2012 SKQB 516
Saskatchewan Court of Queen's Bench

R. v. Alsager

2012 CarswellSask 854, 2012 SKQB 516, [2012] S.J. No. 812, 104 W.C.B. (2d) 1273, 412 Sask. R. 35

Jan Alsager, Appellant and Her Majesty the Queen, Respondent

N.G. Gabrielson J.

Judgment: December 11, 2012
Docket: Battleford Q.B.A. 3/12

Proceedings: affirmed *R. v. Alsager* ((2011)), 2011 CarswellSask 871, 2011 SKPC 184, 250 C.R.R. (2d) 91, 387 Sask. R. 196 ((Sask. Prov. Ct.))

Counsel: G. Rangi Jeerakathil, for Jan Alsager
Peter Arnold Hryhorchuk, for Respondent Crown

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 convicted for exporting wildlife without licence and received sentence of $60,000 fine and $18,000 surcharge — Accused argued Crown did not charge others, placing onus on him to prove he fell within exemption, and also argued defence of due diligence — Due diligence defence was not accepted as accused knew that import permit for deer was not obtained and that authorities were of view that deer could not be lawfully exported, and accused decided to try and see what would happen — Court decided to send message even though more serious offences received much lesser fines — Accused appealed — Sentence appeal allowed only — Conviction appeal dismissed as accused's mistake was mistake of law which was not induced by any advice obtained from appropriate official — Onus was not reversed on accused as it was up to him to come within exemption regardless of whether others were charged — Sentence was reduced to $5,000 fine plus $1,500 surcharge — Original sentence was too far outside normal range for offence as it was steeper than more serious offences.
Table of Authorities
Cases considered by *N.G. Gabrielson J.*:
Merchant v. Law Society (Saskatchewan) (2009), 2009 CarswellSask 154, 2009 SKCA 33, 324 Sask. R. 108, 451 W.A.C. 108, [2009] 5 W.W.R. 478 (Sask. C.A.) — considered
R. v. Charles (1997), 1997 CarswellSask 462, 159 Sask. R. 126, [1998] 1 W.W.R. 515, [1998] 4 C.N.L.R. 172 (Sask. Q.B.) — considered
R. v. Helm (2011), 2011 SKQB 32, 2011 CarswellSask 36, 8 M.V.R. (6th) 59, 368 Sask. R. 115, [2011] 6 W.W.R. 641 (Sask. Q.B.) — followed
R. v. M. (C.A.) (1996), 46 C.R. (4th) 269, 194 N.R. 321, 105 C.C.C. (3d) 327, 73 B.C.A.C. 81, 120 W.A.C. 81, [1996] 1 S.C.R. 500, 1996 CarswellBC 1000, 1996 CarswellBC 1000F (S.C.C.) — considered
R. v. Marsland (2012), [2012] 7 W.W.R. 468, 2012 CarswellSask 291, 2012 SKCA 47, 393 Sask. R. 175 (Sask. C.A.) — considered
R. v. McLeod (1997), 160 Sask. R. 26, 1997 CarswellSask 538 (Sask. Q.B.) — considered

R. v. Nordstrom (2011), 2011 SKPC 166, 2011 CarswellSask 743, 379 Sask. R. 1 (Sask. Prov. Ct.) — considered

R. v. Pizzey (2011), 2011 CarswellSask 597, 2011 SKCA 102, 375 Sask. R. 214, 525 W.A.C. 214 (Sask. C.A.) — followed

R. v. Sault Ste. Marie (City) (1978), 1978 CarswellOnt 24, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 21 N.R. 295, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 1978 CarswellOnt 594 (S.C.C.) — considered

R. v. Wholesale Travel Group Inc. (1991), 1991 CarswellOnt 117, 4 O.R. (3d) 799 (note), 1991 CarswellOnt 1029, 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 (S.C.C.) — considered

Statutes considered:

Animal Products Act, R.S.S. 1978, c. A-20.2 (Supp.)

Generally — referred to

s. 2(a) "animal" — considered

s. 2(b) "animal product" — considered

s. 17(1)(g) — considered

s. 17(1)(h) — considered

s. 18(a) — considered

s. 18(v) — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 7 — referred to

s. 11(d) — referred to

s. 12 — considered

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

Pt. XXVII — referred to

ss. 683-689 — referred to

s. 686 — considered

s. 686(1)(a) — considered

s. 687 — considered

s. 687(1) — considered

s. 794(2) — considered

s. 813(a) — considered

s. 822 — considered

Summary Offences Procedure Act, 1990, S.S. 1990-91, c. S-63.1

s. 4(4) — considered

Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act, S.C. 1992, c. 52

Generally — referred to

s. 6(2) — referred to

s. 6(3) — referred to

s. 10(1) — referred to

Wildlife Act, S.S. 1979, c. W-13.1

Generally — referred to

s. 57(3) — considered

Wildlife Act, 1998, S.S. 1998, c. W-13.12

Generally — referred to

s. 2 "wildlife" — considered

s. 31 — considered

s. 31(1) — considered

s. 31(1)(a) — referred to

s. 31(1)(b) — considered

s. 73 — considered

Regulations considered:

Animal Products Act, R.S.S. 1978, c. A-20.2 (Supp.)

