

2010 ABPC 194
Alberta Provincial Court

R. v. Potts

2010 CarswellAlta 1072, 2010 ABPC 194, [2010] A.W.L.D. 3628, 492 A.R. 180, 88 W.C.B. (2d) 466

Her Majesty the Queen and Malcolm J. Potts

D.G. Redman Prov. J.

Heard: February 18, 2010

Judgment: May 28, 2010

Docket: Lethbridge 05027271P1

Counsel: Mr. Greg Maxwell for Crown
Ms Sandra Folkins for Alberta Justice
Mr. Adam Letourneau for Accused

Subject: Natural Resources; Public

Related Abridgment Classifications

Natural resources

I Fish and wildlife

I.5 Offences

I.5.o Sentencing

I.5.o.i Fines

Headnote

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

Defendant was 52-year-old Aboriginal of limited financial means and education, whose ability to work was restricted by physical limitations — Defendant was subject of undercover operation involving one undercover officer who drove around with him, engaged him in conversation, and observed his actions — Defendant was convicted of 11 counts under [Wildlife Act](#), including unlawfully hunting wildlife, unlawful [trafficking](#) in wildlife, unlawful guiding, unlawfully discharging firearm from vehicle, and contravening order made under Act — Defendant was sentenced to \$4,000 fine plus \$600 surcharge for shooting and selling one deer, \$3,000 fine plus \$450 surcharge for hunting and sale of elk meat, \$2,000 fine plus \$600 surcharge for guiding without licence, \$1,000 fine plus \$150 surcharge for hunting bird of prey, and \$2,000 plus \$300 surcharge for breach of order under Act — Primary consideration in sentencing was deterrence — Overall circumstances of matter, including defendant's modest financial means, were taken into consideration.

Table of Authorities

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

R. v. Cardinal (2009), 46 C.E.L.R. (3d) 146, 470 A.R. 57, 2009 ABPC 296, 2009 CarswellAlta 1559, [2009] 4 C.N.L.R. 276 (Alta. Prov. Ct.) — referred to

R. v. Hofer (2010), 2010 CarswellAlta 404, 2010 ABPC 64 (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.) — considered

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

Statutes considered:

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

Pt. XXIII — referred to

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] — referred to

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

Generally — referred to

s. 97 — referred to

SENTENCING of defendant on conviction of charges under *Wildlife Act*.

D.G. Redman Prov. J.:

Introduction

1 Mr. Potts was convicted of 11 counts under the *Wildlife Act*, R.S.A. 2000, c.W-10. written reasons for which were delivered February 18th, 2010. This Court heard submissions with respect to sentencing and a decision was reserved. The issue for consideration is what is a fit and appropriate sentence given all the proper considerations.

Facts

2 The facts were carefully reviewed in the decision of February 18th, 2010 and will not be repeated here. By way of brief summary, it was alleged that between October 18th, 2003 and January 25th, 2005, Mr. Potts committed offences under the *Wildlife Act*, R.S.A. 2000, c.W-10. Mr. Potts was the subject of an undercover operation - Operation Chinook, aimed at illegally **trafficking** in wildlife. As a result of these activities Mr. Potts was convicted of 11 counts, including unlawfully hunting wildlife, unlawful **trafficking** in wildlife, unlawful guiding, unlawfully discharging a firearm from a vehicle and contravening an order of the Court made under the *Wildlife Act*.

Position of the Crown

3 The Crown seeks substantial fines on all charges except Count 5 and submits that the cumulative fine should be in the range of \$25,000.00. With respect to Count 5, the Crown seeks a short period of incarceration. It also seeks an order under s.97 of the *Wildlife Act*. The Crown made reference to a review of the case law it had conducted and relies specifically on *R.v. Ladouceur*, an August 12th, 2008 judgment of the Alberta Provincial Court from Lac La Biche, Alberta.

Position of the Accused

4 Counsel for Mr. Potts submits that these matters can be dealt with by way of fines and given Mr. Potts' lack of a record and his limited financial means, the fine should be in the lowest of ranges.

5 On May 25th, 2010, Mr. Potts also caused to be filed, a document entitled "Brief of Arguments and Evidence in Support of Sentence Recommendations". This brief purports to be signed by Mr. Potts and Dr. John S. Murdoch.

6 The brief reads more like an appeal of the trial decision rather than submissions on sentencing. It does make reference to a "plea arrangement" suggesting that there was an agreement that only fines would be imposed in exchange for an abandonment of the entrapment argument Mr. Potts intended to advance. Counsel for Mr. Potts denied any such "plea arrangement". In light of my decision which follows, there was no need for the Court to inquire further into this alleged arrangement. In the brief Mr. Potts also sought as much time as possible to pay any fines imposed.

Analysis

7 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). The circumstances of each case must be examined carefully, as well as the circumstances of the individual offender.

8 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.).

9 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*).

10 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.

11 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)).

12 Not all principles apply equally in all cases.

13 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.

14 The maximum penalty on a single count 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.

15 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.

4. *R. v. Ladouceur*, supra It is my understanding that the background to this overall matter was that 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 charges being laid against 30 individuals and one business. (See *R. v. Hofer*, 2010 ABPC 64 (Alta. Prov. Ct.))

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.

