IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. McDonald, 2004 NSPC 55

Date:	October 28th, 2004
Docket:	Digby, Nova Scotia
Registry:	992068, 992086, 992115, 992062, 992093 1002518, 992122, 1002512, 992083, 992084, 992081, 992066, 992067, 992087, 992063, 1002511, 992085, 1002514, 1002515, 1002516, 992105

Between:

HER MAJESTY THE QUEEN

v.

ALEXANDER MCDONALD, ET AL

DECISION

Judge:	Jean-Louis Batiot
Charge(s):	Contrary to section 62 of the **Fisheries Act**; ss 267, 270 and 264.1 of the **Criminal Code of Canada**
Issue:	1) Whether fishery officers are acting in lawful execution of their duties, when the **Fisheries Act** and its regulations have not been amended to reflect the decisions in **Marshall (No. 1 and No. 2)**. 2) Whether evidence of an Aboriginal or Treaty right is relevant to the defence of obstruction, assault and uttering threats of a Fishery or Peace Officer.
Held:	Fisheries officers applying the law as it exists, not as it might be declared, in lawful execution of their duty. Evidence of Aboriginal or Treaty right is not relevant to the defence of obstruction, or offences of violence, since colour of right does not include mistake of law.
Counsel:	Keith Ward, for the Crown Bruce Wildsmith, Q.C., for the Defence

1. Both parties agreed, at the beginning of this Application for State-funded counsel, to argue a preliminary issue, its outcome possibly affecting their respective position: whether, given the recent Stay entered on illegal fishing charges, evidence to prove Aboriginal and Treaty rights is still relevant to establish a defence to the charges of obstruction or resisting a fishery or a peace officer, assault or uttering a threat . I have already advised counsel that the answer is negative. These are my reasons. A succinct context is useful.

BACKGROUND

2. It is common ground in this case that the commercial lobster fishery in St Mary's Bay, Digby Co, N.S., was closed on the day in question. Traditionally, it has been, from the last day of May to the last Monday of November, each year. It is a spawning ground.

3. By early July 2000, fisheries officers were aware of the presence of Aboriginal fishers, including the Defendants, at or near New Edinburgh wharf in St. Mary's Bay, and the *Whispering Sea*, the larger of their several vessels, and skiffs. The Department of Fisheries & Oceans (DFO) prepared for a boarding of the *Whispering Sea*, expected to be confrontational. The officers did so at the New Edinburgh wharf, on July 26th. They approached in five high speed Zodiacs, fully armed and wearing protective clothing, to conduct, what they termed to be an inspection, what the Defence sees as a raid. A clash ensued as the officers attempted boarding the vessel. Once successful, the officers looked for lobster traps without valid tags.

4. Ten Aboriginal fishers faced 23 charges, on different informations, all relating to events which occurred on that day. There are other charges as well, for activities on other days. This case proceeded first, with certain agreements to apply evidence and conclusions of law, to the others.

5. There have been various Applications, and decisions. The trial proper began in November 2001, and has proceeded on a multitude of days, over nearly 3 years. In September 2003, we began another Voir Dire with respect to the admissibility of certain Crown evidence on the issue of Justification. This was adjourned to mid-winter, when the Defence gave notice it would make this Application. All adjournments occurred by mutual consent.

6. Five of the Defendants, Alexander Peter McDonald, Leon Russell Robinson, Genevieve Rose Marie Johnson, Holly Lynn McDonald and Andrew Stephen Robinson, faced charges relating to alleged breaches of Regulations, relating to *fishing for food, social and ceremonial purposes* – a limited fishery in this time period – contrary to:
   a. s. 7 of the **Aboriginal Communal Fishing License Regulations,** S.O.R./93-332 *possession of lobster traps without valid tags*,
   b. s. 14(1)(b) of the **Atlantic Fishery Regulations,** 1985 S.O.R./86-21 (*fish for lobsters without being authorized*);
   c. s. 62(1) of the **Atlantic Fishery Regulations** (*having onboard a vessel lobster traps without valid tags attached*).

