facts, which is acknowledged in s. 718.1 of the *Criminal Code* by making it a *fundamental principle* that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

6 The difficulty in applying s. 718.2(b), other than in the case of co-accused convicted of committing the very same offence, is reflected in the wording of the sub-section itself which says that "a sentence should be *similar* to sentences imposed on *similar offenders* for *similar offences* committed in *similar circumstances*". The existence of a wide spectrum both of offenders and factual situations in which they operate will make it rare when a court will have before it a case which is truly on "all fours" with some other reported case. When one adds to that the fact that in many cases the Crown will have several charging options arising out of the same set of facts, the application of the sub-section becomes even more problematic. Given the four-layer "similar" sandwich offered by the sub-section, I have concluded that Parliament intended that this principle be applied in a broad way, except perhaps in the case of those co-accused mentioned above, and that in any event it be subject always to the fundamental principle set out in s. 718.1. I draw support for that conclusion from these words of Burrows J. at para. [19] of his judgment in *R. v. Lamouche*, 2000 ABQB 461 (Alta. Q.B.) where the same argument was made in the context of **trafficking** in wildlife offences:

> I do not accept that proposition. The Legislature has made imprisonment an option available to the trial judge. It clearly is within the discretion of the trial judge to determine that the circumstances of the particular offence and offender are such that the last resort, a term of imprisonment, is a fit sentence. There should be no interference with such a determination on the basis of disparity with sentence imposed in other cases, unless it is very clear that the disparity was not justified. I was given no information upon which to compare the circumstances of this offender and his offences to those of offenders who have previously been fined only. I am unable to conclude that the disparity was inappropriate.

The legislation in question in this case provides a maximum penalty of $100,000 and/or imprisonment for one year for each of the offences involved and thus makes imprisonment an available option.

7 Applying that approach to defence counsel's "similarity" submission, I note first that the majority of the cases upon which she relies concern offences other than the **trafficking** in fish which underlies these charges, with the special enforcement problems that offence presents. Most of those decisions also involve cases in the maritime provinces involving the regulation of the commercial fishery in cases where the defendants were often properly licensed fishermen working outside the restrictions contained in the licenses under which they operated. In other words they are only superficially similar to this case. As well, virtually all of them involved guilty pleas, a significant factor which is not present here, and many of them also involved joint submissions. Finally, I observe that in a number of those cases the amount of the fine imposed is somewhat misleading because the sentence also included forfeitures, including the proceeds of sale of the catch itself, making the actual penalty imposed significantly heavier than the fine amount would lead the casual observer to believe. In short most of those cases are of little assistance beyond confirming that deterrence is the primary sentencing factor involved.

8 Nonetheless, there still remains the question whether on the facts here imprisonment is a fit sanction for Ernest Cardinal. In support of that position the Crown called Mr. Paul McMahon to explain the specific dangers to the preservation of the Alberta fishery posed by the offences Mr. Cardinal has committed. Since 2006 Mr. McMahon has been the Fish and Wildlife Manager of the area which includes Beaver Lake, where the fish in this case were netted. In all, he has spent some 27 years in fisheries

management and has been directly involved in one capacity or another with northeastern Alberta since 1999. He has been qualified as an expert in his field in both the Provincial Court and the Court of Queen's Bench of this province. I found his responses to the questions put to him in both examination-in-chief and cross-examination to be objective, honest and credible.

9 Mr. McMahon began by explaining that by reason of the cold climate and short summers in the northern part of Alberta, the fish stocks there take longer to mature and as a result are very vulnerable to heavy pressure. He demonstrated the special problems we face as a province by comparing this jurisdiction to our neighbours in Saskatchewan and Manitoba. It is a geographical fact that Alberta has considerably less water than those two. That has resulted in increased pressure here on the fish resource. He supported his position by reference to surveys which show that in Saskatchewan and Manitoba there are in effect an average of two or three anglers per lake, while in Alberta the number is 350 anglers per lake. As he put it in laymen's terms, we have in Alberta low supply and high demand. That simple fact presents difficult challenges for those whose task it is to assure the continuation of the fishery resource for future generations and it is why Alberta has some of the most restrictive fishing regulations in the country.