Domestic Game Farm Animal Regulations, R.R.S., c. A-20.2, Reg. 10

Generally — referred to

s. 2(b) "big game animal" (vi) — considered

s. 2(e) "domestic game farm animal" — considered

s. 9 — considered

s. 9(b) — considered

s. 15(1)(a) — considered

s. 18 — referred to

s. 18(2) — considered

s. 20 — considered

Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act, S.C. 1992, c. 52

Wild Animal and Plant Trade Regulations, SOR/96-263

Generally — referred to

s. 6(2) — referred to

s. 6(3) — referred to

s. 10(1) — referred to

Wildlife Act, S.S. 1979, c. W-13.1

Captive Wildlife Regulations, R.R.S., c. W-13.1, Reg. 13

s. 13 — considered

s. 13(2) — considered

***N.G. Gabrielson J.*:**

1 This is a summary conviction appeal by Jan Alsager (the appellant) who was charged with the following offences:

COUNT 1: On or between the 1st day of October 2007 and the 7th day of February 2008 at or near Maidstone in the Province of Saskatchewan, without a permit issued pursuant to subsection 10(1), unlawfully export from Canada any animal or any part or derivative of an animal contrary to Section 6(2) of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52.

COUNT 2: On or between the 1st day of October 2007 and the 7th day of February 2008 at or near Maidstone in the Province of Saskatchewan, without having first obtained an export licence pursuant to this Act or the regulations, export or cause to be exported any wildlife from Saskatchewan, contrary to Section 31(1)(a) of *The Wildlife Act*, *1998*, S.S. 1998, c. W-13.12.

2 Following a trial in Provincial Court, in a judgment dated December 2, 2011, the accused was found not guilty of Count No. 1 but guilty of Count No. 2. After a sentencing hearing held February 3, 2012, the appellant was fined a total of $78,000. The appellant has appealed both the conviction and the sentence.

The Notice of Appeal

3 The notice of appeal contains eight grounds of appeal, five in respect to the conviction and three in respect to sentence:

1. The learned trial judge erred in determining that while-tailed deer and elk that are bred, born, raised and harvested in captivity for the purpose of producing animal products are nonetheless "wildlife" the meaning of *The Wildlife Act, 1998*;

2. The learned trial judge erred in finding that an export licence under the *Wildlife Act, 1998* was required for the export of the "domestic game farm animal" parts that were the subject of the charges, particularly given the exemption in s. 13 of the *Captive Wildlife Regulations* c. W-13.1 Reg. 13 and erred in determining that the relevant white-tailed deer parts were not from "domestic game farm animals";

3. The learned trial judge erred in law and made palpable and overriding errors of fact, by determining that the "domestic game farm animals" from which the subject antlers had originated had been previously imported in 2002 and 2003 contrary to the *Wildlife Act, 1998* by another person, despite such charges not being properly before the learned judge and the time for prosecuting such charges having long expired, and where no conviction for such an offence had ever been entered, and where there was inadequate evidence to make such a finding contrary to s. 7 of the *Charter* and the accused's right to a fair trial and s. 11(d) of the *Charter* and the presumption of innocence;

4. The learned trial judge erred in finding that a failure to label "domestic game farm animal" parts correctly in accordance with s. 18(2) of the *Domestic Game Farm Animal Regulations* leads to a conviction under s. 31 of the *Wildlife Act, 1998*; and

5. The learned trial judge erred with respect to proper test for due diligence and erred in determining that the Appellant was not duly diligent in the circumstances.

6. The learned trial judge failed to consider and apply the appropriate sentencing principles in determining the sentence to be imposed upon the Appellant; and

7. The learned trial judge considered inappropriate sentencing principles when determining the sentence to be imposed upon the Appellant; and

8. The learned trial judge failed to impose a sentence suitable to the gravity of the offence and the nature of the offender, particularly in light of the fact that identical offences under the *Animal Products Act* have a maximum $5,000 fine for a first time offence.

4 At the hearing of the appeal, counsel for the appellant abandoned Ground No. 1 in response to a recent decision issued by the Saskatchewan Court of Appeal, *R. v. Marsland*, 2012 SKCA 47, [2012] 7 W.W.R. 468 (Sask. C.A.).

Background Facts

5 The appellant, through his corporation, Blackrock Ranching Ltd. ("Blackrock"), operated a business which contracted with hunters for the purposes of hunting on a game farm near Maidstone, Saskatchewan. The game farm is owned by Idanell Korner Ranch Ltd. (Idanell Ranch) and operated by the appellant's father Rick Alsager. Idanell Ranch is a holder of a domestic game farm licence issued pursuant to *The Domestic Game Farm Animal Regulations*, R.R.S. c. A-20.2 Reg. 10 ("the DGFAR"), which regulations were passed pursuant to *The Animal Products Act*, R.S.S. 1978 (Supp.), c. A-20.2.

