Most Negative Treatment: Not followed
Most Recent Not followed: R. v. Aberdeen | 2005 ABPC 203, 2005 CarswellAlta 1162, [2005] A.J. No. 1062, 211 C.C.C. (3d) 131, 70 W.C.B. (2d) 205, 133 C.R.R. (2d) 211, 387 A.R. 269, [2005] A.W.L.D. 3502, [2005] A.W.L.D. 3503 | (Alta. Prov. Ct., Jul 27, 2005)

2000 ABQB 461
Alberta Court of Queen's Bench

R. v. Lamouche

2000 CarswellAlta 707, 2000 ABQB 461, [2000] A.W.L.D. 676, [2000] A.J. No. 789, 267 A.R. 347, 47 W.C.B. (2d) 36, 86 Alta. L.R. (3d) 330

Her Majesty the Queen, Respondent and Kenneth Wilson Lamouche, Shawn Lawrence Lamouche and Lawrence Francis Prince, Appellants

Burrows J.

Heard: June 27, 2000
Judgment: July 6, 2000
Docket: Edmonton 9903-0011S4

Proceedings: **Proceedings: varying (December 14, 1998) (Alberta Prov. Ct.)**

Counsel: *Francis McMenemy*, for Kenneth Wilson Lamouche.
Gordon W. Collins, for Shawn Lawrence Lamouche.
Kevin Thomas Mott, for Her Majesty the Queen.

Subject: Corporate and Commercial; Public
Related Abridgment Classifications
Natural resources
I Fish and wildlife
I.5 Offences
I.5.o Sentencing
I.5.o.iv Miscellaneous
Headnote
Fish and wildlife --- Practice and procedure — Sentencing — Miscellaneous penalties
Three accused were convicted of 36 counts of **trafficking** in wildlife and related offences under Wildlife Act — Accused were sentenced to five, nine and 12 months' imprisonment, respectively — Accused appealed from sentence — Appeal allowed in part — Trial judge did not err in imposing term of imprisonment, since this was available sanction under Wildlife Act — Trial judge erred in determining that imprisonment should be sanction of first resort for offences under Wildlife Act — Court should begin by considering all available sanctions other than imprisonment, and use imprisonment as last resort — Trial judge did not err in imposing directions under s. 93.4 of Wildlife Act — Although s. 93.4 did not come into force until after date of offences, imposition of directions thereunder did not offend s. 11 of Charter — Imposition of directions did not constitute penalty for past offence, but regulation of future conduct — Appeal court to impose new sentences after hearing of further submissions — Wildlife Act, S.A. 1984, c. W-9.1, s. 93.4 — Canadian Charter of Rights and Freedoms, s. 11.
Table of Authorities
Cases considered by *Burrows J.*:
Barry v. Alberta (Securities Commission) (1986), 67 A.R. 222, 25 D.L.R. (4th) 730, 24 C.R.R. 9 (Alta. C.A.) — considered

Bulmer v. Alberta (Solicitor General), 46 M.V.R. 195, 50 Alta. L.R. (2d) 180, 76 A.R. 194, [1987] 3 W.W.R. 422, 36 D.L.R. (4th) 688 (Alta. Q.B.) — applied

R. v. Berry (1997), 196 A.R. 398, 141 W.A.C. 398 (Alta. C.A.) — applied

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

R. c. Pelletier (1989), 1989 CarswellQue 591, 52 C.C.C. (3d) 340 (Que. C.A.) — applied

Solicitor's Clerk, Re, [1957] 1 W.L.R. 1219, [1957] 3 All E.R. 617 (Eng. Q.B.) — considered

Statutes 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. 11(i) — considered

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

Pt. XXIII [rep. & sub. 1995, c. 22, s. 6] — considered

s. 687(1) — considered

s. 718.2(b) [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. 822 [am. 1991, c. 43, s. 9 (Sched., item 13)] — pursuant to

Provincial Offences Procedure Act, S.A. 1988, c. P-21.5

Generally — considered

s. 3 — considered

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

Generally — considered

s. 92 — considered

s. 92(4) — considered

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

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

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

APPEAL by accused from sentence imposed on conviction for multiple counts of **trafficking** in wildlife and related offences under *Wildlife Act*, reported at (1998), 236 A.R. 69 (Alta. Prov. Ct.).

