R. v. Lamouche, 1998 ABPC 71

Date: 19980810
Docket: 71769426P10101

IN THE PROVINCIAL COURT OF ALBERTA
CRIMINAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

KENNETH (CHUCK) LAMOUCHE

JUDGMENT OF THE HONOURABLE JUDGE NORHEIM

[1] The Accused has pled guilty to one count of selling walleye contrary to the Alberta Fishery Regulations thereby contravening section 78 of the *Canada Fisheries Act*. There were two other counts of trafficking in walleye set for trial on the date of the guilty plea which the Crown withdrew on the accused's agreement that the circumstances of the other offences be placed before the court as an aggravating circumstance in the sentencing process.

[2] Undercover operations had established Mr. Lamouche as part of a group of mainly family members who poached and trafficked in fish and wildlife. On the date in question the undercover operator was trying to determine the regular clients of the accused. The operator had purchased a fairly large quantity of walleye from associates of the accused in Grouard and then fabricated a story that his usual buyers had backed out and he needed the accused's assistance in selling the fish to the accused's buyers on this occasion only.

[3] The accused was prepared to and did facilitate the sale of a truck load of walleye to various individuals and Chinese restaurants in the Hinton area. For this he was paid $60.00.

[4] The undercover operator provided evidence of the accused's general involvement in this trade. His evidence satisfies me that this was not just a favour for a friend but was one example of a pattern of illegal trafficking in both fish and wildlife. He gave evidence of the accused poaching truckloads of elk and when stopped by uniformed officers claiming his treaty rights as justification, even though he was on his way to Edmonton to illegally sell the elk. He gave evidence of the accused telling

customers to claim they were transporting or storing illegal fish or wildlife for him or for other treaty Indians, if their possession of the “product” was questioned by Fish and Wildlife.

[5] Mr. Sullivan was called as an expert in walleye management. He has been employed by Fish and Wildlife for 15 years and has conducted or participated in numerous walleye studies on various lakes in Alberta. While he avoided being critical of the current management approach, his evidence satisfies me that he has watched while roughly 80% of the walleye fisheries in Alberta have collapsed. He is not aware of any situation where a collapsed fishery has recovered to a viable status. He indicates that there are now only three major lakes in the province wherein the walleye population has not collapsed, and the walleye populations in these lakes are now considered to be vulnerable.

[6] He explained that in managing the walleye, there are four sources of human predation. First there is the domestic or aboriginal fishery. Second there is the sport fishery and thirdly there is the commercial fishery. The last source is poachers. His department has fairly accurate information on the quantities of walleye taken by the second and third categories but no reliable information on the domestic fishery as the regulations in place do not permit an accurate assessment of the quantities taken by the domestic fishery. Reliable estimates are also difficult to make of the illegal fishery. Most of the information is obtained as a result of undercover operations such as this one, however I am satisfied that this information is not particularly reliable in the sense that it only quantifies the fish taken by the organization infiltrated by the undercover operator, and lends little information about other illegally taken fish.

[7] My understanding is that the provincial government drafts regulations which are incorporated as regulations to the *Federal Fishery Act*. He indicated that his department makes recommendations for the management of the walleye. Some of these recommendations have been implemented, however, because of what I would categorize as considerations unrelated to the health of the fishery, only a minimal adjustment is made. There is always a delay, sometimes of several years, before it can be determined if the measures taken have been sufficient. He gave evidence that recently the management strategy has been changed to allow for a quicker reaction to indicators as to the health of the fishery, however, he acknowledged that the current approach may lead to a situation where the species may already be in collapse by the time the indicators have demonstrated whether the last set of modifications to the management scheme are sufficient. If that happens we could have a complete collapse of the walleye fishery in Alberta .

[8] Mr. Sullivan indicates that in making recommendations for the management of the walleye fishery, because of his understanding of the inability to manage the domestic fishery, he simply assumes that a lake can support an uncontrolled domestic fishery. He has no reliable information on the domestic fishery. All of the reliable information comes as a result of management techniques implemented to manage the

sport and commercial fishery. The evidence did not establish that the collapse of most of the walleye fisheries in Alberta is as a result of the government's failure to manage the domestic harvest, however, it is clear to me that its failure to implement regulations which allow them to develop somewhat accurate figures on the domestic harvest are clearly necessary before an effective comprehensive plan for the management of the fishery can be implemented.

[9] He indicated that there is always resistance by each of the user groups to any regulation designed to assist in managing the resource. I conclude that this resistance to the implementation of effective management techniques has had an effect at the government level, as the approach continues to emphasize consideration of the short term effects on the various user groups rather than first ensuring the security of the resource .

[10] Based on the collapse of 80% of the walleye fisheries in Alberta one might conclude that this approach of managing based on incremental changes to the monitored user groups, no meaningful or significant assessment or monitoring of the domestic fishery, and reliance on requests for ever increasing fines on offenders, has not been a sound one.

[11] The most significant consideration and aggravating factor in this sentencing hearing, is that the fish being trafficked in are walleye. Based on my understanding of the evidence that was called these fish are in an extremely precarious situation and need a high level of protection. The deterrent effect of a severe penalty for those found to be contributing to this situation is a factor which may be taken into consideration by the Court. In this case, however, a misunderstanding of the obligations of those charged with the responsibility of managing the fish and wildlife resource, and its resulting effect, is in my view as significant a cause of the precarious position of walleye in the province as the poaching participated in by this accused.

