

Citation: *R. v. Lee*, 2022 YKTC 8

Date: 20220216
Docket: 20-00553
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

DONALD HAROLD LEE III

Appearances:
Noel Sinclair
Donald Lee III (by telephone)

Counsel for the Crown
Appearing on his own behalf

REASONS FOR SENTENCE

[1] RUDDY T.C.J. (Oral): Mr. Lee has entered a guilty plea to a single count of having unlawfully exported a Dall sheep in August 2017 contrary to s. 6(2) of the *Wild Animal and Plant Protection Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52, (the “Act”) commonly referred to as “WAPPRIITA”, thereby committing an offence contrary to s. 22 of the *Act*.

[2] Mr. Lee is a resident of Alaska. In August of 2017, he had the necessary licence to hunt wild sheep in Alaska. Mr. Lee located and harvested a Dall sheep, specifically the rarer Fannin subset, which, if I understand correctly, appear to be predominantly

Dall sheep but with some genetic material from Stone sheep mixed in, resulting in a unique coat mixing both light and dark fur.

[3] At the time he took the shot, Mr. Lee knew he was close to the Yukon border but did not realize the sheep was actually on the other side of the border in the Yukon until he went to recover the sheep. Mr. Lee, nonetheless, packed the sheep out and then registered the kill as an Alaskan harvested sheep.

[4] As noted, the plea that he has entered is for having unlawfully exported the animal rather than reporting it in Canada.

[5] Because of photographs posted online, a report was made to the Wildlife Enforcement Division of Environment Canada in 2018. Officers used the photographs to locate the kill site and determine that the sheep was indeed harvested on the Yukon side of the border.

[6] Mr. Lee, ultimately, voluntarily surrendered the wall mount of the sheep to U.S. authorities when interviewed about the harvest and he, once charges were laid, was in touch with the Crown with respect to having this matter brought forward so that it could be dealt with, notwithstanding the fact that he is not in Canada.

[7] The matter is before me to determine the appropriate sentence.

[8] Crown seeks a fine of \$12,500 in Canadian dollars on the basis that the fine imposed should exceed the cost of lawfully harvesting a sheep in the Yukon, which, in Mr. Lee's case, would have required a guided hunt. Crown has filed a letter from Reynolds Outfitting indicating that the cost of a guided hunt for Dall (Fannin) sheep in

2017 would have been \$19,000 USD for an eight-day hunt. Crown argues that the appropriate fine, in this case, should be below the cost of a guided hunt to reflect the mitigating factors of Mr. Lee's cooperation, acceptance of responsibility, and willingness to attorn to the jurisdiction to address the charges.

[9] In addition to a fine, the Crown seeks a prohibition on hunting in the Yukon for a period of five years and forfeiture of the mount. Per s. 22.11 of the *Act*, Crown is asking that any fine imposed be made payable to the Environmental Damage Fund with a recommendation that somewhere in the neighbourhood of 10% of the fine be paid to the Turn in Poachers and Polluters ("TIPP") tip line program.

[10] Mr. Lee argues that the mandatory minimum would be appropriate in light of his remorse and overall reputation as an ethical and responsible hunter, though he would be content with a longer prohibition on hunting in Canada if the Court feels that that would be appropriate to offset the imposition of a lower fine.

[11] In terms of Mr. Lee's circumstances, his positive antecedents suggests that this incident is out of character. He has no prior record of any kind, most particularly not for any hunting-related infractions. He has provided a letter of reference from an employee of the Alaska Department of Fish and Game attesting to Mr. Lee's reputation as a responsible and ethical hunter, although, as Crown has pointed out, it appears that it was the same individual to whom he reported the kill as having occurred in Alaska rather than the Yukon.

[12] Mr. Lee is a resident of Fairbanks, Alaska, where he works part-time as a medical surgical nurse on a dedicated COVID unit. His manager has provided an

extremely positive letter of reference which speaks highly of Mr. Lee's hard work and dedication in his role as a nurse.

[13] In addition to employment, Mr. Lee has been attending school part-time, obtaining his bachelor's degree this spring and intending to enter into a master's program in the near future. He indicates that the combined impact of attending school, working only part-time, and the cost of living in Alaska leaves him with limited means such that the impact of any fine will be considerable.

[14] With respect to the applicable law, s. 22(2)(b)(i) of the *Act* establishes a mandatory minimum fine of \$5,000, where, as in this case, the Crown proceeds by summary conviction. The maximum fine is \$300,000.

[15] Sentencing principles and factors for consideration are set out in s. 22.08 of the *Act* as follows:

(1) In addition to the principles and factors that the court is otherwise required to consider, including those set out in sections 718.1 to 718.21 of the *Criminal Code*, the court shall consider the following principles when sentencing a person who is convicted of an offence under this Act:

- (a) the amount of the fine should be increased to account for every aggravating factor associated with the offence, including the aggravating factors set out in subsection (2); and
- (b) the amount of the fine should reflect the gravity of each aggravating factor associated with the offence.