10 In order to effectively manage the fishery it is, not surprisingly, necessary to know how many fish of which species are taken from any given lake in a given year. That is done by allocating the harvest according to accepted priorities: firstly, the conservation of the resource; secondly, the aboriginal food fishery protected by treaty; thirdly, recreational use, and finally, where one is feasible, the commercial fishery: see ex. #2, p. 15. These goals are pursued by using regulations setting quotas, mesh sizes and the like, sometimes on a lake by lake basis. That is important because the over-harvesting of even one of the species in a given lake can destabilize that lake and in turn put extra pressure on neighbouring lakes.

11 The illegal harvest, which results largely from activities like those engaged in by Mr. Cardinal, creates special problems because, while the existence of such a harvest is a known reality, it is extremely difficult to predict with any certainty how much of a lake's fish population will be taken. In the result, there is no hope of effectively managing fish populations without making guesses concerning the number and species of fish taken illegally or reducing for everyone else the legitimate interests prioritized above. As Mr. McMahon noted, "If we guess wrong, we collapse the fishery."

12 Given that evidence, I am satisfied that deterrence is especially important in a province where the resource is fragile and important both as a food source for native people and as a recreational and commercial option for many of our citizens. In determining what form that deterrence should take I take into account the fact that **trafficking** offences are easy to commit and hard to detect. While Alberta may have fewer lakes than its neighbours, they are still spread over a vast area, making it difficult to effectively monitor illegal activity given the limited resources available. It must also be remembered that the offence itself involves, not only the netting of fish, but their sale, the real motive underlying that activity in the first place, and that is a task which can easily be accomplished almost anywhere, in the front yard of a residence on a reserve or in the parking lot of some commercial premise in a large city like Edmonton, as occurred in this case. The simple truth is that enforcement efforts depend almost entirely on informants or on expensive undercover operations like the one mounted in this case.

13 That is why those who *are* caught must be deterred by *effective* sanctions, which also send a message to others inclined to engage in the same activity that the risk they take is not worth the potential reward. Without saying that monetary penalties can never achieve that goal, it appears to me that fines may come to be viewed simply as a cost of doing business in the unlikely event one is caught. In some cases such penalties may inadvertently encourage the offender to resume the very activity which led to the sanction in the first place in order to satisfy the penal burden placed on him or her. They can also create the impression that the courts are reluctant to impose the more intrusive sanction of imprisonment because the acts involved are just not serious enough.

14 I am satisfied then that in appropriate cases the imprisonment option, available at law, should be used both to send an unmistakable message to the offender deeply involved in this illegal activity and to emphasize to the public at large that these are serious transgressions with potentially grave consequences for all Albertans.

15 In analysing the evidence here, I begin with the fact that this is not a single transaction conducted by a man for sympathetic, if still illegal, reasons. To put it bluntly, Ernest Cardinal, on the evidence I accept, was "in the business" and had been for some time. In reaching that conclusion, I have considered the argument that his statements to Agent #288 about sales in the past were

no more than exaggerations intended to make sure that his client would return for more purchases. That is a convenient stance for one who later discovers that his statements were made to someone who was not what he thought he was. It is unconvincing. The simple fact is that, so far as Cardinal knew, Agent #288 was a willing buyer and had made no suggestion that he might go elsewhere to obtain fish. There was no reason, then, for Cardinal to make the statements he did if they weren't true and his belated suggestion otherwise lacks credibility. In fact, when one looks closely at his evidence at trial, it is reasonable to conclude that for all intents and purposes he conceded his prior conduct. A short excerpt from his testimony demonstrates that fact.

> Q. Now, you'd been selling fish for years, correct?
>
> A. That's what they say.
>
> Q. And I -
>
> A. There's no proof to it.
>
> Q. So you're saying that there's no proof to it, so you're not denying it?
>
> A. No.

Transcript; p. 229, ll. 13-19.

16 Evasiveness in cross-examination is also a factor to be taken into account in assessing the credibility of the story told by a witness and in assisting the trier of fact to get a sense of the kind of person the witness really is. Mr. Cardinal's testimony is rife with that tactic and in my view says much about him. Again I quote:

> Q. Mr. Cardinal, did you ever domestically fish Winefred Lake?
>
> A. Probably in the 90's.
>
> Q. In the 90's.
>
> A. I know I've got a license for Winefred, but I've never went- fishes too far.
>
> Q. Did you have a license for Winefred during those 2005, '06 and '07?
>
> A. I might have.
>
> Q. Now when you told the undercover officer that you - if I recall correctly got about 250 pickerel off of Winefred Lake and sold them for about $1000 and you told the officer that on June 30th, 2006. Do you remember that?
>
> A. Yeah, I might have told him, but that's 20 years old.
>
> Q. You got $1000 for those pickerel 20 years ago?
>
> A. That's not the case here is it?
>
> Q. No, but you said - you might have told him -
>
> A. I haven't fished Winefred in 20 years, so it had to be 20 years ago.
>
> Q. So you got $1,000 for that amount of pickerel?
>
> A. Well I could say that, I could say $5.00, it didn't matter.
>
> Q. Well which is the truth then, did you tell him that or not?