[12] *R. v. Sparrow,* 56 C.C.C. (3d) 263 makes it clear that in the management of the wildlife resource, the legitimate aboriginal harvest for subsistence must be satisfied before sport or commercial harvests are authorized. Based on the evidence that I heard in this case, I conclude that the authorities managing this fishery have not understood the current position of the Supreme Court on the government's ability to manage the wildlife resource. The evidence satisfies me that no effective measures have been put in place to monitor the aboriginal harvest. The governmental position, as expressed by Mr. Sullivan, is that there is enough fish and wildlife to allow for an unlimited aboriginal harvest, or there can be no aboriginal harvest at all. This is not what I understand the Supreme Court to be saying.

[13] In *R. v. Sparrow,* (*supra*), the Supreme Court embarked on a new course in interpreting aboriginal hunting and fishing claims and set out the process to be followed in accordance with this approach. This decision has had the effect of causing governments to seriously scrutinize regulations and management practices which may

affect aboriginal hunting rights, and no doubt is the basis of the understanding expressed by Mr. Sullivan in his evidence. While a complex approach was set out in this decision, nowhere did the Supreme Court question the right to manage fish and wildlife.

[14] The evidence given at this hearing causes me to conclude that the managing authorities do not understand that their responsibility to manage the fish and wildlife resource exists with reference to treaty Indians as well as other citizens of this country. The lack of any limits on possession of fish, lack of any reporting of catch, and the apparent *carte blanche* permitted by the authorities with reference to this accused because of his treaty status, make the abuse of this special status by some almost inevitable and its detection extremely difficult. I point out various passages from the *Sparrow* decision (*supra*) which make clear both the responsibility and the process.

[15] At page 287 of the *Sparrow* decision (*supra*) it is stated

> In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the *Charter*, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982.* Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

[16] At page 288 it is stated

> We refer to Professor Slattery's "Understanding Aboriginal Rights", *supra*, with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these two extreme positions must be rejected in favour of a justificatory scheme.

[17] At page 290

> If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would

inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid.

[18] At page 292

We therefore repeat the following passage from Jack, at p. 261:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (I) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
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> I agree with the general tenor of this argument.... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.
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> The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year,

> conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

[19] At page 295

> The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

[20] It may be because the Supreme Court considered that in the past governments had used the guise of management to improperly restrict aboriginal hunting and fishing rights, a justification process was adopted. I do not read this decision as restricting the government's ability to properly manage the resource by putting in place measures which allow a proper monitoring of the harvest so that effective management can take place. Such regulations would not likely require a justification analysis. For example, free permits with an attached reporting requirement to assess the impact of the domestic harvest would not restrict the aboriginal right but would supply necessary information for management.

[21] Likewise the aboriginal harvest can be restricted either in whole or in part, if it is necessary for the well-being of the resource. I fail to see how government can determine if the resource can sustain the aboriginal harvest if it doesn't know what that harvest is. Nor can it provide for the continued supply of that resource for legitimate purposes if it fails to put in place regulations which allow for the effective enforcement of legitimate management objectives. The lack of effective regulations in this area have permitted this accused to use his treaty status to obscure his offence to the detriment of legitimate aboriginal and other users. This is an aggravating factor in this case but one for which responsibility must be shared by government for failing to put in place effective management regulations.

[22] The accused is a young man with no fixed residence of his own. Based on the evidence that I have heard he often resides at his parent's home and assists his father in the sideline of marketing illegally taken fish. His father has a steady job at the mill but the accused, in addition to his vocation of trafficking in wildlife, works seasonally on the rigs or as a forest firefighter. He has indicated that last year he made about $13,000.00

from his legitimate employment. The Crown points out that based on information obtained in this undercover operation, he would have also made several thousand dollars from illegally killing and selling wildlife. I note however that his share of the offence to which he has pled guilty was $60.00. He has outstanding fines of approximately $9,000.00 as a result of other wildlife related convictions. His attitude does not appear to have been affected by the evidence concerning the dire condition of walleye in Alberta. After the evidence was in, he was asked if he had learned anything from this experience. Rather than indicating that he was now aware of the damage caused by his activities, he responded, referring to the undercover operator, to the effect that he had learned not to trust outsiders.

[23] This offence must be viewed as serious. I am of the view that the commercial nature of this accused's conduct, the precarious position of walleye in Alberta, the accused's lack of insight and remorse and his abuse of the special status that he enjoys to the detriment of other native people and persons not enjoying that status, all are factors which could justify a significant gaol term. In view of the Crown's statement that it was not seeking a gaol term as a part of its representations on the guilty plea of an unrepresented accused on an offence which would not in the usual case attract a gaol term and the failure of government to put in place regulations to properly manage this and other species of fish and wildlife, I will not impose one. The Crown has asked for a $7,500.00 fine. This amount is, when considering the overall picture, beyond his reasonable ability to pay. Considering all of the circumstances outlined above I am imposing a $3,000.00 fine, in default statutory days.