COURT FILE No.: Thunder Bay #016216, 016217, 016219, 69953836, 038673, 038674,203171,015344
Citation: *Ontario (Minister of Natural Resources) v. Beaudry, et al*., 2006 ONCJ 59

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty the Queen (Ontario Ministry of Natural Resources)

— AND —

David Beaudry, Dean Beaudry, Yvon Beaudry, Mark Roy, Richard Ducharme, Shawna Ducharme, Harold Hein, and Gunnar Hult

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Before Justice of the Peace Bruce I. Leaman
Heard on January 11 & 12, 2006
Reasons for Judgment released on March 1, 2006

Brian Wilkie ..... for the prosecution

Fran Heath for the defendants David Beaudry, Dean Beaudry, Yvon Beaudry, Mark Roy, Richard Ducharme, Shawna Ducharme, Harold Hein and Gunnar Hult

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JUSTICE OF THE PEACE Leaman:

Introduction

[1] All of the defendants, except for Gunnar Hult were charged with offences contrary to the Fish and Wildlife Conservation Act, 1997 ("the Act"). Mr. Hult was charged with unlawfully possessing an overlimit of fish, contrary to the Ontario Fishery Regulations, 1989, made pursuant to the federal Fisheries Act. Because of considerable confusion regarding their representation by counsel, the hearing of their matters did not occur until January of 2005. Each of the defendants, through counsel, waived their s. 11(b) Charter rights.

[2] Among the eight matters heard on the same dates by agreement, the facts were only in dispute as they related to the three Beaudrys. In each of the other cases, agreed statements of fact were filed. In all cases the defendants claimed Métis status. Even if the Crown can prove the charges against each defendant, the question is whether such status should result in the dismissal against each defendant due to s. 35(2) of the Constitution Act, 1982.

[3] Following the trial of these charges counsel undertook to provide written argument based on a schedule that required the prosecutor to file his argument by the 24th of January and counsel for the defendants to file her argument by February 3. If he felt it necessary, the prosecutor was to file reply argument by February 7, 2006. The court undertook, based on this timetable, to deliver written reasons for judgment on March 1, 2006.

[4] On February 7, the court received a fax copy of the prosecutor's argument. It was not until February 22 that the court received a fax copy of defence counsel's written argument. On February 24, the court received a hard copy of the prosecutor's written argument and book of authorities, together with a letter advising the prosecutor did not intend to reply to defence counsel's argument.

[5] Despite counsels' inability to file submissions in accordance with the agreed upon timetable, the court is prepared to deliver its reasons today. Below are those reasons.

The Beaudry Trial

[6] Essentially, brothers David and Dean Beaudry were charged, pursuant to s. 6(1)(a) of the Act with hunting cow and bull moose in October 2000 in Bain Township north of Longlac, Ontario without the authority of resident moose licences. They were each further charged under s. 12 of the Act with unlawfully possessing wildlife, being bull and cow moose, killed contrary to the Act. The brothers were both charged, pursuant to s. 96(a) of the Act with uttering a false statement to Conservation Officer Gross. Both were also charged with unlawfully erecting or placing a building on public land without a work permit, thereby allegedly violating section 2(1)(a) of Ontario Regulation 453/96 made pursuant to the Public Lands Act.

[7] David Beaudry was also charged that he failed to notify the Ministry of Natural Resources (MNR) within 10 days that he had changed his address as he was required to do pursuant to s. 6(2) of Ontario Regulation 665/98 made pursuant to the Act.

[8] Dean Beaudry was charged that he, on November 29, 2000, unlawfully obstructed Officer Gross, contrary to s. 96(b) of the Act.

[9] Yvon Beaudry, the father of the brothers Beaudry, was charged with unlawfully possessing cow and bull moose killed contrary to the Act, s. 12.

[10] Based on the evidence at trial, the Crown has argued that there should be convictions against Yvon Beaudry on both of his charges, against David Beaudry on his charges of possession of unlawfully hunted cow and bull moose, making a false statement and failure to notify change of address, and against Dean Beaudry on his charges of possession of unlawfully hunted cow and bull moose, making a false statement, and obstruction. I agree with the prosecutor's assessment that the other charges against the brothers have not been proven beyond a reasonable doubt.

[11] After hearing the evidence of Conservation Officer Gross and Yvon Beaudry and reviewing the exhibits filed at trial, I have come to the conclusion that the Crown has proven both charges against Yvon Beaudry, the possession charges against both brothers, the false statement charges against both brothers, and the failure to notify change of address charge against David Beaudry. All of those charges arose around the end of October 2000.