A. I told him that, yeah.

Q. And it's true that you did isn't it, sir, because you told him that on more than one occasion didn't you?

A. Yeah, the same story over.

Q. A story.

A. Same story over, yeah.

Q. Well which is the story, sir? When are you telling the truth, then or now?

A. You mean now.

Q. Well you told the officer on a number of occasions that you caught about 250 pickerel off of Winefred Lake and sold them for $1000?

A. Yeah, well I told him that, I figured I could get more money out of him.

Q. Well, no, sir, isn't it true that you never changed your price with the officer during this time?

A. Well, I could have I guess.

Q. No, but isn't it true that you never changed your price?

A. No.

[Transcript; p. 234, l. 27 - p. 236, l. 17]

17 Apart from his considerable involvement in the **trafficking** business, I consider it an especially aggravating factor that Mr. Cardinal used his treaty rights to facilitate what he knew was illegal activity: see e.g. - transcript p. 232, l. 18 - p. 233, l. 14. Recognizing and preserving the treaty right to hunt and fish for food is an accepted obligation of our society, but it can at the same time be a convenient device for some to mask their illegal activities, making detection even more difficult. There can be no doubt on the evidence here that Ernest Cardinal used his treaty status for that very purpose. His conduct is deserving of sanction, not only for the illegal acts themselves, but also for the harm it does to our collective efforts to preserve our fish and wildlife for future generations. The success of those efforts depends, fundamentally in my view, on the ability of all of the stakeholders involved to co-operate for the common good on an acceptable strategy to achieve that goal. One need only read the news reports or hear the evidence I hear from time to time to conclude that one of the major obstacles to that task is the mistaken belief by many in the non-native community that treaty rights are a major factor in the creation of the conservation problems which we now face and the consequent division that results. When people like Mr. Cardinal are shown to have abused those rights, it reinforces that belief and makes it even more difficult to convince non-natives that the answer is co-operation, not accusation, and that the vast majority of native people exercise their hunting and fishing rights responsibly and for the purpose for which they were intended. In further aggravation, I note as well, for the reasons explained by Mr. McMahon, that his abuse of those rights potentially endangers the very resource upon which many of his own people depend for food.

18 With respect to the Crown's assertion that, knowing that his actions were illegal, he made attempts to avoid detection by urging his customers to remain quiet, Mr. Cardinal's own words confirm that accusation. I refer to the following excerpts from the transcript of his evidence:

Q. At the time that you were selling all this fish you knew that if you were caught you would be charged, correct?

A. Correct.

Q. Is that why on January 13 th , 2006, when you first sold fish to the undercover you told him to keep it quiet?

A. That's right.

[Transcript; p. 225; ll. 11-16]

19 Finally, I agree with Crown counsel's submission that Mr. Cardinal has shown complete contempt for both the conservation of the fish he was netting and for any interpretation of his fishing rights other than his own. There is no doubt in my mind that this man's view of his treaty right is that he can do whatever he pleases no matter the regulation, no matter what anyone else thinks and no matter the state of the law. The following exchange is revealing:

Q. What size net did you use when you were catching the fish that you were selling?

A. Five and a half.

Q. Sorry?

A. Five and a half.

Q. Okay. And why did you use five and a half?

A. Well that's what it was recommended for.

Q. Who recommended that?

A. Domestic license.

Q. Now -

A. But the Indian - the *Indian Act* doesn't state what size license you use.

Q. Okay. So where did you get that from then?

A. What.

Q. The five and a half measurement.

A. From the domestic license from Beaver Lake.

Q. So it's not recommended, it's actually required, isn't it?

A. I guess it is.

Q. Is that a - you guess it is or is it?

A. Well that's what they put on there, so it must be -

Q. Okay. So it's required then isn't it?

A. Yes.

Q. You told the undercover officer that you were going to buy a four inch net, didn't you?

A. That's right.

Q. And why were you going to buy a four inch net when the requirement, the legal requirement was five and a half?

A. There's no legal requirement on a treaty Indian in the *Indian Act*.

Q. You just told me that the requirement was five and a half -

A. That's the - Fish and Wildlife's point of view -

Q. So you -

A. - not the treaty Indian.

Q. So you don't care what the domestic license says then about that; is that a fair statement?

A. A fair statement.

Q. Okay. So if you don't care what the domestic license says, why do you bother getting one?

A. Well I got one just to use the five and a half to put flags out on the lake, that's all.

Q. Because you knew that legally you had to have one if you're domestic fishing, didn't you?

A. Yeah. And I didn't have a four inch net either.

Q. But you were going to buy one weren't you?

A. I was going to buy one.

Q. And you knew that was illegal, didn't you?

A. Well to them yeah, not me.

Q. But you knew it was illegal according to your domestic license that you got?

A. Yes.

[Transcript; p. 238, l. 20 - p. 240, l. 17]

And later, he admitted this:

Q. Okay. But you knew that you couldn't use a four inch net according to your domestic license?

A. According to domestic yes.

Q. Right. And you still were going to buy another one?

A. Yes.

Q. And you were going to use that —

A. I was.

Q. Yeah. To get more fish.

A. Yes.

Q. To sell more fish right?

A. Yeah, to an individual, yes.

Q. Yeah, to - to individuals. Individuals that you trusted, right?

A. That's right, the one that befriended me.

Q. Now isn't it true, sir, that pickerel is a smaller fish and that's what you need the four inch net for?

A. I don't know if it's smaller.

Q. What do you need the four inch net for then?

A. It's the only net I'll probably catch him.

Q. Right, because that kind of net is better for pickerel, for catching pickerel.

A. It's quite possible.

Q. Well, you're the fisherman, sir, is it possible or is it right?

A. Yeah.

Q. Which is it?

A. Yeah, you can catch pickerel in a four inch.

[Transcript; p. 242, l. 20 - p. 243, l. 19]

20 Considering all the factors I have outlined above, there is a compelling reason to resort to the imprisonment sanction in Ernest Cardinal's case to express society's denunciation of his misuse of his treaty rights, his contempt for the efforts to preserve a resource important to his own people as well as to others in our province and to deter both himself and others from engaging in activities extremely detrimental to the achievement of that goal. As I have already said, that conclusion is subject to other mitigating circumstances which might justify a less onerous sanction. His counsel puts forth three submissions in that regard. I have considered a fourth.

21 The first one is what I call the "what's the big deal" argument. She developed it in her cross-examination of Mr. McMahon during which she presented to him numerous provincial documents showing that none of the species of fish sold by her client are listed on the endangered species list and that at present the whitefish population in Beaver Lake is stable. She pointed out that the tolerable allowance for both walleye and pike in that lake for the purposes of the commercial fishery was far greater than the few fish of those species sold by her client. In short she suggests that in reality there is no real problem with any of these fish and that Mr. McMahon's concerns are both exaggerated and unfounded.

22 Her argument has a number of flaws. First, it assumes that the fish Mr. Cardinal sold to Agent #288 were the only ones he netted illegally during the 18 months of his interaction with that agent. Given both his statements to #288, which support an extensive involvement in the **trafficking** business, and his intimate knowledge of potential buyers in Edmonton when the agent told him that his customer had backed out of his most recent purchase from Cardinal, that is an unwarranted assumption. It also assumes that Mr. Cardinal was the only person illegally netting and selling fish from Beaver Lake during that time. There is no evidence to support that assumption either and, given the complaints which were put into evidence as the basis for the undercover operation, the more reasonable conclusion is that there were others besides Cardinal engaged in the same activity. To be clear, I am not suggesting that I have evidence that there were other sales by Mr. Cardinal or other sellers, only that the premises upon which counsel's argument is based are unproven and thus faulty.

23 Her submission misses the point for another reason. It does not address the fundamental planning problem presented by the illegal fishery and, with respect, demonstrates a misapprehension of the very nature of deterrence, the paramount principle at play in sentencing for these offences. That principle is not meant to sanction past wrongs. Denunciation, a separate legal principle, does that: see s. 718(a) C.C.. Deterrence attempts to *discourage the repetition of* illegal conduct by the offender or others inclined to do the same thing. In short its purpose is preventative as well as punitive. The issue, then, is not only the present state of the fishery, but its future ability to sustain itself. That proposition was succinctly stated by Nightingale, JPC at paragraph [15] of the judgment in *R. v. Couillonneur*, 2002 SKPC 60 (Sask. Prov. Ct.), a decision to which I was referred by defence counsel herself, in these words, " While fish populations are presently healthy, everyone recognizes that this happy situation can only be maintained by prudent and vigilant management." The illegal fishery imperils that goal for the reasons already given by Mr. McMahon.