6 In November of 2007, two parties of American hunters contracted to hunt at the Idanell Ranch. The hunters harvested nine sets of white-tailed deer antlers, one set of elk antlers and one elk hide (collectively, the "animal products").

7 In January of 2008, the appellant transported the animal products by motor vehicle to the United States to Great Falls, Montana. From Great Falls the appellant then shipped the animal products by a courier to the American hunters. At the time he entered the United States, the appellant was in possession of an export certificate issued under s. 20 of the DGFAR in respect to the elk antlers and the elk hide. This certificate was issued by the Department of Agriculture of Saskatchewan. The certificate was stamped, "Not for the export of white-tailed deer". The appellant had no certificate for the export of the white-tailed deer antlers.

8 In March of 2008, the appellant's transport of the white-tailed deer antlers to the United States came to the attention of a conservation officer employed by the Minister of Environment for the Province of Saskatchewan who commenced an investigation. As a result of the investigation, the charges referred to in para. 1 hereof were then laid.

9 At trial evidence was led that established that in 2002 and 2003, some white-tailed deer had been moved from Alberta to the Idanell Ranch without an import permit or a licence issued by the Province of Saskatchewan as required by s. 31(1)(b) of *The Wildlife Act, 1998*, S.S. 1998, c. W-13.12 ("the Act"). The position of the appellant was that no provincial import permit was required because the deer were not wildlife. However, the trial judge concluded that:

(a) the animal products were derived from white-tailed deer that were domestic game farm animals pursuant to the DGFAR as well as "wildlife" pursuant to the Act;

(b) the appellant was therefore required to comply with the requirements of both the Act and the DGFAR;

(c) the appellant did not qualify for the exemption contained in s. 13 of *The Captive Wildlife Regulations*, R.R.S. c. W-13.1 Reg. 13;

(d) an export licence was required pursuant to the Act in respect to the whitetailed deer antlers which were exported;

(e) the appellant had failed to ensure that the animal products were labelled in accordance with s. 18 of the DGFAR and the animal products were therefore exported in violation of s. 31(1)(a) of the Act; and

(f) the defence of due diligence did not apply in the circumstances of this case.

10 At the sentencing hearing, the Crown submitted that the penalty should be based upon the payment made by the American hunters to hunt the white-tailed deer which Crown counsel submitted was a minimum of $5,000 for each deer. Counsel suggested that the court should therefore multiply the nine sets of white-tailed deer antlers exported by the $5,000, for a total of $45,000

and then double this amount to come up with a fine of $90,000 plus a surcharge of 30%. Without indicating how he arrived at the final penalty, the trial judge levied a fine of $60,000 with a surcharge of 30% for a total fine of $78,000.

The Statutes and Regulations Relevant to this Appeal

11 *The Wildlife Act, 1998*, S.S. 1998, c. W-13.12 provides as follows:

> **2** In this Act:
>
> . . .
>
> **"wildlife"** means a vertebrate animal of any species, excluding fish, that is wild by nature in Saskatchewan ...
>
> . . .
>
> **31**(1) Subject to the regulations, no person shall, without having first obtained an export or import licence issued pursuant to this Act or the regulations:
>
> (a) export or cause to be exported from Saskatchewan any wildlife; or
>
> (b) import, release or introduce into Saskatchewan any wildlife.
>
> . . .
>
> **73** Subject to section 75, any person who contravenes any provision of this Act or the regulations for which no monetary penalty is specified is guilty of an offence and liable on summary conviction to a fine of not more than $100,000.

12 *The Captive Wildlife Regulations*, R.R.S. c. W-13.1 Reg. 13, passed pursuant to *The Wildlife Act, 1998*, provide as follows:

> **13**(1) Any person importing or exporting wildlife or parts of wildlife shall obtain an import or export licence, as the case requires, pursuant to section 30 of the Act.
>
> (2) Notwithstanding subsection (1) but subject to subsection (3), a person who holds a valid licence pursuant to *The Domestic Game Farm Animal Regulations* may export domestic game farm animals without an export licence.
>
> (3) A person who holds a valid and subsisting licence described in subsection (2) who imports or exports wildlife for a purpose other than that mentioned in subsection (2) shall comply with subsection (1).

13 *The Animal Products Act*, R.S.S. 1978 (Supp.), c. A-20.2, provides as follows:

> **2** In this Act:
>
> (a) **"animal"** means any animal raised in captivity for the purpose of producing animal products ...
>
> (b) **"animal product"** means any product produced by or from an animal and includes any part of an animal, whether edible or non-edible, and any by-product of an animal or imitation animal product;
>
> . . .
>
> **17**(1) Any person who:
>
> . . .
>
> (g) without being the holder of a valid and subsisting licence, deals or engages in any business respecting animals or animal products;

. . .

is guilty of an offence and, in addition to any other penalty to which he may be subject by law, is liable on summary conviction:

(h) in the case of a first offence, to a fine of not more than $5,000 or to imprisonment for a term of not more than six months, or to both such fine and imprisonment, and, in default of payment, to imprisonment for a term of not more than six months;

. . .

