Citation: *R. v. Nagano*, 2014 YKTC 55

Date: 20141106
Docket: 12-11466
Registry: Dawson City

TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

DEBBIE LYNN NAGANO

Appearances:
Adrienne M. Switzer — Counsel for the Crown
Alexa McClaren — Counsel for the Defence
(Agent for Brian Macdonald)

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Debbie Nagano is before me, having entered a plea of guilty with respect to a single count of unlawfully selling fish not caught and retained under the authority of an appropriate licence, contrary to s. 35(2) of the *Fishery (General) Regulations* (SOR/93-53), thereby committing an offence contrary to s. 78 of the *Fisheries Act* (R.S.C., 1985, c. F-14).

[2] The facts relating to the offence have been set out in detail in an Agreed Statement of Facts, filed as Exhibit 1 in these proceedings.

[3] To briefly summarize, a confidential source provided information to a Fishery Officer indicating Ms. Nagano had sold smoked salmon at the fastball tournament held in Dawson City, Yukon, during the Discovery Day weekend in August of 2011. This

information prompted an undercover investigation in which two Fishery Officers, posing as Alberta tourists, sought to purchase salmon from Ms. Nagano.

[4] Through a number of telephone exchanges, arrangements were made for the officers to meet Ms. Nagano on September 5, 2011 at a local address, which Ms. Nagano had indicated had been her childhood home, but was now used for butchering fish and wildlife. One of the outbuildings on the property included a walk-in freezer in which the transaction was ultimately conducted.

[5] Ms. Nagano sold the two Officers 11 Chinook salmon, weighing 78.5 pounds, and five bags of smoked salmon, weighing 4.75 pounds, for a total cost of $500.

[6] During the course of the transaction, Ms. Nagano made several admissions in relation to her involvement in fishing, smoking salmon, and selling salmon.

[7] A search warrant was subsequently executed on the property, during which Officers seized a further 1,380 pounds of salmon, along with three scales and other items associated with preparing and packaging fish.

[8] Ms. Nagano is a member of the Tr'ondëk Hwëch'in First Nation, authorized to fish pursuant to a communal licence, which provides for the sale of fish only to other Tr'ondëk Hwëch'in members or to beneficiaries of adjacent Transboundary Agreements in Canada.

[9] As one of the primary goals of fisheries management and legislation is the protection of a valuable and vulnerable resource, this offence must be considered in the context of the overall state of the Chinook fishery in the Yukon. Evidence in relation to

the Chinook fishery was provide through Steve Smith, who was qualified as an expert in salmon stock assessment and fisheries management.

[10] Mr. Smith outlined the current management scheme, which includes the Yukon River Panel, a joint Canadian-American committee tasked with administering the Yukon River Salmon Agreement, pursuant to the *Pacific Salmon Treaty* (“*Treaty*”). With the support of a joint tech committee, the Panel establishes the escapement goal, being the number of salmon required to return to the spawning grounds to ensure optimal production to provide for future harvest opportunities.

[11] The current escapement goal is 42,500, though there appear to be some concerns with this figure due to changes in production rates. Historically, production rates ranged from two to four fish for every fish to reach the spawning grounds. Recent numbers suggest this ratio has dropped to one to one if not less than one.

[12] Escapement goals have not been achieved in five of the last eight years. On cross-examination, Mr. Smith indicated this failure was largely due to overharvest by the U.S.

[13] Fish exceeding the escapement goal make up the allowable catch, which is apportioned at 23 percent to Canada and 77 percent to the U.S. To ensure compliance with harvest shares, Canada has developed a decision matrix to determine what fisheries will be opened. Where the expected run is 0 to 30,000 fish, termed the "Red Zone", no fisheries are opened. In the "Yellow Zone", from 30,000 to 51,000 fish, only the First Nation fisheries open, and in the "Green Zone", anything over 51,000, commercial and recreational fisheries are opened.