24 In comments reminiscent of this case, the court also points that out at paragraph [19] of *Couillonneur*:

> Mr. Couillonneur's offending, while not monetarily significant, insults and dishonours the mutual and scrupulous care which everyone else takes about the Canoe Lake fishery. He was prepared not only to treat the lake's resources as his own, but also to disregard the sanctuary and indeed to use it to his own advantage because he knew others would not set nets there. He had no regard for the effect of his actions on the sustainability of the fishery.

I find defence counsel's submission on this point neither convincing nor mitigating.

25 Her second submission relies on the provisions of s. 718.2(e) of the *Criminal Code*. That subsection directs sentencing courts to take into consideration that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." Ernest Cardinal, a member of the Beaver Lake Cree Nation, is of course aboriginal and thus, so the submission goes, entitled to the benefit of that subsection, especially since the overwhelming majority of the existing decisions have imposed fines. I disagree with that stance.

26 First, as Crown counsel suggested in her submissions, it would be a perverse application of that sub-section to give Mr. Cardinal the benefit of it when he has used his very aboriginal status to facilitate the commission of the offences of which he has been convicted. In those circumstances, assuming incarceration is otherwise warranted, lesser sanctions are not, in my view, "reasonable in the circumstances".

27 However, even apart from that, I conclude that he is not entitled to the benefit of the subsection. The decision of the Supreme Court of Canada in *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.) is the authoritative interpretation of s. 718.2(e). It confirms that the section did not confer an automatic right on aboriginal offenders to a less onerous sentence simply because of their native status. At p. 417 of its decision the Court said this:

> [78] In describing the effect of s. 718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

28 Later on the Court makes it clear that the focus should be, not just on the aboriginal heritage of the offender, but on how the *unique circumstances* of that fact may have played a role in the commission of the offence and on bringing the offender into conflict with the law. Those factors will not necessarily be present in the background of every offender. These comments appear at pp. 420-21 of the judgment:

> [88] But s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal. To the extent that the appellant's submission on affirmative action means that s. 718.2(e) requires an automatic reduction in sentence for an aboriginal offender, we reject

> that view. The provision is a direction to sentencing judges to consider certain unique circumstances pertaining to aboriginal offenders as a part of the task of weighing the multitude of factors which must be taken into account in striving to impose a fit sentence. *It cannot be forgotten that s. 718.2(e) must be considered in the context of s. 718, s. 718.1, and the overall scheme of Part XXIII*. It is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon *all* the factors which must be taken into account in each case. At the same time, it must in every case be recalled that the direction to consider the unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence. [Emphasis mine]

29 Applying those words to Ernest Cardinal, there is nothing in the evidence before me to show that his unique circumstances or that his unjust treatment by the justice system in the past has somehow contributed to his involvement in the present offences. To the contrary, the Crown alleges no prior record of any kind. The evidence on which he himself relies suggests that he is employed and happily entertaining numerous children and grandchildren at his home, that he regularly provides assistance to the elders in his community and that he is therefore a respected member of the Beaver Lake Cree Nation. On the evidence the only conclusion I can reach is that his involvement in these offences was for the sole purpose of increasing his income. Accordingly, I find nothing in the words of s. 718.2(e), as interpreted by the Supreme Court of Canada, which would support a sanction other than imprisonment in his case by reason of his aboriginal status.

30 The third submission made by his counsel in support of a non-custodial sentence is her assertion that the improper seizure of an expensive vehicle registered in the name of his wife has caused him undue hardship by reason of the expense to which he has been put to obtain the return of that vehicle to her. Even assuming that the vehicle in question is related to this prosecution, I find her submission to be too irrelevant to what I must deal with to have any weight in the decision I must make. That issue involves a separate legal proceeding relating, on its face at least, to a person distinct from Mr. Cardinal. If the Crown has acted improperly as she suggests, Mrs. Cardinal will have her redress in that proceeding and it is not for me to give this defendant relief for those actions.