[12] On the evidence before me at trial, there is no proof that Dean Beaudry obstructed Officer Gross one month later, on November 29, 2000 at Kenogami Road. While this may have been a typographical error, I do not deem it appropriate in all the circumstances of this case, and in the absence of a motion to amend made by the prosecutor prior to the close of the Crown's case, to amend that count of the Information to accord with the evidence. Consequently, there will be a finding of not guilty on count 6 of Information # 016217.

[13] I do not agree with the position taken by defence counsel that it is a prerequisite to finding the Beaudrys guilty of possession of unlawfully hunted moose that there first be a finding that they unlawfully hunted those moose. On these charges the evidence showed that Dean Beaudry had numerous packages of moose meat in the freezer of his house. The evidence further showed that Yvon Beaudry had similar packages in his home freezer. Yvon Beaudry admitted that David Beaudry lived with him, and Officer Gross testified that he had seen the brothers, who were licensed at the material time to hunt only calf moose, in a truck that included firearms and moose hair and skin in a boat being towed by the truck. He further testified that he seized samples of moose hair and hide from the boat and from a cow moose kill site and a bull moose kill site. Samples of those items were sent for analysis along with samples from the packages of moose meat found during the execution of search warrants at the Yvon and Dean Beaudry residences. The DNA analysis of those samples showed there was a greater than 99.9 % probability that the samples came from the same animals.

[14] A part of Dean Beaudry's firearm was found at the cow moose kill site. The bull moose antlers were found at his residence.

[15] Mr. Yvon Beaudry, when asked in cross-examination whether, when he had seen the moose hanging in his garage before they were butchered and the meat packaged, if he had seen any tags on either moose, answered that he had not. He further gave evidence that his sons had shot the cow and bull moose.

[16] The Crown has proven beyond a reasonable doubt that the cow and bull moose that had been butchered and packaged, were not killed according to the Act as there was no tag affixed to the animals as was required, and neither of the Beaudry brothers had a licence to hunt cow or bull moose.

[17] With respect to the charge of fail to notify of change of address within 10 days of moving, in my opinion, the Crown need only prove that David Beaudry provided

an address on his Outdoors Card application and that, at the material time, he was no longer living there, and that there was no change of address notice received by the MNR. The Crown need not prove something that is primarily within the knowledge of David Beaudry, that is, whether he notified the MNR within the time period specified in the Regulation, that is, within 10 days of moving. The evidence of his father was that David Beaudry lived with him in Longlac. Officer Gross testified that David Beaudry's Outdoors Card application showed an address of Klotz Lake, and the MNR had not any record of receiving a change of address notice from David Beaudry. There is no evidence that David Beaudry ever notified the MNR of his change of address. The onus must shift to him to show that he did so within 10 days of his move, otherwise section 6(2) would be impossible to prove and therefore meaningless. The Crown has proven the essential elements of this charge beyond a reasonable doubt.

[18] Since David Beaudry was charge in one count by making a false statement in two respects to Officer Gross, I believe I should address both prongs of this charge. Briefly, I find on the evidence presented by the Crown witnesses at trial that the Beaudry brothers had lied to Officer Gross about where they were hunting. David Beaudry further lied to the officer by giving his brother, Dean's, address as his when, according to their father's evidence, David lived with the father. I find that the Crown has therefore proven this count against David Beaudry.

[19] Finally, with respect to Dean Beaudry, I find on all the evidence that he lied to Officer Gross about the location of both the hunt camp and the moose kill sites, and therefore, the false statement charge against him has been proven.

Mark Roy's Charges

[20] Mark Roy admitted by way of an agreed statement of facts that he was hunting calf moose on December 15, 2003 in the Northwest Region and, when asked to provide his hunting licence, produced a membership card for the Ontario Métis and Aboriginal Association ("OMAA") instead. He was the holder of a valid licence to hunt moose, but it was in his vehicle, several kilometres from where he was hunting. Section 66 of the Act requires that a hunter have his or her licence on his or her person when hunting.

Richard and Shawna Ducharme's Charges

[21] Shawna Ducharme admitted through her testimony and an agreed statement of facts to killing a cow moose on October 7, 2001 in the Northwest Region without having a licence to hunt for moose, and helping transport it to her brother, Richard Ducharme's home where he butchered it. Richard Ducharme, by way of an agreed statement of facts, admitted the possession of the meat from the moose that his sister had shot without a licence.

