Date: 20020403
Docket: CA 173680
CA 174779
CA 174780

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Marshall, 2002 NSCA 43]

Bateman, Cromwell and Hamilton, JJ.A.

BETWEEN:

STEPHEN FREDERICK MARSHALL, KEITH LAWRENCE JULIEN, CHRISTOPHER JAMES PAUL, JASON WAYNE MARR, SIMON JOSEPH WILMOT, DONALD THOMAS PETERSON, STEPHEN JOHN KNOCKWOOD, IVAN ALEXANDER KNOCKWOOD, LEANDER PHILIP PAUL, WILLIAM JOHN NEVIN, ROGER ALLEN WARD, MIKE GORDON PETER-PAUL, JOHN MICHAEL MARR, JOSEPH SACK, MATTHEW EMMETT PETERS, STEPHEN JOHN BERNARD, WILLIAM GOULD, CAMILLIUS ALEX JR., JOHN ALLAN BERNARD, PETER ALEXANDER BERNARD, ERIC STEPHEN KNOCKWOOD, GARY HIRTLE, JERRY WAYNE HIRTLE, EDWARD JOSEPH PETER-PAUL, ANGUS MICHAEL GOOGOO, LAWRENCE ERIC HAMMOND, THOMAS M. HOWE, DANIEL JOSEPH JOHSNON, DOMINIC GEORGE JOHNSON, JAMES BERNARD JOHNSON, PRESTON MACDONALD, KENNETH M. MARSHALL, STEPHEN MAURICE PETER-PAUL, LEON R. ROBINSON, PHILLIP F. YOUNG

Appellants

- and -

MARTIN E. HERSCHORN, in his capacity as Acting Director of Public Prosecutions (Nova Scotia) and HER MAJESTY THE QUEEN

Respondents

REASONS FOR JUDGMENT

Counsel: Bruce H. Wildsmith, Q.C. for the appellants
Duncan R. Beveridge, Q.C. for the respondents

Appeal Heard: March 22nd, 2002

Judgment Delivered: April 3rd, 2002

THE COURT: The three applications for leave to appeal and the application for leave to cross-appeal are dismissed per reasons for judgment of Cromwell, J.A.; Bateman and Hamilton, JJ.A. concurring.

CROMWELL, J.A.:

[1] In early March of 2001, the appellants were convicted in Provincial Court on charges under the **Crown Lands Act**, R.S.N.S. 1989, c. 114. In early April of that year, they commenced a summary conviction appeal in the Supreme Court of Nova Scotia. On April 20, the (then acting) Director of Public Prosecutions, Martin E. Herschorn, pursuant to section 14(1) of the **Public Prosecutions Act**, S.N.S. 1990, c. 21 appointed Alexander MacBain Cameron a Crown Attorney "... to act on any appeals resulting from the conviction of ... [the appellants] under the Crown Lands Act."

[2] The appellants thought this appointment was inappropriate and unlawful. In their view, Mr. Cameron, was a staff lawyer with the Department of Justice, under the direction, control and supervision of the Minister of Justice and Attorney General. Mr. Cameron, they say, continued to act as such in civil proceedings on matters of Mi'kmaq Aboriginal title and treaty rights at the same time as he acted as a prosecutor in the appellants' summary conviction appeal. In the appellants' view, these two roles are incompatible because a lawyer who is accountable to the Attorney General and Minister of Justice cannot have the degree of independence required to also act as a "quasi-judicial minister of justice", as a Crown Attorney is often described.

[3] The appellants therefore took steps to have Mr. Cameron removed and his appointment as a Crown Attorney quashed. The manner in which they took these steps, however, has resulted in a procedural quagmire, aspects of which are now before this Court on three interlocutory appeals which we have heard together.

[4] The appellants brought two separate applications challenging Mr. Cameron's appointment. It will be convenient to refer to these two proceedings, respectively, as the "summary conviction appeal application" and the "judicial review application." I will address each in turn.

[5] In the first proceeding, that is the summary conviction appeal application, the appellants brought an interlocutory application in the context of their summary conviction appeal, which was then pending in the Supreme Court of Nova Scotia, for an order "[r]emoving as counsel of record in this proceedings (sic) Alexander MacBain Cameron" and "[d]irecting that [he] not participate further in the conduct of these proceedings." They alleged that Mr. Cameron's appointment and his participation in the appeal were inconsistent with and compromised the required independence of Crown counsel, were contrary to the **Public Prosecutions Act**, constituted an abuse

of process and deprived the appellants of their right to a fair hearing as guaranteed by the Charter.

[6] In aid of this interlocutory application, the appellants brought a further interlocutory application for leave to call the DPP as a witness and, in addition, served him with a notice to attend for examination for discovery.