[14] Since 2002, there has been only one year in which numbers allowed for a commercial fishery, albeit resulting from a technical error in calculation rather than an increase in production. The remaining years have allowed only for the opening of the First Nation fishery.

[15] A fully-subscribed First Nation fishery is calculated as a harvest of 8,000 fish. Where the available catch is predicted to fall below 8,000, the expectation is that First Nation harvest rates will be reduced accordingly. For example, if the allowable catch is anticipated to be 4,000, the expectation is that harvest rates will be reduced by 50 percent.

[16] These reductions sought are communicated through an established process to the 11 affected First Nations who, in their own discretion, factor this into their fisheries management.

[17] In 2011, the relevant time period of this offence, the Chinook harvest was initially predicted to be 5,200, and a 25 percent reduction in harvest rates was sought. While numbers improved, allowing for a greater harvest, the actual 2011 First Nation harvest was 4,500, with 1,200 of those being caught by members of the Tr'ondëk Hwëch'in First Nation.

[18] Escapement targets were met in 2011; however, with reductions in production rates, it is clear that there are ongoing concerns with respect to preservation of the Chinook fishery. Indeed, by joint Canadian and U.S. agreement, no fisheries were opened in 2014.

[19] Juxtaposed against this larger context, I must also consider Ms. Nagano's personal circumstances. These have been provided to me primarily by way of an affidavit filed as Exhibit 4.

[20] To summarize, Ms. Nagano is a 52-year-old member of the Tr'ondëk Hwëch'in First Nation who comes before the Court with no prior record for criminal or related regulatory offences. She was raised in a traditional lifestyle, spending summer months in fish camps and winter months out on the trap lines. She has a close connection to the land and to her traditional heritage.

[21] Her family, like so many Yukon First Nation families, was impacted by the residential school system. While Ms. Nagano herself did not attend residential school, she has nonetheless been impacted by the detrimental effects the residential school system has had on her own family and community, including, but not limited to, substance abuse and violence.

[22] To her credit, she made a conscious choice to break this cycle for her children, and has maintained sobriety for over 20 years.

[23] Ms. Nagano is currently employed by her First Nation as a Director of Heritage trainee. While not necessarily a permanent position, is does provide her with an income sufficient to meet and slightly exceed the current monthly expenses related to her own needs and those of her three adult children, who still rely on her financially to some extent.

[24] In the past, she has held other positions of responsibility, although it is notable that a couple of months prior to this offence she had both lost a close family member and been fired from her then position as Health and Social Director for the Tr'ondëk Hwëch'in First Nation. Since that time, she has only been successful in finding part-time positions, until securing her current position.

[25] Numerous letters of support have been filed by the defence and marked jointly as Exhibit 5. These letters universally describe Ms. Nagano as a well-respected member of the community who has been generous in passing on her extensive traditional knowledge, and diligent in her efforts to preserve Tr'ondëk Hwëch'in culture and values.

[26] With respect to disposition, Crown seeks a fine of $20,000 and a s. 79(2) fishing prohibition for a period of 18 months, citing the fragile nature of the Chinook fishery, the significant impact of this type of behaviour on the fishery if not deterred, the deliberateness of the conduct, and the commercial nature of the operation. Defence suggests a fine in the range of $500 to $1,500, in addition to community work service or donation of in-kind goods, would be appropriate in these circumstances.

[27] In support of these opposing positions, counsel provided me with a number of cases. For the purposes of this decision, it is unnecessary, in my view, to summarize each of the cases provided. Rather, I will highlight some general principles enunciated in the case law, and focus my attention on those cases that, in my view, most closely mirror the factual situation before me.

[28] In terms of general principles, the cases make it clear that the sentencing principles set out in s. 718 through s. 718.2 of the *Criminal Code* are applicable. Of

these, deterrence, both specific and general, is the dominant sentencing principle: firstly, because of the very real risk of depletion of a vulnerable resource and the resulting ramifications for society as a whole; and, secondly, because of the inherent difficulties and exorbitant cost of enforcing legislation of this type.