Harold Hein's Charges

[22] By way of an agreed statement of facts, Harold Hein admitted he shot a cow moose on October 21, 1999, from the shoulder of Highway 11, in the Northwest Region. He admitted that neither he, nor his companion who helped him dress and haul out the moose, had a licence to hunt cow moose.

Gunnar Hult's Charge

[23] Gunnar Hult admitted by way of an agreed statement of facts that on May 24, 2001 in the Northwest Region he was in possession of 16 walleye over the limit permitted by s. 24(1)(a) of the Ontario Fishery Regulations, 1989.

The Law on Métis Status

[24] The prosecutor in his written argument has neatly and thoroughly summarized the law in this area. Much of what follows in this section is taken from those submissions.

[25] The pertinent subsections of section 35 of the Constitution Act, 1982 provide as follows:

> (1)The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2)In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

[26] The Supreme Court of Canada in the case of R. v. Sparrow (1990), 70 D.L.R. (4th) 385 held that Métis rights, like all aboriginal rights, flow from historical traditions and practices of Métis communities. The Court further held that aboriginal rights are communal, rather than individual, and are site specific. The case held, at p. 411, that those rights "are held by a collective and are in keeping with the culture and existence of that group".

[27] In 1996, the Supreme Court decided R. v. Van der Peet (1996), 137 D.L.R. (4th) 289, in which it affirmed the communal nature of aboriginal rights by stating, at p. 318, that these rights flow only from the "traditions, customs, and practices of the particular aboriginal community claiming the right".

[28] The leading case in the area of Métis hunting and fishing rights is R. v. Powley (2003), 230 D.L.R. (4th) 1. In that case, the Supreme Court of Canada set out a framework that trial courts such as this one must apply in determining whether a person may rely on Métis hunting or fishing rights to avoid the application of provincial wildlife legislation. The Court also affirmed that Métis rights, like other aboriginal rights, are community based rather than individual, and that Métis hunting and fishing rights are site specific, when it said, at paragraphs 10, 13 and 19 respectively:

> The term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.
>
> The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.
>
> Aboriginal hunting rights, including Métis rights, are contextual and site-specific.

[29] As is the case when anyone is claiming a particular right, in Powley, the Supreme Court stated that the onus is on a person claiming a Métis right to prove all of the following facts:

> (1) that there existed an historic Métis community living a distinctive Métis lifestyle (para. 10, 11, 12), as of the time of effective European control (para. 37);
>
> (2) that the Métis community remained in place from the time of effective European control to the present (para. 24-28);
>
> (3) that the person claiming the right self-identify as a member of the modern Métis community (para. 31) and is accepted by the modern community (para. 33);
>
> (4) that the person traces his or her ancestry to the historic Métis community (para. 32, 34); and,
>
> (5) that the hunting [or fishing] was integral to the distinctive culture of the Métis community (para. 41) at or near the location where the hunting [or fishing] took place (para. 12, 19, 20).

[30] The Court in Powley ruled, at para. 33, that membership in a Métis political organization, such as OMAA,

> may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups.

[31] Several cases at provincial court or higher levels that have followed Powley have confirmed that a person whose aboriginal ancestry is traced back to a location other than the hunting or fishing location where he or she was charged will not generally be able to prove membership in a local Métis community. These cases are listed in the Crown's book of authorities filed with the court and support the position

stated in Powley relating to what persons claiming Métis status must prove.

Application of the Law to the Defendants before the Court

[32] Before proceeding further, it is necessary, as the Supreme Court directed in Van der Peet, to characterize the right being claimed. In each of the cases that came before the court, the right claimed was to hunt (or fish, in the case of Mr. Hult) for food in the area around each defendant's Métis home community. For the Beaudrys and the Ducharmes, that community is Longlac, for Mr. Roy, Red Rock, for Mr. Hein, Orient Bay, for Mr. Hult, Hurkett. Despite suggestions from the defence witness and OMAA president Michael McGuire, the case law is clear that Métis rights, like other aboriginal rights are site-specific. Therefore, each of the defendants must prove the existence of an historic Métis community in his or her area to which he or she belonged at the time of the alleged offences, and that he or she hunted or fished in that specific area, as well as the other issues set out in Powley at paragraph 29 of this judgment, infra.

