

2010 ABPC 64
Alberta Provincial Court

R. v. Hofer

2010 CarswellAlta 404, 2010 ABPC 64, [2010] A.W.L.D. 1752, 86 W.C.B. (2d) 911

Her Majesty the Queen and John A. Hofer

D.G. Redman Prov. J.

Heard: January 28, 2010

Judgment: February 23, 2010

Docket: Medicine Hat 100013408P1

Counsel: Andrea Dolan for Crown
Accused for himself

Subject: Natural Resources; Public; Criminal

Related Abridgment Classifications

Natural resources

I Fish and wildlife

I.5 Offences

I.5.e Illegal sale of fish or wildlife

Headnote

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

Accused was member of Hutterite colony located in Saskatchewan — Hunter approached accused with moose he wanted made into jerky — Accused agreed to accept part of moose jerky as payment — Accused attempted to sell moose jerky to employees at retail store — Alberta Fish and Wildlife received tip regarding accused's activities, attended store and arrested him — Accused was charged with one count of unlawfully **trafficking** in moose meat contrary to s. 62(1) of Wildlife Act — Accused pleaded guilty — Accused ordered to pay fine of \$2,000 — Mitigating circumstances included fact accused had no prior record, that accused pleaded guilty, that he was not aware that his actions were illegal, that he did not hide his activity in any way, that investigation was straightforward and that accused was cooperative with authorities and remorseful — Notwithstanding existence of mitigating circumstances, there was need for general deterrence.

Table of Authorities

Cases considered by D.G. Redman Prov. J.:

R. v. Cardinal (April 14, 2008), Fuller J. (Alta. Prov. Ct.) — distinguished

R. v. Cardinal (2009), 46 C.E.L.R. (3d) 146, 2009 ABPC 296, 2009 CarswellAlta 1559, [2009] 4 C.N.L.R. 276 (Alta. 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.) — referred to

R. c. M. (L.) (2008), 2008 CarswellQue 4417, 2008 CarswellQue 4418, (sub nom. *R. v. L.M.*) 374 N.R. 351, (sub nom. *R. v. M. (L.)*) 293 D.L.R. (4th) 1, (sub nom. *R. v. L.M.*) [2008] 2 S.C.R. 163, (sub nom. *R. v. M. (L.)*) 231 C.C.C. (3d) 310, 2008 SCC 31, 56 C.R. (6th) 278 (S.C.C.) — referred to

R. v. Moosemay (2005), 2005 ABPC 346, 2005 CarswellAlta 1837 (Alta. Prov. Ct.) — referred to

R. v. Soto (1996), 1996 CarswellAlta 748 (Alta. Prov. Ct.) — referred to

Statutes considered:

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

Pt. XXIII — considered

s. 718 — considered

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

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

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

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

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

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

Wildlife Act, R.S.A. 2000, c. W-10

Generally — referred to

s. 62(1) — referred to

Regulations considered:

Fisheries (Alberta) Act, R.S.A. 2000, c. F-16

General Fisheries (Alberta) Regulation, Alta. Reg. 203/97

Generally — referred to

SENTENCING of accused convicted of unlawfully **trafficking** in moose meat contrary to s. 62(1) of *Wildlife Act*.

D.G. Redman Prov. J.:

Introduction

1 Mr. Hofer is charged with one count of unlawfully **trafficking** in moose meat, contrary to s.62(1) of the *Wildlife Act*. Mr. Hofer pled guilty on his first appearance before this Court and a decision on sentencing was reserved. The Crown seeks a fine of \$6,900.00 and relies upon the decision in *R. v. Ladouceur*, an August 12th, 2008 unreported decision from the Alberta Provincial Court in Lac la Biche. Duty Counsel assisted Mr. Hofer in making his plea. He advised that Mr. Hofer was aware of the fine that the Crown was seeking, but he made no specific representations regarding an appropriate sentence. The matter was reserved and counsel for the Crown was invited to submit further case authority in support of their position.

Facts

2 Mr. Hofer is a member of a Hutterite colony located in Saskatchewan. A hunter went to the Colony and gave Mr. Hofer a moose that he wanted made into moose jerky. Mr. Hofer ultimately agreed to accept part of the jerky in payment of his efforts. Mr. Hofer travelled to Medicine Hat where he attempted to sell the moose jerky in one pound packages to employees at a retail store. He made no attempt to disguise his efforts, even going so far as to place a distinct "M" on the individual bags containing the jerky. Alberta Fish and Wildlife received a tip regarding his activities, attended the store, and arrested him. In the process they seized a total of 13 pounds of moose jerky. During sentencing submissions one of the investigation officers advised that there may have been previous sales of moose jerky by Mr. Hofer. This was not included as part of the facts read to the Court when the plea was accepted and when asked, Mr. Hofer denied any prior involvement.

Position of the Crown

3 The Crown seeks a fine of \$6,900.00 and relies upon the decision of *R. v. Ladouceur*. The Crown further submits that Alberta Fish and Wildlife is attempting to establish a precedent throughout the province based upon this decision. On the day

the sentencing decision was to be rendered, counsel for the Crown submitted the case of *R. v. Cardinal* [(April 14, 2008), Fuller J. (Alta. Prov. Ct.)] Decision of Judge Fuller rendered April 14th, 2008.

Mr. Hofer as an Offender

4 From time to time, Mr. Hofer makes a variety of jerkies. He was not aware that it was contrary to the *Wildlife Act* to sell moose jerky without a proper authorization to do so. Mr. Hofer has no prior record, entered a guilty plea on his very first Court appearance, and appears remorseful for his involvement in this matter.