18 For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council may make regulations that are ancillary to and are not inconsistent with this Act, and every regulation made under this section has the force of law and, without restricting the generality of the foregoing, the Lieutenant

Governor in Council may make regulations:

(a) defining any word or expression used in this Act but not defined in this Act;

. . .

(v) respecting any other matter that he considers necessary for carrying out the provisions of this Act.

14 *The Domestic Game Farm Animal Regulations*, R.R.S. c. A-20.2 Reg. 10, were passed pursuant to *The Animal Products Act* and were effective on May 19, 1999. They provide as follows:

2 In these regulations:

. . .

(b) **"big game animal"** means any of the following animals that is not held in captivity or that is held in captivity but not for the purpose of producing animal products:

. . .

(vi) a white-tailed deer;

. . .

9 No person shall obtain a domestic game farm animal or a big game animal unless:

(a) the animal is kept by a person who holds:

(i) a valid domestic game farm licence issued pursuant to these regulations; or

(ii) a valid licence issued pursuant to *The Captive Wildlife Regulations*; or

(b) the animal is imported in accordance with these regulations.

. . .

15(1) No person, without obtaining an import licence and complying with any import restrictions or protocols imposed by the minister pursuant to *The Diseases of Animals Act* and any regulations made pursuant to that Act, shall import any of the following into Saskatchewan:

(a) live domestic game farm animals;

. . .

Jurisdiction and Standard of Review

15 The parties agree that s. 813(a) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 ("the *Code*"), permits an appeal by an accused of both the conviction and the sentence in the circumstances of this case. Pursuant to s. 822 of the *Code*, ss. 683 to 689 of the *Code* apply in respect to such an appeal. The powers of an appellate court with respect to an appeal from a conviction are set out in s. 686 and with respect to an appeal from sentence in s. 687 of the *Code*. They provide as follows:

686(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

. . .

687(1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(b) dismiss the appeal.

16 I adopt the standard of review in respect to a summary conviction appeal which was recently reviewed by Popescul J. as he then was in the case of *R. v. Helm*, 2011 SKQB 32, 368 Sask. R. 115 (Sask. Q.B.), beginning at para. 18, where he stated:

[18] ... Accordingly, the standard of review for both Crown and defence appeals from either conviction or acquittal are much the same, except that the defendant has the additional protection found in s. 686(1)(a)(iii) (miscarriage of justice) and the limitations set forth in s. 686(1)(b). In short, both can appeal on factual and legal grounds.

[19] On the factual grounds, the standard of review is whether there is evidence upon which a trier of fact, properly instructed, could reasonably reach the verdict. See *R. v. Bigsky*, 2006 SKCA 145, [2007] 4 W.W.R. 99at para. 74; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; and *R. v. Yebes*, [1987] 2 S.C.R. 168. The appellate court ought not substitute its own view of the evidence for that of the trial judge. However, the appellate court is entitled to review, re-examine and reweigh the evidence, but only for the purpose of determining if the evidence was reasonably capable of supporting the learned trial judge's conclusion. See *R. v. Burns*, [1994] 1 S.C.R. 656.

[20] On a question of law, the standard is correctness, and the appellate court should intervene if the decision is not correct in law unless, in the case of defence appeals, there has been no substantial wrong or miscarriage of justice that has occurred. See *R. v. Shepherd*, 2007 SKCA 29, [2007] 4 W.W.R. 659; and *R. v. Henry (B.)*, 2006 SKQB 469, 286 Sask. R. 154.

17 In respect to appeals against sentence, in a recent decision of the Saskatchewan Court of Appeal, *R. v. Pizzey*, 2011 SKCA 102, 375 Sask. R. 214 (Sask. C.A.), the Court dealt with the standard of review at para. 2:

[2] The standard of review for sentence appeals was defined in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500: absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, an appellate court should not interfere with sentence unless it is demonstrably unfit.

Analysis

18 Although five grounds of appeal were raised in the notice of appeal concerning the conviction, as mentioned previously, the appellant has abandoned Ground No. 1. Therefore, only the remaining four grounds must be considered.

Ground Nos. 2 and 3 - Did the learned trial judge err in determining that an export licence under The Wildlife Act, 1998 was required for the export of the white-tailed deer in question?

19 Section 31(1) of *The Wildlife Act, 1998*, provides that no one can import or export wildlife into or out of Saskatchewan without a licence issued pursuant to that Act. There is no issue between the parties that the appellant did not obtain an export licence. The appellant's position is that he did not need an export licence because the white-tailed deer products that he was exporting were derived from a domestic game farm. The appellant refers to s. 13(2) of *The Captive Wildlife Regulations* passed pursuant to *The Wildlife Act, 1998* and which the appellant states allows a person to export wildlife and wildlife parts without a licence if the person holds a valid licence pursuant to the DGFAR.

20 The appellant's position is that Idanell Ranch, which is operated by the appellant's father and on which the white-tailed deer in question were killed, had a valid licence pursuant to the DGFAR, and accordingly, the exemption provided in s. 13 of *The Captive Wildlife Regulations* applied to him and the export of the animal products in question.