[29] Where a fine is intended to achieve a deterrent effect, it must be of an amount high enough to discourage others from engaging in this type of behaviour, and not so low as to be seen as a reasonable cost of doing business. I would note that the legislation provides for a maximum penalty of $100,000.

[30] While some of the cases filed involve the imposition of a jail term, there is no suggestion before me that such a penalty would be warranted in these circumstances, particularly given Ms. Nagano's lack of a prior record. Conversely, at least one case provided by the defence resulted in a conditional discharge. It is conceded by the defence, however, that a discharge would not be appropriate in this case. Rather, a monetary penalty would appear to be the preferred penalty in this as in most situations of this nature.

[31] In terms of amount, I would note that the cases provided reflect a broad range of monetary penalties. Indeed, I understand some of the Crown's cases are offered primarily to indicate that even minor infractions attract comparatively large monetary penalties, such as the $1,800 fine imposed on two defendants with respect to one illegally-caught salmon, in the case of *R. v. Genge*, [2007] N.J. No. 9 (PC).

[32] Those cases which are most relevant, in my view, to the case before me are as follows:

[33] In *R. v. Cardinal*, 2009 ABPC 296, an aboriginal man was convicted after trial on six counts of the unlawful sale of a total of 509 fish over an 18-month period. His son was convicted as a party to one of the sales. The father received a jail term of 90 days, reduced on appeal to 30 days. The son received a total fine of $2,300. Factually, this case, at least as it relates to Mr. Cardinal, Sr., is largely distinguishable on the basis of the number of transactions and the amount of fish actually sold. However, the sentence as it relates to the son is relevant, in my view. In addition, the Crown relies on the comments of the trial judge in finding Mr. Cardinal's use of his *Treaty* rights to facilitate his illegal activity to be an aggravating factor on sentencing.

[34] In *R. v. Jones*, 2011 NLTD(G) 18, a commercial fisher was charged with illegally catching seven fish during a closed time. On appeal, a sentence imposing fines totalling $3,500 and forfeiture of property valued at $5,000 was upheld.

[35] In *R. v. Leask*, (15 April 2009), Prince Rupert 25548-1 (BCPC), the illegal sale of 200 fish caught under a communal First Nation fishing licence resulted in total fines of $6,000, plus the return of $1,790 in profits from the sale.

[36] In *R. v. Grandy*; *R. v. Bell* (1992), 113 N.S.R. (2d) 85 (N.S.Co.Ct.), the Nova Scotia County Court cited the increases in maximum penalties, and, on appeal, raised fines of $5,000 and $3,000, respectively, to $10,000 for each defendant with respect to 96 illegally caught fish weighing a total of 415 pounds.

[37] In *R. v. Couillonneur*, 2002 SKPC 60, the Saskatchewan Provincial Court imposed fines totalling $16,000 for three offences, including illegally marketing fish,

fishing without a commercial licence, and fishing in closed waters, committed by an Aboriginal offender over a five-month period.

[38] The determination of where Ms. Nagano's sentence should fall in this range of monetary penalties requires an assessment of a number of factors.

[39] Firstly, Ms. Nagano is entitled to credit for her guilty plea. While entered after trial dates were set, her intention to plead guilty was nonetheless communicated early enough to ensure witnesses were not unduly inconvenienced. In addition, I accept Ms. Nagano's self-imposed ban on fishing since her arrest to be a further indication of her remorse, particularly when considered against her commitment to a traditional lifestyle, of which fishing has been a significant component. I also take into account that Ms. Nagano has no prior related history and is otherwise of good character.

[40] However, these mitigating factors must be weighed against the negative impact of offences of this nature. Even though escapement targets for 2011 were met, such that it is arguable that Ms. Nagano's conduct did not in actuality jeopardize conservation efforts, the vulnerable nature of the Chinook fishery and the risks of encouraging others to engage in similar activities, further depleting an already at-risk resource should this behaviour be condoned, demand a deterrent sentence which sends a clear message to Ms. Nagano and to others that such behaviour will result in significant sanctions.