***Burrows J.*:**

1 Mr Kenneth Lamouche, Mr. Shawn Lamouche and Mr. Prince were three of nine persons charged in various combinations with 47 violations of the *Wildlife Act* of Alberta. The charges arose out of an undercover operation in which a wildlife officer posed as a person who had contacts to whom he could sell wild game. Over the course of a year he participated in hunting trips with the accused and purchased wild game from them. He kept a record of events.

2 The charges against the other 6 accused persons named in the information were resolved without trial. The charges against the 3 appellants were tried. The learned Provincial Court Judge convicted and sentenced all three appellants. All three appellants appealed against the sentences imposed on them.

3 Mr. Prince has not pursued his appeal. It is dismissed.

4 The particulars of the convictions entered against the two remaining Appellants are as follows:

Kenneth Lamouche:

- 8 counts of **trafficking** in wildlife

- 2 counts of hunting for the purpose of **trafficking** in wildlife

- 2 counts of abandoning killed game

- 1 count of transporting a loaded firearm in a vehicle

Shawn Lawrence Lamouche:

- 5 counts of **trafficking** in wildlife

- 3 counts of hunting for the purpose of **trafficking** in wildlife

- 1 count of hunting when the season was closed.

- 1 count of abandoning killed game

- 1 count of hunting without the consent of the land owner

- 1 count of transporting a loaded firearm in a vehicle

- 1 count of discharging a firearm from a vehicle

- 1 count of hunting without due regard for the safety of others

- 1 count of hunting at night

- 1 count of hunting using a light

5 Each appellant was sentenced to a combination of concurrent and consecutive terms of imprisonment of various durations. For Kenneth Lamouche the total sentence was 12 months imprisonment. For Shawn Lamouche the total sentence was 9 months imprisonment. For Lawrence Prince the total sentence was 5 months imprisonment.

6 The sentences were imposed pursuant to s. 92 of the *Wildlife Act*. Most of them were pursuant to subsection 4 which provides that a person convicted of an offence under specified sections "... is liable to a fine of not more that $100,000 or to imprisonment for a term of not more than 6 months, or both."

7 In addition the learned Provincial Court Judge imposed the following directions on each of the appellants pursuant to s. 93.4 of the *Wildlife Act*:

> (1) Within two weeks of the date of their release from the terms of imprisonment imposed today, to advise the Fish and Wildlife office nearest their place of residence of their address and thereafter for three years, to advise that office in advance of any change in that address,
>
> (2) For the three years following the release date referred to in direction (1), to report in writing to that office every successful hunt for wildlife in which they engage. The report is to include 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.

(3) Upon the request of a Fish and Wildlife officer, to provide proof of the information contained in the report provided pursuant to direction (2).

8 In his written reasons for sentence the learned Provincial Court Judge observed that the objectives of the legislation being enforced are an essential consideration in the determination of a fit sentence along with the circumstances of the offender and of the offence. The objective of the *Wildlife Act*, he noted, is the management and ultimately the preservation of wildlife resources. He observed that, "**trafficking** in wildlife and hunting for that purpose pose one of the greatest threats to the management and protection of the wildlife resource," and noted that the penalty prescribed by the Legislature is accordingly severe. He articulated some of the rational for that policy:

> There are natural controls on those who hunt for food for themselves, even when they do so illegally. There is a limit to how much they can eat, how fast they can eat it and how much they can reasonably store. While there may be exceptions to the general rule, those simple realities limit how many animals will likely be taken by those types of illegal hunters. The **trafficker** is different. Since he or she is, in effect, hunting for sale to others, the take is limited only by the number of willing buyers and by his or her own greed. As is so amply demonstrated by these prosecutions, the goal is money, and usually quick money, not the future of the hunter's own food supply. In the result, the **trafficker** often shows little regard for the preservation of the resource he or she exploits. The sad truth is that those involved in **trafficking** usually seek the maximum profit with the minimum effort; they almost always would rather escape detection than accord the animals they kill a humane death. ... In practical terms the effect of that approach to the killing of wild game is potentially devastating to the wildlife resource. ... It leads to the abandonment and waste of wounded game. It can lead to the slaughter not only of mature adults, but of the unborn they carry. Since the **trafficker** by definition tries to avoid apprehension, it also inevitably affects the proper management of the wildlife resource because of the number, gender and species of animals taken in any one year is made more difficult to determine. ... The **trafficker** then presents a special obstacle to the protection of the wildlife resource.

