

2003 ABPC 217  
Alberta Provincial Court

R. v. Smallboy

2003 CarswellAlta 1864, 2003 ABPC 217, [2003] A.J. No. 1620, 60 W.C.B. (2d) 56

## Her Majesty the Queen and Paul Francis Smallboy

Norheim Prov. J.

Judgment: December 9, 2003  
Docket: Edson 006930770P101003

Counsel: Fred W. Whiting, for Crown  
Jan Ter Hart, for Accused

Subject: Public

### Related Abridgment Classifications

Aboriginal and Indigenous law

V Indigenous rights to natural resources and environmental protections

V.2 Right of access to natural resources

V.2.a Hunting

V.2.a.v Possession

Natural resources

I Fish and wildlife

I.5 Offences

I.5.o Sentencing

I.5.o.iv Miscellaneous

### Headnote

Aboriginal law --- Aboriginal rights to natural resources — Hunting offences — Possession — **Trafficking** in wildlife  
Fish and wildlife --- Practice and procedure — Sentencing — Miscellaneous penalties

### Table of Authorities

#### Cases considered by *Norheim Prov. J.*:

*R. v. Lamouche* (1998), 1998 CarswellAlta 1215, 236 A.R. 69 (Alta. Prov. Ct.) — considered

*R. v. Sparrow* (1986), 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, 32 C.C.C. (3d) 65, [1987] 2 W.W.R. 577, [1987] 1 C.N.L.R. 145, 1986 CarswellBC 412 (B.C. C.A.) — followed

#### Statutes considered:

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

s. 606(1.1) [en. 2002, c. 13, s. 49(1)] — referred to

s. 718 — referred to

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

s. 61(1) — pursuant to

s. 93 — considered

s. 93.4(i) [en. 1996, c. 33, s. 68] — considered

#### *Norheim Prov. J.*:

1 The accused was originally charged with several counts of **trafficking** in wildlife. On February 3, 2003, being the date set for trial of these matters, the accused entered a guilty plea to one count of **trafficking** in rocky mountain sheep contrary s. 61(1) of the *Wildlife Act*.

2 The accused was originally represented by Mr. Morin who had, prior to the entry of the guilty plea, made a preliminary application and provided the Court with various written authorities. I am satisfied that he is an experienced counsel knowledgeable in this area of the law. After a series of delays to obtain information in the sentencing process and to accommodate the accused while he considered his options, the accused appeared on October 7, 2003 represented by Mr. Ter Hart and confirmed his guilty plea. I am satisfied that all of the provisions of s. 606(1.1) have been complied with and the accused has had the full benefit of counsel in entering this plea.

3 Mr. Smallboy admitted that on June 17<sup>th</sup>, 2000 there was a meeting between he and undercover Wildlife Officer Rob at the Agricom in Edmonton. They went to Mr. Smallboy's truck where Mr. Smallboy retrieved a set of bighorn sheep horns from under a jacket. As these horns were being examined by Officer Rob, Mr. Smallboy said, "just keep them down; I don't want people to see them". Mr. Smallboy indicated that this was the biggest sheep he had shot so far. After negotiations as to the price to be paid, the horns were purchased by the undercover officer for \$1200.

4 Mr. Smallboy is a 32-year-old treaty Indian who lives in the Smallboy Camp which is located near the Redcap mountain range where the sheep was shot. He is married and has three children ages two, six and nine. He lives a largely traditional lifestyle which is supplemented by a government payment to him and oil royalties to the three children in his care in the sum of \$200 per child per month.

5 There was a joint submission presented to the court for a fine in the sum of \$6000. Counsel indicated that the sum was arrived at after consideration of a fine given to a non-aboriginal who was caught in the same undercover operation and given a fine of \$8000 on his conviction for the same offence. This individual was fined a total of \$22,000 for wildlife offences. Counsel submitted that the fine should be smaller for Mr. Smallboy in consideration of s. 718 of the *Criminal Code*.