21 The learned trial judge concluded that the white-tailed deer in question were not domestic game farm animals as set out in *The Wildlife Act, 1998*, because they did not meet the definition of domestic game farm animal found in s. 2(e) of the DGFAR. In his decision, the learned trial judge concluded that in order for an animal to be considered a domestic game farm animal, the word "held" found in s. 2(e) of the DGFAR should be defined as "legally" held. The learned trial judge concluded that in the circumstances of this case, the white-tailed deer were not legally held because they had been unlawfully imported into Saskatchewan without an import licence which was required by s. 31(1) of *The Wildlife Act, 1998* and s. 15(1)(a) of the DGFAR.

22 The appellant submits that the learned trial judge failed to consider the provisions of s. 9 of the DGFAR which the appellant submits regulates the manner in which an operator of a domestic game farm can lawfully obtain an animal which is already a domestic game farm animal. However, s. 9 of the DGFAR only provides that domestic game farm animals are to be imported and kept by persons in accordance with the regulations and only by holders of valid licences. In my opinion, s. 9 does not assist the appellant because the facts as found by the trial judge did not establish that the whitetailed deer were imported in accordance with the DGFAR as required by s. 9(b). Section 9 states:

> 9 No person shall obtain a domestic game farm animal or a big game animal unless:
>
> (a) the animal is kept by a person who holds:
>
> (i) a valid domestic game farm licence issued pursuant to these regulations; or
>
> (ii) a valid licence issued pursuant to The Captive Wildlife Regulations; or
>
> (b) the animal is imported in accordance with these regulations.

23 The appellant submits that the Saskatchewan Court of Appeal in the case of *R. v. Marsland*, *supra*, at para. 3, found that the animals in question were "domestic game farm animals" despite the fact that there had been an illegal import of these animals. Therefore, in the circumstances of this case, the appellant says that the manner in which the animals in question came into Saskatchewan is not relevant.

24 However, in my opinion, it is clear from a review of the *Marsland* case that the question of whether or not illegally imported deer lost their status as domestic game farm animals was not raised or argued. It is also my opinion that the trial judge's interpretation of s. 2(e) of the DGFAR as requiring that the deer in question be "legally" held is an interpretation which the legislation can bear. Furthermore, in my opinion, his interpretation was correct.

25 The appellant also submits that it was open to the Crown to bring charges against Rick Alsager or Idanell Ranch for unlawfully importing the deer in question, but that the Crown did not do so. Having failed to do so, the appellant submitted that this amounts to requiring the appellant to disprove the guilt of a third party who was never charged, thereby reversing the onus of proof and the presumption of innocence. In my opinion, however, as the appellant's defence to the charge of exporting without a licence is by reference to an exemption contained in s. 13 of *The Captive Wildlife Regulations*, the onus is upon him to establish that he comes within the exemption, which in this case would be that the white-tailed deer in question were domestic game farm animals. Section 794(2) of the *Code* places the burden of proving an exemption on the defendant in a criminal trial. Section 4(4) of *The Summary Offences Procedure Act, 1990*, S.S. 1990-91, c. S-63.1, makes Part XXVII of the *Code* which includes s. 794(2) applicable to provincial offences.

26 For the reasons outlined above, I am satisfied that the learned trial judge was correct in his interpretation of *The Wildlife Act, 1998* and the DGFAR in finding that an export licence under the Act was required. Accordingly, I would dismiss Ground Nos. 2 and 3 of the appeal.

Ground No. 4 - Did the learned trial judge err in finding that the appellant had failed to properly label the animal products in accordance with s. 18(2) of the DGFAR?

27 Beginning at page 32 of his judgment, the learned trial judge considered this issue as an alternative defence should it be determined that his conclusion that an export licence was required was in error. He concluded that s. 18(2) of the DGFAR expressly required that a domestic game farm operator ensure proper labelling and that the labels in question did not meet the requirements of s. 18(2).

28 Subsection 18(2) of the DGFAR provides that a domestic game farm operator who slaughters or authorizes the slaughter of a domestic game farm animal shall ensure that, *inter alia*, the antlers and hides are labelled before they are removed from the farm with the following information:

(a) the date of the slaughter;

(b) the unique identification of the animal;

(c) the species and sex of the animal; and

(d) the domestic game farm licence number or the name of the domestic game farm operator.

29 There was no evidence at trial that there was a label upon the animal products at the time they were removed from the farm or that the label contained the information listed in s. 18(2) of the DGFAR. The appellant's position is that the offence with which he was charged and convicted being a breach of s. 31(1)(a) of *The Wildlife Act, 1998*, did not include a breach of s. 18 of the DGFAR regarding tagging. Counsel for the appellant submits that there are two separate regulatory schemes, one pursuant to *The Wildlife Act, 1998*, and a second pursuant to *The Animal Products Act*, and that a violation of one scheme does not constitute a violation of the second. Counsel points out that the potential fines available for a violation of *The Animal Products Act* and its regulatory scheme, the DGFAR, are substantially lower than those under *The Wildlife Act, 1998*.