...

(2) The aggravating factors are the following:

- (a) the offence caused damage or risk of damage, directly or indirectly, to animals or plants;

- (b) the offence caused damage or risk of damage to a unique, rare, particularly important or vulnerable species of animal or plant or population of animals or plants;
- (c) the offender committed the offence intentionally or recklessly;
- (d) the offender profited, or intended to profit, by committing the offence;
- (e) the offender has a history of non-compliance with federal or provincial legislation that relates to environmental or wildlife conservation or protection; and
- (f) the offence involved a high degree of planning.

...

(3) The absence of an aggravating factor set out in subsection (2) is not a mitigating factor.

...

(4) For the purposes of paragraphs (2)(a) and (b), **damage** includes loss of use value and non-use value.

[16] In addition to the requirements of the *Act*, several cases have been provided which offer some guidance with respect to the appropriate considerations, in particular, the paramountcy of deterrence as a sentencing principle.

[17] *R. v. Houchin*, 1984 CarswellYukon 8 (Terr Ct), at para. 9(a), a 1984 decision out of this Court, involved hunting a sheep without a licence and unlawfully transporting the carcass. The case does not offer much assistance in terms of assessing the appropriate fine, given changes to legislation and inflation over the significant passage of time, but Stuart C.J. does speak to the seriousness of offences of this nature as follows:

The cherished heritage of Yukon wildlife must be protected for the public good as well as for future generations. With a few exceptions, violations of any law designed to protect wildlife must be severely punished.

[18] The recent British Columbia Provincial Court decision in *R. v. Chalupiak*, 2018 BCPC 82, involved the shooting of a reproductive grizzly bear in a management area out of season, but which the offender mistakenly believed to be a black bear. As with *Houchin*, differences in jurisdiction and type of animal make the decision less valuable in assessing the appropriate range of fine, but the case does offer some guidance in addressing the question of deterrence, which is frequently stressed to be the dominant sentencing principal in cases of this type.

[19] In *Chalupiak*, at para. 24, Arthur-Leung J. adopts reasoning from what is referred to as the “foundational case” of *HMTQ v. Shamrock Chemicals Ltd. and Samuel John Shirley*, a February 1989 decision of the Ontario Provincial Offences Court, as follows:

Of particular note, in addressing sentencing in environmental and conservation matters such as this, on pages 5 and 6, the court specifically addressed the importance of deterrence in stating:

In the analogous areas of trade offences and tax evasion, deterrence is the major sentencing objective. The classic statement with respect to deterrence, repeated in a number of subsequent cases, is that “the fine must not be a licence fee, something capable of being regarded as a probable cost of or necessary risk in doing business in the manner in question”.

The basic rule in environmental cases, as in other cases, is that “without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere licence fee for illegal activity”.

[20] A similar reference was made by Stuart C.J. in *Houchin*, wherein he stated at para. 9(c):

The profits or savings realized by criminal acts must be removed. Thus the sentence imposed must make the cost of an illegal hunt clearly greater than the cost of a legal hunt. ...

[21] In *R. v. Leggett*, 2004 BCPC 73, a decision of the British Columbia Provincial Court, the Court imposed a sentence on four offences in relation to hunting Stone sheep without a licence, without a licenced guide, falsely registering the kill using the licence of another, and unlawfully exporting the sheep. The sentence imposed was a fine of \$25 on each of the four counts and required payment to the Habitat Conservation Trust Fund in the amount of \$4,900. This joint submission, however, reflected the fact that considerable penalties had been imposed on the offender by the U.S. authorities, including four months of house arrest, a fine of \$10,000, restitution of \$20,000, forfeiture, and a hunting prohibition.

[22] In *R. v. Shmyr*, 2017 YKTC 53, a decision of this Court, the offender was convicted of three offences for providing false information to get a licence, hunting when not properly licensed, and illegal transport of moose parts to Alberta. Seidemann J. imposed fines of \$5,000 for providing false information, \$2,000 for illegally hunting, and \$3,000 for illegal transport, plus a hunting prohibition of three years.

[23] The judge makes no mention of any interrelationship between the fines imposed and the cost of a legal hunt but does stress the importance of general deterrence noting the seriousness of providing false information and the extreme difficulty of enforcement,

given the limited number of conservation officers available to police the remote areas where individuals hunt in the Yukon Territory.

[24] In *R. v. Cartwright*, a 1997 decision of Jackson J. of this Court, the offender was on a hunt in Alaska with a U.S. guide when he shot a Dall sheep on the Yukon side of the border. In addition to the illegal kill, the offender was also sentenced for wasting meat and illegal transport. The Court adopted a joint submission and imposed fines of \$8,500; \$1,250; and \$250, respectively, plus a three-year hunting prohibition.