The Beaudrys

[33] The defence produced, through the testimony of Luc Lacroix, a person qualified at this and other trials to give opinion evidence of the aboriginal and non-aboriginal roots of the Beaudrys, which shows they have such mixed ancestry. Yvon Beaudry's testimony also supports this Métis ancestry evidence. However, he gave no evidence that his parents, he or his two charged sons practised any aboriginal ceremonies. Furthermore, there was no evidence that the three belonged to any distinct Métis community in the Longlac area, or indeed, that such a community existed either historically or at the time of the offences. The evidence of Mr. McGuire goes only to show that he may have grown up in a Métis community in Macdiarmid, some distance northeast of Nipigon, and considerably far away from Longlac, that practised traditional Métis rituals. That evidence does not assist the Beaudrys in what they must prove, according to the Powley case and those that have followed it. Certainly, mere membership in OMAA is also insufficient in this regard.

Mark Roy

[34] The genealogical evidence presented by Mr. Roy and Mr. Lacroix on his behalf shows Mr. Roy's ancestors came from Manitoba and Quebec. The evidence of Mr. Lacroix focused entirely on Mr. Roy's aboriginal roots; his European ancestors were all but ignored.

[35] Notwithstanding his mixed blood heritage, Mr. Roy gave no evidence that he participated in any Métis community activities in the Nipigon or Red Rock area, nor indeed that a Métis community historically existed in either area.

Richard and Shawna Ducharme

[36] Shawna Ducharme spoke eloquently and passionately about her heritage and

her hunting as well as the fact that she was the first female hunting and fishing guide in Canada. She testified that she learned how to hunt and guide as a child, and that she hunts for the purpose of feeding her family, including her six children and her brother's family.

[37] Ms Ducharme also testified that both of her parents are aboriginal, although no genealogical evidence of the kind offered for the Beaudrys or Mr. Roy was presented. Instead, the defence produced photocopies of Ms Ducharme's and her mother's birth certificates, both from Manitoba, as well as her mother's status card for the Ginoogaming First Nation near Longlac. Ms Ducharme testified that her mother moved to the area in the early 1990s and transferred her status to Ginoogaming from a Manitoba First Nation in 1999.

[38] Although Shawna and Richard Ducharme may have argued, because of their ancestry, an Indian right, they did not. The right claimed was a Métis right. There is no evidence that either meets the Powley test regarding Métis status, given the reasons set out above regarding the other Longlac residents, the Beaudrys.

Harold Hein

[39] Mr. Hein testified his grandmother was a descendant of the Winnebago tribe in Wisconsin and that he moved from Wisconsin to Nipigon 35 or 40 years ago. He considers himself Métis, and purchased one of the first memberships in the forerunner to OMAA in the early 1970s. He gave evidence that he hunts, fishes and traps to feed himself. He testified there are some Métis people living in the Orient Bay area northeast of Nipigon where he now lives, but the evidence does not support a finding that, other than his longstanding membership in OMAA that he felt he was part of a Métis community or that he was actively involved in such a community; indeed, from his evidence it appeared that Mr. Hein was for the most part a loner and not involved in any community at all. In any event, there was no evidence presented that there was historically, at the crucial point in time according to the Powley decision, a distinctive Métis community in this geographical area where Mr. Hein was hunting.

[40] Other than his own testimony as to his ancestry, there was no genealogical evidence led to establish Mr. Hein's Métis background; he could not even tell the court how far back his native ancestry went.

Gunnar Hult

[41] Mr. Hult testified as to his aboriginal roots in Michigan and that he moved to the Hurkett, Ontario area 25 years ago. No documentary evidence was produced to support his Métis ancestry.

[42] Mr. Hult stated in evidence he was getting fish for a Native gathering and that it was his responsibility to provide the fish for a feast for the Métis of his community in Hurkett.

[43] Mr. Hult identified himself as a Métis, and participated in Métis community activities in the Hurkett area. He said the Hurkett Native Council, of which he is the president, is a subset of OMAA.

[44] Although he demonstrated a strong connection to an existing Métis community in Hurkett, since his aboriginal family originated in the Sault Ste. Marie, Ontario and Michigan areas, he could claim no ancestral connection with that Métis community in Hurkett. Furthermore, there was no evidence as to whether that Métis community in Hurkett existed at the crucial time as discussed in Powley.

Conclusion

[45] For the reasons set out above, there will be findings of guilty on all counts against each defendant, except for count six on Information # 016217 against Dean Beaudry.

Released: March 1, 2006

Signed: "Justice of the Peace Bruce I. Leaman"