

R v Kooktook, Peetooloot and Tucktoo

**Nunavut Court of Justice
12 January 2005**

NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation: R. v. Kooktook, Peetooloot and Tucktoo,
2005 NUCJ 01

Date of Judgment: 12 January 2005
Docket Number: 25-01-18, 25-01-19, 25-01-20
Registry: Iqaluit

Applicant: Her Majesty the Queen

-and-

Respondent: Saul Kooktook, Kokiak Peetooloot and David Tucktoo

Before: The Honourable Mr. Justice R. Kilpatrick
Counsel (Applicant): Christine Gagnon
Counsel (Respondent): ohn Wonnacott

Location Heard: Iqaluit, Nunavut
Date Heard: Dec 25, 2004

Matters: Fisheries Act, s. 72(3), Marine Mammals Regulations, S.O.R./93-56,
s.14

REASONS FOR JUDGEMENT

- 1 These three citizens have been acquitted after trial of charges laid under the Marine Mammals Regulations. The charges arose out of a harvest of narwhal in waters adjacent to the community of Taloyoak, Nunavut, in September 2001.
- 2 The Crown now seeks an order of forfeiture in relation to the three narwhal tusks seized by Fisheries officers in the course of this investigation. The Defense resists this application and asks that the tusks be returned to the three hunters who were the focus of this prosecution.
- 3 In bringing this application for forfeiture the Crown relies on s.72(3) of the Fisheries Act. This section provides that:

"Where a person is charged with an offence under this Act that relates to fish seized pursuant to paragraph 51(a) and the person is acquitted but it is proved that the fish was caught in contravention of this Act or the

regulations, the court may order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty."

- 4 This Court is satisfied on the basis of the evidence before it:
 1. that the three narwhal tusks are "fish" within the meaning of the Act and the Marine Mammal Regulations;
 2. that the three tusks were seized pursuant to s.51(a) of the Fisheries Act;
 3. that all three tusks when seized were illegal, there being no tag authorizing the kills affixed to the tusks as required by s.14 of the Marine Mammal Regulations.
- 5 I conclude that the Crown has established the necessary preconditions for forfeiture set out in s.72(3) of the Fisheries Act.
- 6 In the course of the trial, this Court ordered all evidence linking the three hunters to the tusks excluded. Section 24(2) of the Canadian Charter of Rights and Freedoms (Charter) was applied as a consequence of this Court finding that a number of serious breaches of the three accused's constitutional rights had occurred in the course of the investigation. All statements made by the hunters to the authorities, together with evidence of their conduct in bringing the tusks to the seizing authorities, were also ordered excluded by virtue of the Crown's failure to prove that the hunters made these statements voluntarily to the investigating authorities. There is consequently no admissible evidence linking the three hunters to the tusks. For want of this evidence, the three accused were acquitted.
- 7 However, the failure of the prosecuting authorities to secure convictions in this case does not establish that the three citizens were lawfully entitled to possess the seized tusks. No challenge was made to the constitutional legitimacy of the regulatory regime under which Inuit are required to possess licenses to fish for narwhal. These licenses must be acquired prior to a kill being made. Identifying tags must then be affixed to the tusk following a kill. The Marine Mammals Regulations predate the Nunavut Land Claims Agreement. Under this regulatory regime, Inuit are not defined as "beneficiaries". In the absence of a constitutional challenge, this Court is precluded from assessing the impact that this regulatory regime has on traditional Inuit harvesting practices and any resulting interference with a right of harvest under the Land Claims Agreement. This Court is bound to apply the law, as it presently exists.
- 8 In order to return these tusks to the hunters, this Court would have to be satisfied that these citizens were lawfully entitled to possess the tusks in question under the existing regulatory regime. No such evidence exists. Having excluded all evidence of possession by the three hunters, there is simply no admissible evidence to establish that these three citizens have a lawful right to possess the tusks presently in the possession of the Crown. When seized the three tusks were illegal. They had no tags affixed to them as required by the regulations.
- 9 The Court knows of no authority to suggest that evidence declared inadmissible as a result of a breach of a Charter right should then be admissible at the instance of the Defense to assist the defendants in regaining that which has been lawfully seized by the Crown. Having once invoked the Charter as a shield to protect the defendants from conviction, the Charter cannot then be wielded by the same defendants as a sword to regain that



which has been lawfully taken from them. This Court is consequently left with no option except to declare the three tusks, exhibits 3, 4, and 5, forfeited to the Minister.

- 10 This Court has no power under the Fisheries Act to fetter the Minister's discretion with respect to disposition of items forfeited under the Act. In view of the significance of the narwhal to Inuit and Inuit culture, this Court strongly recommends that these tusks not be destroyed. It is hoped that the Minister will find a way to ensure that citizens of Nunavut benefit from the ultimate disposition of the three exhibits now forfeited to the Crown.

Dated at the City of Iqaluit this 12th day of January, 2005

Mr. Justice R.G. Kilpatrick
Nunavut Court of Justice