6 The Crown submitted a report prepared by Fish and Wildlife with reference to the status of the sheep herd from which this sheep was taken. In that area there is a limited hunt. There was no hunt permitted between 1988 and 1993. In 1996 there were seven licensed rams taken. In 1997 there were eight licensed rams taken. In 1998 there were eight licensed rams taken. In 1999 there were three licensed rams taken, in 2000 there were six licensed rams taken, and in 2001 there were two licensed rams taken. In 2002 there were 2400 applicants for three permits. There were no rams taken. This was because the number of rams in that herd which would be legal for a licensed hunter has diminished significantly. As Mr. Smallboy and Mr. Badger, another aboriginal living at the Smallboy Camp have pled guilty to the sale of a trophy ram, I conclude that illegal aboriginal hunting has contributed to this situation.

7 Counsel for the defence suggested that part of the problem that exists is a lack of understanding within the native community as to the limitation on native hunting for commercial purposes. The accused also addressed the Court, and from the comments made by the accused, the Court became concerned about the accused's understanding of principles of conservation. Accordingly the Court asked counsel if they could provide, as part of the sentence, recommendations how this accused could promote aspects of conservation and game management within his community. The matter was adjourned so that these issues could be looked into and so that a pre-sentence report could be prepared.

8 In considering whether the Court can follow the joint submission I take into account the following factors:

1. I give particular consideration to the fact that Mr. Smallboy is an aboriginal person. A mitigating factor is that he lives a largely traditional lifestyle and has a limited ability to pay a fine.

2. An aggravating factor is that he has used his special status to defeat the management goals of the wildlife managers. In Alberta aboriginal people do not presently need tags when hunting. Accordingly, it is very difficult for Wildlife Officers to

monitor the aboriginal harvest. It is only in situations like this, after the wildlife has been killed, and parts of the wildlife are sold, that it can be determined if the hunting was a legitimate exercise of aboriginal rights, or if it was an illegal activity.

9 Based on the report from Kirby Smith which was referred to by the Crown, I conclude that this accused's illegal acts have contributed to a decline in the number of mature rams in the Red Cap.

10 The Crown was unable to provide me with any comparable penalty for **trafficking** in bighorn sheep. The fine given to Mr. Stelter is the most comparable in time and situation but for the fact that Mr. Stelter is not an aboriginal. Within Alberta bighorn sheep are unique to the eastern slopes of the Rockies and are not, compared to other game species such as deer, very plentiful.

11 A significant penalty is called for when a **trafficking** situation is detected. It would appear that the penalty given to Mr. Stelter could be used as a starting point although I note that the total fines given to Mr. Stelter totalled approximately \$22,000. I would expect that there was consideration given to the global aspect of Mr. Smallboy's situation in the determination of the sum of \$8000 for **trafficking** in a bighorn sheep.

12 A fine in the range of \$6000 to \$8000 may be on the low end of the scale for this offence, however I am aware that counsel for the Crown and defence have taken into account the relative strengths and weaknesses of their positions in recommending this sentence to the court.

13 Counsel for the defence has commented that there is some confusion in the aboriginal community with reference to the limitations on aboriginal hunting rights. It may very well be that some members of the aboriginal community do not fully appreciate that they may not sell wildlife. Mistake of law, however, is not a defence. I am satisfied by the words spoken by this accused at the time of the sale of the sheep horns that he was aware that what he was doing was wrong which is why he directed the undercover operator to keep the sheep horns out of sight.

14 The pre-sentence report makes it clear that Mr. Smallboy admits to the illegal act but feels that he should have the right to sell wildlife. The report also demonstrates the lack of understanding of sound wildlife management principles held by this accused and some of the other members of the community who were spoken to by the probation officer. The report indicates that Fish and Wildlife is prepared to work in the aboriginal community. If Mr. Smallboy chooses to do so there could be the opportunity for him to work off some or all of this fine by working with Fish and Wildlife to educate members of the aboriginal community on issues of conservation and wildlife management.