30 At para. 10 of his decision, the trial judge stated that charges of this type are regulatory in nature and accordingly, their constituent statutes and the regulations are to be interpreted purposively and liberally. It is clear that is what the trial judge did in his judgment and in particular in relation to his alternative determination involving s. 18(2) of the DGFAR. In my opinion, his interpretation of the regulatory scheme involving domestic game farm animals and the exportation of parts thereof is an interpretation which the overall regulatory scheme can bear. If the appellant's argument was accepted and s. 18(2) of the DGFAR

did not apply to the export of domestic game farm animal products, it would be difficult if not impossible to track the proper export of products from these animals. The appellant can be in no better position than the game farm operator himself and if he is acting as an agent for the game farm operator when transferring the animal products, he must have those products properly labelled. Therefore, although the issue is moot because the trial judge's principal ground for conviction has been upheld, I would also dismiss this alternate ground of appeal.

Ground No. 5 - Did the learned trial judge err in respect to his determination that the appellant had not been duly diligent?

31 The trial judge dealt with the defence of due diligence in paras. 50 to 56 of his decision. The trial judge correctly identified that the defence of due diligence is available in respect to strict liability offences in accordance with the case of *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161 (S.C.C.). He correctly identified that the onus falls on an accused person to establish the defence of due diligence on a balance of probabilities.

32 Counsel for the appellant submitted that the trial judge focussed only on the appellant's beliefs and the steps of due diligence concerning the import of the whitetailed deer in question to Saskatchewan rather than the export of the animal products from the white-tailed deer. He submitted on behalf of the appellant that the trial judge failed to consider that Saskatchewan Agriculture did not have a label which was specifically issued for the labelling of domestic game farm animal products and therefore this was left to the discretion of the domestic game farm operator, or in this case, the appellant as the operator's agent. Counsel also submitted that Saskatchewan Agriculture no longer issued export certificates under s. 20 of the DGFAR. Finally, counsel pointed out that the evidence of Mr. Paul Johnson, the director of the Livestock Branch of the Ministry of Agriculture for the Government of Saskatchewan, who testified on behalf of the appellant, was that the appellant's documentation would have been acceptable.

33 The position of counsel for the Crown was that the appellant took no steps prior to the export of the animal products to determine whether he had complied with s. 31 of *The Wildlife Act, 1998* or s. 18 of the DGFAR. Furthermore, counsel submitted that the trial judge made findings of fact in this regard and that deference must be given to such findings of fact.

34 The Saskatchewan Court of Appeal in the case of *Merchant v. Law Society (Saskatchewan)*, 2009 SKCA 33, [2009] 5 W.W.R. 478 (Sask. C.A.), summarized the requirements of the defence of due diligence at para. 47:

> 47 ... The Sault Ste. Marie case gave recognition for the first time to an intermediate category of offences described as "strict liability offences" (also referred to as "regulatory offences" or "public welfare offences") where a defendant could avoid culpability for a prohibited act by demonstrating on a balance of probabilities that: (1) due diligence was exercised and all reasonable steps were taken to avoid its commission; or (2) the defendant held a reasonable belief in a set of facts which, if true, would render the act or omission innocent.

35 When considering the defence of due diligence, the trial judge made the following findings of fact:

> 1) that the appellant knew that an import permit for the deer had not been obtained;
>
> 2) that the appellant knew that the Provincial authorities were of the view that the deer could not be lawfully exported;
>
> 3) that the appellant decided to give it a try and see what happened; and
>
> 4) that the appellant's mistake was a mistake of law which was not induced by any advice obtained from an appropriate official.

36 As indicated previously in para. 32 of my decision, the statement of the law concerning the defence of due diligence by the trial judge was correct. In my opinion, he made findings of fact in determining that due diligence had not been established which, based upon the evidence, a trier of fact properly instructed could reasonably reach. Accordingly, I dismiss this ground of appeal.

Ground Nos. 6, 7 and 8 - Did the trial judge err in his assessment and quantification of sentence?

37 The trial judge imposed a fine of $60,000 plus a victim surcharge of 30% ($18,000) for a total fine of $78,000. The trial judge also prohibited the appellant from obtaining a licence to hunt wild game under *The Wildlife Act, 1998* for a period of two years.

38 The trial judge's reasons for his decision are set out at page 28 of the transcript from his oral sentencing decision. They are as follows:

> What is more, rather than trying one and see what happens, as a test case, he took nine [sets of antlers]. He was paid $45,000 for this, more or less. The Crown suggests that I should double that and then add surcharge on it, as a penalty. I think that there is case law where people have done that. I am not satisfied there is any — that any of the evidence put before me indicates that Mr. Alsager is in a position where he cannot pay. Nonetheless, I don't think I am required to double this, I don't think that is the law. I think the law does tend to be that the straight up revenue, as Mr. Jeerakathil called it, and I think that is a fair way to describe it, should be addressed, and something on top of that.
>
> I have decided on the one count upon which I have convicted Mr. Alsager to sentence him to a fine of $60,000, with a surcharge of 30%, which, if my somewhat late in the day arithmetic is correct, is $18,000, for a total of $78,000. ...