   These have now been stayed.

7. It is common grounds that the complexity of this trial rests in the presentation of evidence
   a. to establish an Aboriginal or Treaty right for the Defendants to fish lobsters in these waters, at this time;
   b. should the right be declared to exist, the justification evidence to prevent such fishing during the traditional closed season.

   Thus this preliminary application.

8. Of the remaining charges, 10 are contrary to s. 62 of the **Fisheries Act,** R.S.C. 1985, c. F-14, (the Fisheries Act hereafter) (*obstruction of a fisheries officer*); all others relate to criminal allegations (*assault with a weapon (s. 267), resisting arrest (s. 270), uttering threats (s. 264.1)*), contrary to **Criminal Code of Canada** , R.S.C. 1985, c.C-46 (the **Code**).

ISSUES

9. The central issues in this Application, therefore, are whether evidence of an Aboriginal or Treaty right to fish for lobsters, a limited access fishery, in Saint Mary's Bay, some 300 kilometers from their reserve, during the traditional close season, is relevant to establish:
   a. The fisheries officers were not in the lawful execution of their duty when they attempted to board the *Whispering Sea*;
   b. the Defendants' assertion of belief in the existence of such a right, in doing the acts complained of;
   c. whether such belief can amount, in the case of a strict liability offence (s. 62 of the **Fisheries Act**), to the defence of due diligence or mistake of fact, or, in the case of criminal offences, to self-defence, and/or mistake of fact or law, i.e. colour of rights.

10. Given the arguments presented in this application, I propose to deal firstly with the officers' lawful authority to act, and then, in theory, with the possible defences which may be available to the Defendants.

LAWFUL AUTHORITY

11. The main argument is that the fishery officers who boarded the *Whispering Sea*, at New Edinburgh wharf on 26th of July, 2000 were acting without lawful authority since the **Fishery Act** and its **Regulations** have not been amended to reflect the decision of the Supreme Court of Canada in **R. v. Marshall (No. 1),** [1999] 3 S.C.R. 456**, and R. v. Marshall (No. 2),** [1999] 3 S.C.R. 533, which recognized a Treaty right to fish to earn a modest livelihood – to extend such Treaty right to fish for lobsters in the summer in St. Mary's Bay. Therefore in attempting to board the vessel, the officers were using their powers, in the guise of conducting an inspection, to unlawfully invade or trespass upon private property of which the Defendants were in peaceable possession. It is particularly relevant to those offences, such as s. 62, **Fisheries Act** (*obstruction of a fishery officer*) or s. 270(1)(1) of the **Code** (*assaulting a peace officer*), where the lawful authority of the peace officer to act is a constitutional element. It is also relevant to the more general charges pursuant to s. 267(a) and 264.1(1) where, open to the Defendants, are the defences provided by s. 34, 37 and 38 of the **Code** .

12. The Defence relies on the principle that any individual has the right "*to be left alone, to be free of private or public restraints, save as the law provides otherwise*": **R v. Biron,** [1976] 2 S.C.R. 56.

13. There is no law at common-law to justify such a boarding. It must be found within the confines of the **Fisheries Act** or its **Regulations**, which would allow for enforcement of Aboriginal or Treaty fisheries. As there is no criteria or guidelines for the Minister's exercise of discretion with respect to these issues, any such exercise of discretion is in breach of the **Marshall** decisions. Any authority to intercept or inspect found in this **Act** is inapplicable to the Defendants. Their **Marshall** fishery right is unregulated, and there is nothing to inspect, such as size and number of lobsters caught, the bookkeeping required or which may be required to earn a modest livelihood, as this fishery has not been recognize by DFO.