[7] These and other procedural matters arising out of the summary conviction appeal application ended up before two different judges. Wright, J. held that the DPP was not compellable on discovery and MacDonald, A.C.J.S.C. refused leave for him to be called as a witness. The appellants now seek leave to appeal those rulings.

[8] Between the time of those rulings and the hearing of the present appeals from them to this Court, two things of note have occurred. The underlying application to remove Mr. Cameron as counsel on the summary conviction appeal was adjourned at the request of the appellants and was not pursued before the judge hearing the summary conviction appeal itself. The summary conviction appeal has now been heard and dismissed by the Supreme Court of Nova Scotia and that decision, of course, did not address the issue of Mr. Cameron's appointment. An application for leave to appeal from the dismissal of the summary conviction appeal has now been filed in this Court. None of the grounds of appeal relates to the appointment of Mr. Cameron or his acting as counsel for the respondent Crown on the summary conviction appeal.

[9] We, therefore, are faced with two applications for leave to appeal from the decisions of two different judges. Their rulings concerned procedural matters arising out of an interlocutory application to remove Mr. Cameron as counsel in a summary conviction appeal which has now been heard and decided. Moreover, the underlying objection to Mr. Cameron acting as counsel was not pursued before or addressed by the judge who decided the summary conviction appeal on its merits.

[10] Assuming, without deciding, that interlocutory appeals such as these lie in the context of the summary conviction appeal (a matter on which we have grave doubts), these appeals should not be entertained in these circumstances. Given the conclusion of the summary conviction appeal and the fact that the objection was not pursued before the summary conviction appeal court judge, no practical purpose would be served by hearing these appeals.

[11] As announced at the hearing, the applications for leave to appeal in relation to the two interlocutory appeals in the summary conviction appeal proceeding are dismissed.

[12] I find it remarkable, to say the least, that the appellants would, on one hand, submit that Mr. Cameron's acting as co-counsel for the respondent Crown on the summary conviction appeal denied them their Charter rights and constituted an abuse of process while, on the other hand, on their own initiative, having shelved that complaint and left it in limbo while their summary conviction appeal was heard and decided.

[13] In the second of the two applications to remove Crown counsel or quash his appointment -- that is the judicial review application -- the appellants proceeded by originating notice (application) seeking an order in the nature of *certiorari* and prohibition in relation to Mr. Cameron's appointment as Crown counsel. The same three grounds were advanced as in the summary conviction appeal application -- namely that the appointment was contrary to both the requirement of Crown independence and to the Public Prosecutions Act, was an abuse of process and deprived the appellants of their right to a fair hearing. The relief sought, however, was somewhat different than that sought in the context of the summary conviction appeal proceeding. Specifically, in the judicial review application, the appellants sought an order quashing Mr. Cameron's appointment by the DPP and prohibiting him from further appointing Mr. Cameron or others employed by the Department of Justice to take charge or conduct the appeal or appeals in relation to the appellants' convictions.

[14] Within the judicial review application, the appellants applied, among other things, for a date for the DPP to file the return required under **Rule** 56, for an order requiring the DPP to attend for examination for discovery or alternatively for leave to adduce oral evidence from him on the return of the main application.

[15] MacDonald, A.C.J.S.C. set a date for filing the return, ruled on its contents and refused to order discovery or grant leave to adduce oral evidence. The appellants seek appellate review of these orders.

[16] Given the broader relief claimed in the judicial review proceeding as compared to the summary conviction appeal application, I do not think that the interlocutory appeal in the judicial review proceeding is so clearly moot or hypothetical or so clearly is an impermissible collateral attack that we should refuse to hear it on any of those bases. Whether the underlying judicial review application is moot, hypothetical or constitutes an

impermissible collateral attack should be determined if and when the judicial review application is addressed on its merits in the Supreme Court. The issues before us on this interlocutory appeal are procedural in nature and do not go to the merits of the underlying judicial review application.

[17] It is argued that MacDonald, A.C.J.S.C. erred in defining the return when that issue was not set out in the interlocutory notice and that, in any event, he defined the record too narrowly. These submissions, in my view, do not raise fairly arguable issues.

[18] The issue of the contents of the return was clearly raised before the judge as a matter for his decision. The briefs filed before him and the oral submissions advanced to him indicate that counsel raised and made submissions on the question of what should be in the return. The judge plainly did not err in ruling on this matter.

[19] On the question of the contents of the return, the judge directed that the return should consist of the appointment of Mr. Cameron by Mr. Herschorn and "... any amendment, modification, limitation or change to that appointment." Mr. Herschorn's return certifies that he has truly set out all the papers and documents in his custody and power pursuant to the judge's decision. In defining the record in this way, we see no error arguably justifying appellate intervention. The words of Freeman, J.A. in **Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)** (1994), 129 N.S.R. (2d) 298 at para. 29 are apt:

> ... When the review is sought of a discretionary administrative decision for which there are no procedural or evidentiary requirements there may be little resembling the record [i.e., the return] defined in Rule 56.08.