39 It appears that the trial judge's intent was to remove any financial advantage obtained by the appellant for his breach of the law. As there was no evidence tendered as to the profit which the appellant received in respect to the sale of the nine white-tailed deer taken by the American hunters, the trial judge appears to have based his penalty solely on the evidence of the appellant who in cross-examination acknowledged that his website listed prices for a hunt for white-tailed deer that started at $5,000 per deer. [page 447 of transcript] However, at page 449 of the transcript, the appellant also testified that the money paid by the American hunters goes into a U.S. account controlled by the appellant's father who owns Idanell Ranch and that the appellant's father then pays him a percentage of this sum at the end of the year. Also at page 447 of the transcript, the appellant testified as follows:

> Q You don't know anything about the legality about as far as the game farm animals?
>
> A I don't own any — legally I don't own any game farm animals.
>
> Q Right, you don't own it, but you are getting paid by your dad to sell the hunts on the farm, right?
>
> A Yeah, I get paid a commission, yes.

40 In my opinion, the basic premise upon which the trial judge's determination of the amount of the fine was fundamentally flawed. The above-noted evidence establishes that it was the appellant's father, not the appellant, who would have received the revenue referred to by the trial judge, which revenue was based upon the cost of the hunts. The only evidence as to what the appellant received was that he received a commission or percentage of this amount. The appellant was never asked what this percentage or commission was.

41 In applying the standard of review referred to by the Saskatchewan Court of Appeal in *R. v. Pizzey*, *supra*, I find that the trial judge failed to consider a relevant factor which is whether the revenue that the trial judge referred to was revenue to the credit of the appellant or the revenue of a third party, his father, who was not an accused at the trial. While the payment for the hunts may have been made to the account of a company owned by the appellant, Blackrock, the company account was, according to the evidence, controlled by the appellant's father and the appellant was only paid a commission or a percentage of the hunt revenue. Without evidence as to the actual revenue of the appellant, the trial judge was not in a position to determine an appropriate penalty for the appellant in the manner in which he purported to do. While the discretion of a sentencing judge should not be interfered with lightly, in my opinion, as the sentence imposed here was based on revenue not received by the appellant, the sentence cannot stand.

42 Furthermore, in my opinion, the sentence imposed was demonstrably unfit when compared with sentences in other Saskatchewan *Wildlife Act* cases of similar circumstances. In the case of *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 (S.C.C.), the Supreme Court of Canada stated at para. 92 that one of the functions of an appellate court in a sentence appeal

is to review and minimize the disparity of sentences imposed by sentencing judges for similar offenders in similar offences. In this regard, I have considered the following Saskatchewan sentencing decisions for similar offenders in similar circumstances:

1. *R. v. McLeod* (1997), 160 Sask. R. 26, [1997] S.J. No. 553 (Sask. Q.B.).

In this case, the appellant appealed his conviction and sentence on several charges of **trafficking** in and possession of elk meat, white-tailed deer antlers and elk antlers, and hunting white-tailed deer without a licence all contrary to *The Wildlife Act*, S.S. 1979, c. W-13.1. The convictions for **trafficking** in elk antlers, hunting deer and **trafficking** in elk meat were set aside on appeal. The convictions for two counts of **trafficking** in deer antlers was upheld as was the sentence of a fine of $1,250 in respect to each count. The trial judge referred to the evidence concerning the two counts and stated that in respect to the first count, the appellant had sold two sets of deer antlers for $60.00, and on the second occasion, sold three sets of deer antlers for $20.00. The court pointed out that the minimum fine for **trafficking** in wildlife under that section of *The Wildlife Act*, was $1,000, and that the maximum penalty was $25,000. In those circumstances, the court held that the amount of the fines imposed of $1,250 in respect to each count did not appear to be unjust and dismissed the appeal.

2. *R. v. Charles* (1997), [1998] 1 W.W.R. 515, 159 Sask. R. 126 (Sask. Q.B.).

The appellants, who were treaty Indians, appealed their convictions and sentences for **trafficking**, illegally hunting, and illegally possessing wildlife, contrary to the provisions of *The Wildlife Act*, S.S. 1979, c. W-13.1. The appeals against conviction were dismissed. The appeal against sentence, which was $1,000 for each appellant, was the minimum penalty provided for under s. 57(3) of *The Wildlife Act*. The appellants contended that such an amount contravened s. 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, as it would constitute cruel or unusual treatment or punishment. The appellants' submission was that the offence in question, where the antlers had been sold for $100.00, was a relatively minor act of **trafficking**. The appellate judge however found that the purpose of *The Wildlife Act* is the conservation and management of wildlife, and that **trafficking** was a serious impediment to the conservation of wildlife. The appellate judge therefore concluded that a minimum fine of $1,000 was not cruel and unusual punishment.

3. *R. v. Marsland*, *supra.*

This case involved the unlawful transport and import into Saskatchewan of white-tailed deer without a valid permit contrary to s. 6(3) of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52 ("the WAPPRIITA"), and s. 31(1)(b) of *The Wildlife Act, 1998*. The summary conviction appeal court had overturned the acquittals and imposed a fine of $1.00 for *The Wildlife Act, 1998* conviction and $5,000 for two convictions under the WAPPRIITA. On appeal, the Saskatchewan Court of Appeal maintained the sentence in respect to the conviction for *The Wildlife Act, 1998* offence, but reduced the penalty for conviction under the WAPPRIITA to a fine of $100.00.