[41] The sanction required to send that clear deterrent message in this case turns on how I view the nature and scope of Ms. Nagano's behaviour.

[42] To begin, it must be remembered that Ms. Nagano, as do all members of the Tr'ondëk Hwëch'in First Nation, has a *Treaty* right to fish, as set out in the Communal Licence appended to the Agreed Statement of Facts. There is no evidence before me to suggest that there were any specific catch limits beyond overall harvest limits imposed on any member of the First Nation. This is not a case in which Ms. Nagano is accused of fishing when or in a location she is not entitled to, or harvesting more fish than she is allowed.

[43] Furthermore, her *Treaty* rights in the Communal Licence allow for the sale of fish to other Tr'ondëk Hwëch'in members or to beneficiaries of adjacent Transboundary Agreements in Canada.

[44] The offence in this case is not the sale of fish, but rather the sale of fish to someone who falls outside of the scope of her *Treaty* rights, though I accept the fact that Ms. Nagano deliberately did so, knowing full well she did not have the right, to be an aggravating factor in this case.

[45] Where this case becomes difficult is in assessing, based on the facts provided to me, the nature and extent of Ms. Nagano's involvement in the sale of fish outside the scope of her *Treaty* protected rights. Crown urges me to infer from the facts that Ms. Nagano was a principal actor in an ongoing profit-motivated commercial operation involving the sale of fish well beyond the individual sale which forms the basis of the charge, and to treat this as an aggravating factor on sentence. This submission is based on the following factors:

1. Ms. Nagano was known within the community as someone who sold fish;

2. Community information suggested she was specifically involved in the sale of smoked salmon at the ball tournament;

3. She had established prices for her product;

4. She stated an intention to sell an additional 200 pounds, including an order for 100 pounds out of Inuvik;

5. The volume of fish, including the 206 additional fish that were seized pursuant to the search warrant; and

6. That paraphernalia consistent with a commercial operation were also noted or seized, including a sign reading "Come in, we're open!", three scales, and various materials associated with preparing and packaging fish.

[46] In response, the defence asks me to consider the following factors and conclude that this was not a commercial enterprise motivated by greed:

1. Ms. Nagano and her family have a long history as fishers, and all members of immediate family have been actively involved;

2. They are known within the community for providing fish to those in need, and have clearly been actively involved over the years in the sale of fish, as permitted within the scope of their *Treaty* rights;

3. Ms. Nagano's father had a commercial licence permitting the sale of fish, and operated a business out of the same location. Much of the paraphernalia observed or seized indicative of a commercial enterprise, such as the "Open" sign, are remnants of that earlier business.

[47] In considering all of these factors, I am not satisfied that the evidence before me is sufficient to enable me to draw the inference that Ms. Nagano was the principal actor in a commercial enterprise illegally selling fish solely, or even primarily, to individuals who did not fall within the scope of her *Treaty* rights—many of the factors relied upon are open to other inferences—nor am I satisfied that I can conclude that this was the only instance that Ms. Nagano sold fish knowing full well that it was illegal for her to do so.

[48] I am satisfied that I can conclude that this was not an isolated incident. Beyond that, it is simply impossible to quantify, on the evidence before me, the extent to which Ms. Nagano might have been involved in illegally selling fish, particularly when I consider the alternate explanation for the indicia of a commercial operation and the fact that Ms. Nagano was well within her rights to sell fish and to profit from doing so, provided she sold only to those who fell within the scope of her *Treaty* rights.

[49] Having so concluded, I am satisfied that the appropriate monetary penalty in this case in light of penalties imposed in similar cases and in light of the particular circumstances of both this offence and this offender, would be $5,000.

[50] Defence has asked that I factor in s. 718.2(e), as interpreted by the Supreme Court of Canada in such cases as *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*,

2012 SCC 13. As indicated in our discussions earlier, this section is aimed at reducing the overrepresentation of Aboriginals in our criminal justice system, particularly in our prison system. Judges are urged to consider the impact of systemic discrimination of Aboriginal persons and its resulting impact on this overrepresentation. Normally, this comes into play when a liberty issue is at stake, which is not the case here.