[25] In addition to these sentencing precedents, Mr. Lee has provided a number of Internet articles denoting lower fines imposed than that sought by the Crown, predominantly in other jurisdictions, but for much more egregious behaviour.

[26] Determining the appropriate sentence against this legal backdrop, I am mindful of the applicable aggravating factors, that being the loss of the Dall (Fannin) sheep (while not a protected species, Dall (Fannin) sheep are, nonetheless, rare enough to warrant protection by virtue of tight regulations); the significant cost of investigating this offence; the difficulty of enforcement overall to guard against similar offending; and the false reporting and registration of the kill in Alaska.

[27] The mitigating factors include Mr. Lee's positive antecedents; his limited means; his lack of a record; and his early guilty plea, which, in my view, is deserving of significant mitigation, as it includes his proactive willingness to attorn to the jurisdiction to address this matter, particularly given that the warrant could not be executed outside of Canada.

[28] The question then is how I balance all of these considerations. Deterrence, of course, is the dominant factor, but I also need to consider the impact any fine will have on Mr. Lee.

[29] The reason I sought more information about Mr. Lee's financial and personal circumstances is that the amounts that we are talking about here are not insignificant. I need to make sure that the amount sends a clear deterrent message but, at the same time, as pointed out in one of the cases filed, is not unduly harsh or crippling for Mr. Lee in his current circumstances.

[30] Weighing all of the factors before me, my view is that this is not an appropriate case for the minimum fine to be imposed. On the other hand, while Crown has quite appropriately put effort into trying to reflect the mitigating factors in their position at the same time, Mr. Lee does seem to be of limited means as he is only working part-time, so I am concerned about the impact the fine sought by the Crown will have on him.

[31] When I balance all of the relevant factors, I am satisfied that the appropriate fine would be \$8,500.

[32] What I am going to suggest, if this makes sense, Mr. Sinclair, is that I will make the fine payable to the Environmental Damage Fund, and you had said 10%, but does it make sense for me simply to make the recommendation that \$1,000 of the fine go towards the TIP line?

[33] MR. SINCLAIR: Or \$2,000.

[34] THE COURT: Or \$2,000. I am content with either. Wherever the money is going to be most beneficial, I am happy to direct it there.

[35] MR. SINCLAIR: Let's allocate \$1,000 to the TIPP line.

[36] THE COURT: All right.

[37] The fine of \$8,500, in Canadian dollars, will be payable to the Environmental Damage Fund with a recommendation that \$1,000 of the fine be paid to the TIPP line to support the work that it does.

[38] Time to pay will be one year.

[39] There will be a hunting prohibition. Crown is seeking five years. Mr. Lee indicated that he would be content with a longer prohibition. There was some discussion about what kind of deterrent effect a prohibition would have or not have if Mr. Lee does not have a history of hunting in Canada, but I do think it is important to impose a prohibition for its general deterrent effect even if there is a question in my mind about whether it would have a specific deterrent effect. I am going to impose the five-year hunting prohibition requested by the Crown.

[40] That leaves us, I think, with the question of the sheep mount. I do not believe there was any issue with it being forfeited. It has already been provided to the authorities in Alaska, in any event, but I would make the formal order that the mount be forfeited as part of the sentence imposed.

[DISCUSSIONS]

[41] The mount will be forfeited to Environment Canada in right of Her Majesty the Queen. If it requires a written order, you can draft it for my signature and I would dispense with the requirement of Mr. Lee to sign it, as to form.

[42] Now, I think that leaves the remaining count.

[43] MR. SINCLAIR: Stay of proceedings, Your Honour.

[44] THE COURT: All right.

[DISCUSSIONS]

[45] MR. SINCLAIR: Is there a victims of crime surcharge in relation to these offences?

[46] THE CLERK: I have no idea.

[47] THE COURT: I do not know either. It would fall under the federal *WAPPRIITA* legislation. The question would be whether the *Act* imports the *Criminal Code* provisions with respect to surcharge or not.

[48] MR. SINCLAIR: Right.

[49] THE COURT: I think the easiest thing to do — because it is already a significant fine for Mr. Lee, in the circumstances — if it falls under the *Code*, the Court has the ability to waive it if I am satisfied that it would be disproportionate or if he would not have the ability to pay the surcharge.

[50] I would be content to waive it on the basis that it would make the overall sentence disproportionate to add the additional amount, but I am not certain that the *Act* would incorporate those provisions in any event. It certainly references the sentencing principles, but it may well depend on —

[51] MR. SINCLAIR: Section 737 is in the *Criminal Code*, sentencing part.

[52] THE COURT: — if it incorporates the whole part and not just 718.1 and the related principles.

[53] I would note there is no reference to any surcharges in any of the cases provided to me, so I would be uncomfortable imposing one unless I have certainty about jurisdiction.

[DISCUSSIONS]

[54] THE COURT: To be safe, I will waive it in the event it does apply.

RUDDY T.C.J.