9 He found that deterrence should be given precedence in determining a fit sentence:

> Where the chance of discovery is small, temptation increases. That is why general deterrence, usually expressed by high fines even for first offenders, plays such a significant role in sentencing for wildlife offences.
>
> Given the serious threat they present to the wildlife resource and the temptation which inevitably results from the prospect of monetary gain with little risk to the offender, sentencing for **trafficking** offences must, in my view, emphasize before all else individual and general deterrence. The message which should be sent to **traffickers** and prospective **traffickers** alike is that the price will be very high indeed in the event they are caught. And I make it clear that I am not talking only about money when I use the word "price". There may be cases where high monetary penalties are appropriate, but Courts should neither forget nor ignore the other resources they are given by the legislation. They were provided for a reason. Where **trafficking** is concerned, I have concluded that the most effective message that can be sent to those who are inclined to engage in that activity is one which makes it clear that the prospective **trafficker** gives in to temptation at the very real risk of his or her own liberty.

10 The learned Provincial Court Judge concluded his analysis with the following paragraph which gives rise to the ground of appeal Mr. Kenneth Lamouche relied upon:

> That is why I have concluded that offences related to **trafficking** in wildlife should generally attract a term of imprisonment. In saying that, I do not suggest that every **trafficker** must automatically go to goal. There may be circumstances, either surrounding the offence itself or peculiar to the individual offender, which would lead a Court to conclude that some other sanction is more appropriate. I do suggest, however, that the special need for deterrence, both individual and general, in these cases should cause a court to resort first to the imprisonment option unless there are very good reasons to invoke some other sanction.

Appeal with regard to imposition of term of imprisonment

11 Mr. Kenneth Lamouche submitted that in this last quoted paragraph, and in particular in the last sentence of it, the learned Provincial Court Judge made an error in law. He submitted that the law requires a judge to canvass the appropriateness of available sanctions other than imprisonment in the individual case of the person convicted and to impose a sentence of imprisonment only if a lesser sanction is found to be inappropriate for the particular offender in the particular circumstances. He submitted that the learned Provincial Court Judge erred in concluding that for the offences of **trafficking** in wildlife and hunting for the purposes of **trafficking**, the default sentence should be imprisonment and that the judge should impose some lesser sanction only if the circumstances of the offence or the offender make that appropriate in the particular case.

12 The *Provincial Offences Procedures Act*, applies to this case. It provides in s. 3:

> Except to the extent that they are inconsistent with this Act and subject to the regulations, all provisions of the *Criminal Code* (Canada), ... that are applicable in any manner to summary convictions and related proceedings apply in respect of every matter to which this Act applies.

13 The provisions of the *Code* in Part XXIII - Sentencing are applicable to summary convictions. Subsections 718.2(d) and (e), in Part XXIII therefore apply. They say:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) 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.

14 In *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.) (decided 4 months after the learned Provincial Court Judge's decision) Cory and Iacobucci, JJ, speaking for the Court said: (para 36)

> Section 718.2(e) directs a court, in imposing a sentence, to consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, "with particular attention to the circumstances of aboriginal offenders". The broad role of the provision is clear. As a general principle, s. 718.2(e) applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender.

15 The learned Provincial Court Judge appears to have determined that for **trafficking** in wildlife, imprisonment is the sanction of first resort and alternative, less severe penalties are to be imposed only if there is reason justifying deviation from the imprisonment starting position.

16 I agree that this constitutes an error in law.

Disparity of Sentence

17 Mr. Kenneth Lamouche also argued that the learned Provincial Court Judge erred in imposing a term of imprisonment because of a disparity between that sentence and the sentence imposed in other cases. Counsel advised that this is the first case where terms of imprisonment rather than fines have been imposed on first time violators of the *Wildlife Act*. The 6 other original accused persons, who plead guilty to the charges against them, were all fined.

18 The submission was that the learned Provincial Court Judge failed to comply with s. 718.2(b) of the *Criminal Code* which provides:

> (b) a sentence should be similar to sentences imposed on similar offences for similar offences committed in similar circumstances.

In effect, it was submitted, because of this section, if no other first time offender has ever been sent to gaol for a *Wildlife Act* violation, Mr. Lamouche can not be sent to gaol.

19 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.