16 Counsel for the Crown noted in his review of the cases that there seems to be a difference between the way in which these cases were dealt with in sentencing in the northern versus the southern part of the province, there is a difference depending on the type of animal and that the ranges do vary substantially.

17 In all cases, a Court must consider the circumstances of the offences, the offender and both mitigating and aggravating factors.

18 The circumstances of the offences have already been reviewed. The following circumstances and factors are important in arriving at an appropriate sentence:

1. Mr. Potts is 52 years of age and has no prior record in that his previous involvement with the law resulted in a discharge.
2. Mr. Potts is Aboriginal and of limited financial means. He has only a grade 9 education and his ability to work is restricted due to physical limitations. Based upon the evidence at trial, he is nonetheless a respected and contributing member of his community.
3. Although the investigation involved an undercover operation it was still relatively straight forward in its operation and scope. It involved only one undercover officer who simply drove around with Mr. Potts and engaged him in conversation and observed his actions.
4. Except in relation to Count 11, the hunting of a bird of prey for the purpose of **trafficking**, in which no bird of prey was shot or sold, the other charges deal with animals that are fairly common and prevalent in southwestern Alberta.
5. Mr. Potts was aware his actions were illegal and in defence of his activity attempted to hide behind his aboriginal rights. Aboriginal hunting rights have been well defined over an extended period of time and there should have been no uncertainty in the mind of Mr. Potts as to his rights and obligations in this regard. Mr. Potts even told the undercover investigator he was aware of his rights and obligations and by his actions, chose to ignore them.
6. Mr. Potts was subject to an order of the Court at the time.
7. This was not an isolated act, but rather involved various groups over an extended period of time.

Sentence

19 I have attempted to take into account the overall circumstances of this matter and the submissions of counsel, including the relatively modest financial means of Mr. Potts. I have also tried to consider the totality of this matter and for that reason have grouped these offences together in certain subsets:

Counts 1, 2, 3, 4

20 For the most part these activities involved Mr. Potts travelling around with an undercover officer culminating in the shooting and sale of one deer. An appropriate fine for these offences is \$4,000.00 plus surcharges as follows:

Count 1 - \$1,000.00 plus surcharge of \$150.00 in default 16 days

Count 2 - \$1,000.00 plus surcharge of \$150.00 in default 16 days

Count 3 - \$1,000.00 plus surcharge of \$150.00 in default 16 days

Count 4 - \$1,000.00 plus surcharge of \$150.00 in default 16 days

The default time in all cases is concurrent.

Counts 7, 8 and 9

21 These charges involve the hunting for and sale of elk meat previously shot.

22 On each of these charges, Mr. Potts will be fined the sum of \$1,000.00 plus a surcharge of \$150.00 in default 16 days, concurrent to each other, but consecutive to Counts 1, 2 3, and 4.

Counts 10 and Count 12

23 These counts involve Mr. Potts guiding without a license. It occurred over an extended period of time and Mr. Potts earned money and received other benefits.

24 On each of Count 10 and 12, Mr. Potts will be fined the sum of \$2,000.00, together with a surcharge of \$300.00 each, with a default time of 33 days on each, concurrent to each other, but consecutive to the other sentences.

Count 11

25 This involves the hunting of a bird of prey which is a protected animal. Mr. Potts did not shoot at any animal on the day in question, but he was hunting within the meaning of the *Wildlife Act* and this behaviour must be deterred. Mr. Potts will be fined the sum of \$1,000.00. A surcharge of \$150.00 will apply, in default 16 days consecutive.

Count 5

26 This involves the flagrant breach of a Court order under the *Wildlife Act*. The Crown is correct in submitting that this would often require a period of incarceration. I am satisfied however that the ends of justice and in particular the principles of deterrence can be met by imposing a fine, particularly in light of the other convictions and sentences imposed herein. Accordingly, Mr. Potts will be fined the sum of \$2,000.00 plus a surcharge of \$300.00, in default 33 days consecutive.

Section 97 Order

27 The Crown has requested and I hereby issue an order pursuant to s.97 of the *Wildlife Act* as follows:

1. That he must by June 11th, 2010 advise the Fish and Wildlife Office nearest his place of residence of his address and thereafter for 10 years to advise that office in advance of any change of address.
2. That he must report to that office of his intent to hunt prior to going to hunt for wildlife. If the hunt is successful, he must report any kill within 24 hours to that office. 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. That he must report to that office within 24 hours of his coming into possession of any wildlife. The report is to include the name of the person who killed the wildlife, the name of the person who provided the wildlife to him and the number, species and gender of that wildlife.
4. That he must report to that office within 24 hours of transferring the possession of any wildlife to another person. The report is to include the name and address of the person or persons who were given possession of the wildlife and the amount and species of wildlife transferred.
5. That he shall not accompany any person that is not a resident of Alberta, while that person is in possession of a firearm or involved in the act of hunting, nor shall a non-resident person accompany Malcolm James Potts while he is hunting.
6. Reports referred to in paragraphs 2,3 and 4 may be made by telephone or other electronic means.
7. That he must by June 11th, 2010 meet with the Fish and Wildlife Officer in charge of the Pincher Creek and wildlife office to review the order and obtain contact information for reporting purposes.

Order accordingly.