31 Although it was, perhaps understandably, not pressed by his counsel in her submissions, I have considered remorse as a factor affecting whether the otherwise fit sanction of imprisonment might be reduced to the fines which have been imposed in so many of the other cases. Remorse is most often expressed by a guilty plea which has the dual effect of saving the Crown the expense of a trial and allowing the court to give credit for an admission of wrongdoing. That can of course be a significant factor in sentence and I note that the overwhelming majority of the cases cited by both counsel were resolved in that way.

32 Unfortunately, that mitigating factor is completely absent here. Mr. Cardinal insisted, as was his right, on a trial during which he admitted for all intents and purposes the illegal acts with which he was charged and relied, for a defence, on treaty rights which had already been definitively decided against him in numerous appellate cases reaching to the Supreme Court of Canada. In conducting the trial as he did, he used up three weeks of court time to no apparent purpose. At the sentence hearing, he chose not to speak when given the opportunity to do so. This is similar to the stance taken by Alvin Couillonneur in *R. v. Couillonneur*, *supra*, and I can do no better than adopt the comments of the trial judge at para. [16] of that case :

> ... More recently, when asked at the conclusion of counsels' submissions if he had anything to say, Mr. Couillonneur chose not to speak. This is not utterly consistent with a sense of remorse.

33 Having concluded then that a fit sentence, considering all the aggravating circumstances involved, should include a term of imprisonment and that there are no mitigating or other factors which would justify a different sanction, I sentence Ernest Cardinal to imprisonment for 90 days on each count concurrent. Although no submissions were made on the point at the sentence hearing, despite the Crown's request for a gaol sentence, I have considered whether a conditional sentence would be appropriate and have concluded that the overriding need for deterrence in the case of offences like this one committed in these circumstances by offenders like Ernest Cardinal requires that actual incarceration be imposed.

34 In addition to that sanction, I impose a period of probation of three years on each count concurrent. Probation is intended, in my view, not only for rehabilitative reasons, but also to help secure the good conduct of the offender during the probationary period. Given the special challenges to enforcement presented by these sorts of offences, the following conditions, in addition to the statutory conditions, will contribute to the achievement of that goal:

> 1. You are to report within five working days to a probation officer at Lac La Biche, Alberta and thereafter at such times and places as directed by the probation officer.
>
> 2. You are to notify the person in charge of the Fish & Wildlife Office in Lac La Biche, or his or her designate, of your intention to set a fishing net, including the name of the lake and the location on that lake where the net will be set.
>
> 3. You are to notify that same office within 24 hours of pulling the net of the number of fish harvested by species.
>
> 4. If the fish netted are distributed elsewhere, either within the Beaver Lake First Nation, or at some other place, you are to provide a list of the names of the people to whom the fish were given and the number of fish provided by species.

There will be a victim fine surcharge of $50. for each count.

35 Finally, I am prepared to hear an application to serve the sentence intermittently, if the Defendant wishes to do so, and of course for time to pay the surcharges.

36 With respect to William James Cardinal I do not agree that the amount of the fine proposed by Crown counsel is appropriate. On the evidence I have, Mr. Cardinal is shown to have done nothing more than help load the fish during one transaction and receive some small reward for that effort. I am unable to conclude that he actively assisted his father throughout the 18 months in question or that he is provably involved in extensive **trafficking** himself. Nonetheless, deterrence is important, even for those who help others to deplete the resource illegally. Accordingly, there will be a fine of $2300 including victim fine surcharge, in default three months' imprisonment and probation for three years on the same conditions imposed on his father. The latter penalty is imposed since it is clear that he was aware, at a minimum, of his father's business and was prepared to assist on at least one occasion. The order will have the effect, not only of securing his own good conduct, but of deterring the two men from doing indirectly what Ernest Cardinal cannot do directly by reason of the sentence imposed upon him. Again I will entertain today an application by William Cardinal for time to pay the fine.

37 I close with this observation. There is a large poster on the wall in the judge's office at Cold Lake. It depicts a young Indian woman wrapped in a blanket standing on a barren rock. Inscribed on the poster are these words:

> Only after the last tree has been cut down
>
> Only after the last river has been poisoned
>
> Only after the last fish has been caught
>
> Only then will you find that money cannot be eaten
>
> Cree Indian Prophecy

38 Mr. McMahon and those who work with him to preserve the Alberta fishery have figured that out. Ironically, Ernest and William Cardinal and those who condone their actions have not.

Order accordingly.