[20] It is also necessary to remember that, as Freeman, J.A. pointed out in the **Waverley** case at para 54, the definition of the return in these circumstances is an interlocutory decision within the discretion of the judge. To interfere with it, the appellate Court must be persuaded that the decision proceeds on some wrong principle or gives rise to a substantial injustice. I see no arguable issue raised on either count.

[21] The remaining issues are whether the judge erred in refusing discovery and leave to orally examine the DPP on the return of the judicial review application. In my view, the appellants' position on these issues is not fairly arguable given the the decision of this Court in **Waverley**, **supra**.

[22] As expressed by the appellants in their factum, the issue they raise in the judicial review proceeding is "... whether [the DPP] acted "illegally" in an

administrative law sense in the exercise of a statutory power of appointment by selecting someone who lacked the necessary independence required by the **Public Prosecutions Act**, S.N.S. 1990, c. 21, as amended. It follows that the DPP, in the context of this judicial review proceeding, was acting as a statutory decision-maker whose decision is sought to be reviewed.

[23] There is, therefore, the legal question of whether the requirement for independence, which the appellants assert, limits the DPP's statutory power of appointment under s. 14(1) of the **Public Prosecutions Act**. If so, there is also the factual question of whether Mr. Cameron possesses the required degree of independence.

[24] As set out in **Waverley** at para 31, before discovery will be allowed, it must be shown that the record is insufficient to provide a basis for judicial review. In my view, the appellants do not arguably meet this test.

[25] It is helpful to review the state of the record in the judicial review proceeding. That record consists, in the main, of the affidavit of Mr. Christmas, filed by the appellants and the return filed by Mr. Herschorn. Mr. Christmas' affidavit, which at this point is unchallenged, includes the following assertions:

(a) Mr. Cameron is a staff lawyer in the Nova Scotia Department of Justice;

(b) In his role as legal counsel for the Attorney General, Mr. Cameron acts in civil proceedings on matters of Mi'kmaq Aboriginal title and treaty rights.

(c) He was prior to his appointment as a Crown Attorney paid his salary for his work on Aboriginal title and treaty rights by the Attorney General, and presumptively continues to be so paid.

(d) After his appointment as a Crown Attorney in the summary conviction appeal, Mr. Cameron continued to act for the Attorney General in civil cases involving Aboriginal title and treaty rights.

[26] The DPP has filed a return which consists of the appointment and his certification which indicates that there has been no modification, limitation or change to that appointment. There is no evidence of any particular financial or administrative arrangements made with regard to Mr. Cameron's appointment as a Crown attorney to address the sort of independence which the appellants say is required.

[27] Mr. Wildsmith suggests that there are three relevant general areas for examination of the DPP. It is suggested that the DPP should be examined first about the policies, usual practices and safeguards applied by the

Prosecution Service and second, about what provisions were made for security of tenure, financial security and administrative independence in this case. However, as noted, there is no evidence that there are any special financial or administrative conditions attached to Mr. Cameron's appointment. I do not understand how, on the record as it now stands, further exploration of these matters on discovery could assist the appellants or the court in having the issue the appellants raise in their judicial review proceeding fairly and properly determined. As for the third topic for examination, Mr.Wildsmith says that he should be able to explore the role, if any, which the Attorney General played in the appointment. However, on this point, the appellants clearly have not met the evidentiary threshold of showing that there are valid reasons for believing that there was some improper involvement in the appointment: see **Waverley**, **supra** at para. 31.

[28] I would conclude, therefore, that the appeal in relation to discovery and examination do not raise fairly arguable issues. Assuming, without deciding, that there can be an interlocutory appeal such as this in the context of the main judicial review application, leave to appeal should be denied. It is accordingly not necessary to deal with the motion to quash brought by the respondents.

[29] On the cross-appeal, the respondents challenge MacDonald, A.C.J.S.C.'s order that the interlocutory application to remove Mr. Cameron in the now concluded summary conviction appeal be consolidated with the judicial review application. In view of our disposition of the main appeals and given that the summary conviction appeal has now been heard and decided, we see no practical purpose in addressing the cross-appeal since the only ongoing matter in the Supreme Court is the judicial review proceeding. Leave to cross-appeal is, therefore, denied.

[30] In the result, the three applications for leave to appeal and the application for leave to cross-appeal are dismissed. It is not necessary to address the respondents' motion to quash the appeals. There will be no order as to costs.

Cromwell, J.A.

Concurred in:

Bateman, J.A.