[51] Absent more argument on this issue, with accompanying case law, I am loath to draw any conclusions about the application of *Gladue* to a fine situation.

[52] However, I am of the view that a number of factors in this case suggest to me that some creativity in determining how best to impose the appropriate monetary penalty of $5,000 is in order, which I understand to be defence counsel's goal in raising the issue of *Gladue* before me. These include the size of this community, which ensures broader public knowledge of both the charges and consequences than one might find in a larger urban centre, which in turn allows for the deterrent message, in my view, to be sent in a more creative fashion. In addition, Ms. Nagano's Aboriginal status, and the fact that her conduct is particularly detrimental to members of her own community and the First Nation fishery in general, suggests to me that there is value in including in her sentence a component that she make reparations to her own First Nation.

[53] Counsel have discussed two options for doing so, the first being community work service, and the second being that Ms. Nagano employ her traditional skills in making and donating fur hats and mitts to the Tr'ondëk Hwëch'in Justice Program, to be used

by participants in land-based at-risk youth programs. Of these two, my preference is the latter, as it is more easily translatable to an equivalent monetary penalty.

[54] I am advised that such items could be sold for $250 per hat or per pair of mitts, which is consistent with my knowledge, having purchased such items myself.

[55] Accordingly, the sentence is going to be as follows:

[56] Ms. Nagano, I am ordering that you pay a fine in the amount of $2,500. It seems to me the best way to effect the other half of this monetary penalty is through a probation order, so I would impose a probation order for a period of 12 months on the following terms and conditions. These would include the statutory terms, Ms. Nagano:

1. That you keep the peace and be of good behaviour;

2. That you appear before the Court when required to do so by the Court;

3. That you notify the Probation Officer in advance of any change of name or address, and promptly of any change in employment or occupation;

[57] I am going to require that you:

4. Report to a Probation Officer within two working days and, thereafter, when and in the manner directed by the Probation Officer;

because I want the probation Officer to ensure that this is completed.

[58] So what I have done, essentially, for the other $2,500 is calculate what I think the equivalent is in hats and mitts for you to produce and donate. So the only remaining condition of the Probation Order is going to be:

> 5. That you make five pairs of traditional fur mitts and five traditional fur hats, and that you donate them to the Tr'ondëk Hwëch'in Justice Program, and that you provide proof of same to your Probation Officer.

[59] Now, I have set the Probation Order at 12 months because I know you are working full time at this moment, so I want to make sure you have sufficient time to produce these without it being detrimental to you maintaining your employment because, obviously, with the other fine, it is important that you maintain employment as well, so I want there to be enough time.

[60] Should this all be completed earlier than 12 months, you can certainly bring the matter back before the Court to seek a termination of the Probation Order.

[61] [DISCUSSION WITH COUNSEL]

[62] With respect to the $2,500 fine payable, there will be a standard $500 Fine Order, and an Order under s. 79.2(f) that $2,000 be payable by Ms. Nagano for use towards salmon conservation purposes, as seen fit by Katherine Pelletier or whomever might be acting in the position of the Conservation Protection Supervisor, such order to be drafted by the Crown in these circumstances.

[63] Is there anything else that we have missed?

[64] Oh, yes, sorry. I did make note that I was going to impose a Prohibition; I do think it is appropriate in these circumstances. I recognize that Ms. Nagano has seen fit to impose one on herself but, from a general deterrent standpoint, I do think it is absolutely necessary that that be imposed in addition to the monetary penalty.

[65] So, pursuant to s. 79(2), there will be an order, for a period of 18 months, prohibiting Ms. Nagano from fishing, including:

1. That she not fish in the Yukon River;

2. That she not use a fish wheel or set nets;

3. That there will be expressly no fishing for Chinook; and

4. That she not possess any Chinook salmon.

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RUDDY C.J.T.C.