15 The Supreme Court of Canada in *R. v. Sparrow* (1986), 32 C.C.C. (3d) 65 (B.C. C.A.) , makes it clear that there is an obligation on the provincial wildlife authorities to consult with the aboriginal community on issues which will affect their aboriginal hunting rights. At present, few steps have been taken by Alberta Fish and Wildlife to carry on an ongoing consultation with the aboriginal community on wildlife issues. This may be an opportunity to proceed in that direction.

16 Accordingly, I am of the view that the joint submission is within a range that can be considered by this Court. I accordingly direct that Mr. Smallboy pay a fine in the sum of \$6000, in default 90 days in gaol.

17 While not a part of the joint submission I feel that the circumstances in this case require that I consider the provisions of s. 93 of the *Wildlife Act*.

18 Section 93.4 of the *Wildlife Act* reads as follows:

**93.4** Where a person is convicted of an offence against this Act, the Court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order against the person containing one or more of the following directions, which may contain such substance or conditions as the court considers appropriate:

...

(i) To comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing his repeating the offence or committing other offences against this Act.

19 Judge Ayotte considered this section in the case of *R. v. Lamouche*, [1998] A.J. No. 1437 (Alta. Prov. Ct.). In making an order under this section he writes as follows:

In making the foregoing order, I recognize that the defendants' Treaty right to hunt will not be affected in any way by these convictions. This order does not, nor is it intended to, restrict that right. They may still hunt for food for themselves and their families in accordance with their Treaty privileges. They are only required to provide information that will enable the proper management of the wildlife resource to be better accomplished and to assist the authorities in ensuring that their illegal activities do not resume.

20 A treaty right may be restricted if it is necessary for the proper management of the resource. The Supreme Court of Canada in the case of *R. v. Sparrow*, (*supra*), makes this clear.

21 I agree with Judge Ayotte that conditions made under this section which provide for better management of wildlife are not necessarily restrictions of treaty rights.

22 The licensing regime which is currently in place for non-aboriginal people requires a person who is authorized to hunt a certain animal, tag that animal immediately upon killing it. From a management point of view this provides more certainty and better opportunities for management than requiring the hunter to file a report after the animal has been killed and removed from the field. The authorities would be much less likely to discover an illegal activity if the reporting only had to take place days or weeks after the animal was killed. If a person happened to be caught with an animal, he could say that he was planning to report its killing at some later date. If he is not stopped before he disposes of the game, there is little likelihood that the taking of that animal will be known to the managers and that little can be done to enforce effective reporting after the fact. Management is less efficient if no tag is required to be affixed to the animal.

23 This accused has shown by his actions that it is necessary to put in place provisions which have a reasonable likelihood of actually monitoring his hunting activity. For this reason I further direct that, for a period of three years, this accused shall:

3. Advise the Fish and Wildlife Office nearest his place of residence of his address and thereafter for three years to advise that office in advance of any change in that address.

4. Advise Fish and Wildlife in advance of his hunting of his estimate of the number and species of game that he requires for subsistence. Fish and Wildlife will provide him with numbered tags for each species of animal that he intends to hunt.

5. He shall forthwith upon the killing of an animal affix the appropriate tag to the animal in same fashion as required by licensed hunters and it shall remain so affixed in accordance with the regulations that apply to licensed hunters.

6. He will at the request of Fish & Wildlife produce and account for any tags which he has not affixed to wildlife and reported in accordance with the following paragraph.

7. He shall within three weeks of the taking of any animal report its taking to Fish and Wildlife along with a description of the area in which the hunt took place, the names of the persons who participated in the hunt, and the number, species and gender of animals killed by their party.

8. On request he shall account to Fish & Wildlife for any tags that have been issued to him and shall produce any tags for inspection that have not been the subject of a report filed by him.

24 These conditions are not restrictions on the accused's treaty rights. They are provisions which enable Fish & Wildlife to monitor the game taken by this accused to assist in the management of wildlife.