Analysis

5 The *R. v. Ladouceur* decision is clearly distinguishable on its facts. In that case, Alberta Fish and Wildlife received information about an ongoing illegal fish and wildlife **trafficking** problem in the Lac la Biche and Athabasca areas. An intensive undercover investigation over a two year period resulted in 64 charges under the *General Fisheries (Alberta) Regulation* and 12 *Wildlife Act* charges being laid against 30 individuals and one business. Between November 2005 and March 2007, Mr. Ladouceur sold fish and meat from big game animals to an undercover officer. He ultimately pled guilty to six counts, four of which dealt with the sale of moose meat, and received a fine of \$6,900.00 with respect to each of the unlawful moose **trafficking** charges. I am not aware whether or not Mr. Ladouceur entered a prompt guilty plea or whether or not he had a prior record. Further, the case is distinguishable for the additional following reasons:

1. Mr. Ladouceur was part of a large scale operation.
2. Mr. Ladouceur was convicted of six counts.
3. The investigation involved an intensive undercover operation resulting in a total of 76 charges against 30 individuals and one business.

The decision of *R. v. Cardinal* (April 14, 2008) is also distinguishable. There, the accused was sentenced to pay a fine of \$6,000.00 after he sold two quarters of moose on one occasion and fish on another occasion to an undercover Fish & Wildlife officer. The investigation was described as detailed and extensive and the Plaintiff was well aware of the illegality of his activity. There was a suggestion that it was a problem in the area, and finally, the disposition followed a joint submission.

6 Determining a proper sentence is not an exact science, nor does it follow an inflexible predetermined procedure. It is primarily a matter for the trial judge's competence and expertise. Sentencing is a very individualized process, such that sentences imposed for offences of the same type, will not always be identical. Because of the co-existing principle of proportionality, the principle of parity does not preclude disparity where warranted by the circumstances (*R. c. M. (L.)*, 2008 SCC 31 (S.C.C.) at para. 36). Although the Crown advocates for a uniform sentence to be used throughout the province based upon the *Ladouceur* decision, it must be emphasized that there is no such thing as a uniform sentence for a particular crime. The circumstances of each case must be examined carefully, as well as the circumstances of the individual offender.

7 Part XXIII of the *Criminal Code* applies to sentencing proceedings under the *Wildlife Act*: *R. v. Lamouche* (2000), 267 A.R. 347 (Alta. Q.B.); see also *R. v. Moosemay*, 2005 ABPC 346 (Alta. Prov. Ct.).

8 The fundamental purpose of sentencing is "to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more" of the objectives set out in s.718.2(a)(f) of the *Criminal Code* inclusive: (s.718 of the *Criminal Code*).

9 Section 718 sets out six sentencing objectives:

1. Denounce unlawful conduct.
2. Deter the accused and other persons from committing offences.

3. Separate the offender from society, where necessary.
4. To assist in the rehabilitation of offenders.
5. To provide reparation for harm done to victims.
6. To promote a sense of responsibility in the offender, and acknowledgment of the harm done to the victim and to the community.

10 A sentencing Court must also take into account statutorily mandated aggravating factors (s.718.2(a)); proportionality between offenders (s.718.2(b)); totality (s.718.2(c)); avoiding unnecessary deprivation of liberty (s.718.2(d)); and considering available sanctions other than imprisonment (s.718.2(e)).

11 Not all principles apply equally in all cases.

12 I accept that the primary consideration in cases such as this is deterrence: *R. v. Cardinal*, 2009 ABPC 296 (Alta. Prov. Ct.) at para. 3.

13 The maximum penalty applicable to this offence is a fine of \$100,000.00 or imprisonment of not more than 2 years, or both. This is the greatest fine allowable under the *Wildlife Act* and this too is a factor to be taken into account when sentencing.

14 The range of sentences for **trafficking** in wildlife vary greatly. The following is a brief summary of some of the sentences in this area:

1. *R. v. Soto*, [1996] A.J. No. 826 (Alta. Prov. Ct.)

Fines imposed were between \$2,000.00 and \$2,500.00 for **trafficking** in wildlife.

2. *R. v. Moosemay*, [2005] A.J. No. 1699 (Alta. Prov. Ct.)

The accuseds were convicted of a number of offences under the *Wildlife Act*. Their sentences ranged from \$200.00 for unlawfully hunting big game out of season, up to \$2,500.00 for **trafficking** in big game. Some of the meat which was linked to the **trafficking** charges was moose.

3. *R. v. Cardinal*, 2009 ABPC 296 (Alta. Prov. Ct.)

One of the Defendants was sentenced to a period of incarceration of 90 days and the other Defendant who was the son of the first Defendant, and who assisted the first Defendant on one occasion in loading the fish, was fined the sum of \$2,300.00 including victim fine surcharge.

15 All these cases have more aggravating factors than the existing case at bar. For example, they dealt with a number of charges, which occurred over an extended period of time, and in at least one case, the accused had a record.

16 In the case at bar, the following mitigating circumstances exist.

1. Mr. Hofer has no prior record.
2. Mr. Hofer pled guilty at the first possible opportunity.
3. Mr. Hofer was not aware that his actions were illegal.
4. Mr. Hofer did not hide or obscure his activity in any way.
5. The investigation was relatively straight forward and did not involve, as is often the case, an undercover operation.

6. Mr. Hofer was cooperative with the authorities and remorseful.

17 Notwithstanding the existence of the mitigating circumstances referred to above, there is still a need for general deterrence. Taking into account all these matters, I hereby order Mr. Hofer to pay a fine of \$2,000.00 inclusive of surcharge, and in default of payment, 30 days imprisonment.

Order accordingly.

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