4. *R. v. Nordstrom*, 2011 SKPC 166, 379 Sask. R. 1 (Sask. Prov. Ct.).

The accused in this case was found guilty of 16 offences relating to the import and export of elk or white-tailed deer or parts thereof contrary to *The Wildlife Act, 1998* and the WAPPRIITA. The accused in that case operated a hunt farm but took the position that, as a status Indian, he was entitled to do so because he was operating on reserve land and was therefore exercising a treaty right. The trial judge, who was the same judge who heard the judgment under appeal before me, held that what took place on the accused's hunt farm was neither hunting nor farming as contemplated under the First Nation treaty in question and convicted the accused. Although the sentencing portion of that decision is not reported, counsel before me confirmed that the sentence imposed was a fine of approximately $38,000, including surcharge. Counsel also advised that the charges in that case involved approximately 40 sets of capes and 40 sets of antlers, and that the fine was approximately $1,000 per set of antlers. Counsel also advised that both the conviction and sentence in the *Nordstrom* case are currently under appeal by the accused.

43 Counsel for the appellant submitted that based upon the above cases, fines for illegal **trafficking** in deer antlers or importing and exporting such deer or of whitetailed deer ranged from $100 to $1,000 per set of antlers. Counsel submitted

that the fine in the current case of $78,000 divided by nine sets of antlers results in a fine of $8,666.67 per set, which counsel submitted was grossly excessive given the sentences imposed in the cases set out above.

44 Counsel for the appellant also submits that had the charges in this case been laid pursuant to *The Animal Products Act*, as was the case in the *R. v. McLeod* and *R. v. Charles* cases, the penalty provided for in s. 17(1)(h) of that Act would have been a total fine of not more than $5,000. Counsel also submitted that although the accused was convicted of an offence under *The Wildlife Act, 1998*, in which s. 73 of the Act provides for a penalty with no minimum but a maximum of $100,000, the fine under both Acts should be similar. Finally, counsel submitted that the maximum fine should be reserved for the most egregious of offences such as the wholesale export of animal parts as part of a large criminal operation.

45 Crown counsel submitted that the trial judge wanted to send a strong message that this type of conduct which involved a deliberate attempt to avoid export regulations would not be tolerated. Counsel submitted that the trial judge properly considered factors of deterrence and punishment in arriving at the sentence rendered.

46 In the case of *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 (S.C.C.), beginning at para. 121, Cory J. pointed out that the criminal law acknowledges a distinction between truly criminal conduct and conduct which although otherwise lawful is prohibited in the public interest. He pointed out that the objective of regulatory legislation is to protect the public from the potentially adverse effects of otherwise lawful activity, and that while criminal offences are designed to condemn and punish past inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of standards of conduct and care. Again, at para. 219, Cory J. points out that regulatory schemes can only be effective if they provide for significant penalties in the event of their breach. He was of course in that case dealing with the offence of false or misleading advertising by a travel company, but in my opinion, the distinction between criminal law offences and regulatory scheme offences is very relevant. Conviction for a regulatory offence implies a reduced degree of culpability compared with that for a conviction for a criminal offence. Denunciation and deterrence however remain fundamental principles. In this case, the appellant's conviction alone will serve to denounce conduct involving the export of animal products without a proper licence as being illegal and the object of a sentence must now be to deter others from "taking a chance" as the trial judge found guided the appellant's actions.

47 In determining what would be a fit sentence, I have considered the trial judge's finding that the appellant was "largely acting in the capacity of agent, entrepreneur for his father's business" (page 27 of sentencing transcript). His father was however never charged. In his sentencing decision, the trial judge also found that the situation regarding the animals may have lacked some clarity, but that rather than trying to export one of the animals as a test case, the appellant took nine. As was stated by the Saskatchewan Court of Appeal in the *R. v. Marsland* case, where there is some ambiguity, such ambiguity is relevant in determining the amount of the fine. It should be noted that the offence here was not one of illegal hunting of the animals which were kept on a game farm and could be legally killed at any time. This was not a situation where conservation of wildlife was an issue except to the extent that it is necessary to be able to account for the domestic game farm animals kept in captivity. I have also considered that the fines in the *R. v. McLeod* and *R. v. Charles* cases of $1,275 and $1,000 were levied for **trafficking** in white-tailed deer antlers, which offence is more serious than the situation here. Taking all these factors into consideration, it is my opinion that a fine of $5,000 plus a surcharge of $1,500 for a total penalty of $6,500 in addition to the two-year hunting ban levied by the trial judge would be an appropriate sentence in the circumstances of this case.

Conclusion

48 The appeal against conviction is dismissed. The appeal against sentence is allowed. The appellant shall pay a fine of $5,000 plus a surcharge of $1,500 for a total of $6,500. The prohibition for two years from obtaining a licence under *The Wildlife Act, 1998* as levied by the trial judge is confirmed.