Directions under s. 93.4 of the *Wildlife Act*

20 On the hearing of this appeal, Mr. Shawn Lamouche advised that he appealed only from that portion of the sentence of the learned Provincial Court Judge by which directions were given pursuant to s. 93.4 of the *Wildlife Act*. Mr. Kenneth Lamouche also appealed in respect of those directions.

21 The ground of appeal here was that s. 93.4 did not come into force until August 14, 1997, after the dates upon which the offences of which the appellants were convicted were committed. The appellants submitted that by giving directions under that section in respect of offences that occurred before the section was in force, the learned Provincial Court Judge was improperly giving the section retrospective effect.

22 Counsel for the Crown understood the appellants to be arguing that the imposition of directions in the circumstances constituted a violation of s. 11(i) of the *Charter*. That section reads:

> 11. Any person charged with an offence has the right ...
>
> > (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

23 Counsel for the Crown argued that s.11(i) did not apply because the directions given under s. 93.4 did not constitute a punishment.

24 The determination of this issue - whether it be articulated as one concerning the retrospective operation of the section or as one concerning the application of s. 11(i) of the *Charter* - depends on the same question: Do directions under s. 93.4 of the *Wildlife Act* amount to a punishment for an offence?

25 A statute should not be characterized as having retrospective effect where it authorizes an action to be taken affecting only future conduct, even though the foundation for the action is what happened in the past, before the statute was in force. However that situation is to be distinguished from one where a penalty is inflicted for an act done in the past In the latter case, the statute should be characterized as having retrospective effect. *Solicitor's Clerk, Re*, [1957] 3 All E.R. 617 (Eng. Q.B.); *Barry v. Alberta (Securities Commission)* (1986), 67 A.R. 222 (Alta. C.A.).

26 Similarly s. 11(i) of the *Charter* does not apply where the object of the legislation is not to punish for the commission of the prohibited act, but to protect the public by the regulation of future conduct. In *Bulmer v. Alberta (Solicitor General)* (1987), 76 A.R. 194 (Alta. Q.B.), McFadyen J. said (para. 33):

> Where the real object of the legislation is the protection of the public by a scheme for regulating the future conduct of individuals who have committed past infractions, the proceeding does not come with the protection of s. 11 although the effect may be punitive.

27 In my view, though the directions the learned Provincial Court Judge made under s. 93.4(g) and (i) follow upon conviction for an offence against the *Wildlife Act*, their purpose was not to punish but to protect the public interest in the management of the wildlife resource. After setting out his directions, the learned Provincial Court Judge said:

> 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.

28 In my view neither the rule against retrospective operation of a statute nor s. 11(i) of the *Charter* were offended.

Disposition

29 Given the error of law noted previously, I allow Mr. Kenneth Lamouche's appeal as to the sentence he received. I dismiss the appeal of both Mr. Kenneth Lamouche and Mr. Shawn Lamouche with regard to the directions made under s. 93.4 of the *Wildlife Act*.

30 At the argument of this appeal the Crown submitted that if I allowed the appeal, it should remit the matter back to the Provincial Court for sentencing. Mr. Lamouche's counsel submitted that I should myself determine a fit sentence.

31 I understand that before the learned Provincial Court Judge there was a sentencing hearing with evidence. I have not been provided with a transcript of those proceedings. I have only been given the reasons for sentence written by the learned Provincial Court Judge. The Crown observeed that the learned Provincial Court Judge having heard the trial and the evidence adduced on the sentencing hearing would be in a much better position than me to now determine a fit sentence has considerable merit.

32 However, s. 687(1) of the *Criminal Code* applies in this case by virtue of s. 822 of the *Code* and the provisions of the *Provincial Offences Procedures Act*, previously cited. It provides:

> 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.

33 Accordingly, because of this section, whether or not it would be efficient to do so, I have no power to remit the matter to the Provincial Court. I must determine a fit sentence myself. *R. c. Pelletier* (1989), 52 C.C.C. (3d) 340 (Que. C.A.); *R. v. Berry* (1997), 196 A.R. 398 (Alta. C.A.)

34 The materials and submissions made to me on the hearing of this appeal were not sufficient for that purpose. Accordingly I direct counsel for the Crown and for Mr. Kenneth Lamouche to reappear before me to speak to sentence. Arrangements for this hearing may be made through the office of the Trial Coordinator.

Appeal allowed in part.