14. In effect the enforcement actions by the Fishery Officers were not for inspection of the exercise of an existing right, but a denial of such a right, similar to the denial of the Treaty right to fish for eels in Pomquet Harbour, eventually recognized by the Supreme Court of Canada, in **Marshall (No. 2)**, **supra**. In that case the Supreme Court of Canada held, at para. 66:

> *The Appellant caught and sold the eels to support himself and his wife. Accordingly, the close season and the imposition of a discretionary licensing system would, <u>if enforced</u>, interfere with the appellant's treaty right to fish for trading purposes, and the ban on sales would, <u>if enforced</u>, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal.* [<u>my underlining</u>]

There was no evidence of violence in that case.

15. Mr. Ward, for the Crown, counters:

a. There is no need to prove or disprove a treaty or aboriginal right to fish for lobsters in St. Mary's Bay in the summer to earn a modest livelihood.
b. The **Fisheries Act** applies to the Defendants and is not inconsistent with the **Marshall** decisions.
c. The powers of inspections pursuant to s. 49 of the **Fisheries Act** are broad and give ample powers to the fisheries officers, from those of inspection, to seizure, to even arrest. Further there is no liability for trespass pursuant to s. 52.
d. The **Marshall** cases must be looked at in light of the very specific questions they answer. The fishery officers were in the lawful exercise of their duty and at any rate, whether they are in lawful exercise of their duties or not, such criteria do not apply to the uttering of threats or assault with a weapon. Indeed the defences suggested, under ss. 34, 37, 38 and possibly 39, are untenable as they would amount to aboriginal fishers claiming immunity from inspection.
e. A better way was simply to submit, under protest, to the boarding.
f. S. 37 requires a commensurate use of force to prevent the assault, s. 38 is premised on the peaceable possession of personal property, the vessel and peaceable means. Here the presence of the *Whispering Sea* on St. Mary's Bay was in preparation for the development of a hot dispute, rife with possible conflicts.

EVIDENCE

16. The commonly accepted evidence of this case is that the remaining charges arose as a result of the boarding of the *Whispering Sea*, and not as a result of the subsequent inspection of the vessel, and its occupants.

DISCUSSION

17. The Federal Government regulates fisheries in general through the **Fisheries Act** and its regulations. But for those with *an exclusive right to fish recognized by law* (s.7), all fishers may only fish pursuant to the terms of a license. S. 49 authorizes fisheries officers to enforce any licensing schemes. The enforcement is through inspections and possible charges for any breach observed. For ease of reference, the relevant portions of ss. 25, 49 and 50 read as follows:

> S. 25 (1) provides a prohibition against setting fishing gears during closed time:
> *Subject to the regulations, no person shall place or set any fishing gear or apparatus in any water, along any beach or within any fishery during a close time*
>
> S. 49*(1) Subject to subsection (2), for the purpose of ensuring compliance with this Act and the regulations, a fishery officer or fishery guardian <u>may enter and inspect any place, including any premises, vessel</u> or vehicle, in which the officer or guardian believes on reasonable grounds there is any work or undertaking or any fish or other thing in respect of which this Act or the regulations apply and may*
>
> *(a) open any container that the officer or guardian believes on reasonable grounds contains any fish or other thing in respect of which this Act or the regulations apply;*
>
> *(b) examine any fish or other thing that the officer or guardian finds and take samples of it;*
>
> *(c) conduct any tests or analyses and take any measurements; and*
>
> *(d) require any person to produce for examination or copying any records, books of account or other documents that the officer or guardian believes on reasonable grounds contain information that is relevant to the administration of this Act or the regulations.*
>
> *Operation of data processing systems and copying equipment*
>
> *(1.1) In carrying out an inspection of a place under subsection (1), a fishery officer or fishery guardian may,*
>
> *(a) use or cause to be used any data processing system at the place to examine any data contained in or available to the data processing system;*
>
> *(b) reproduce any record or cause it to be reproduced from the data in the form of a print-out or other intelligible output and remove the print-out or other output for examination or copying; and*
>
> *(c) use or cause to be used any copying equipment at the place to make copies of any record, book of account or other document.*
>
> *Duty to assist*

(1.2) The owner or person in charge of a place that is inspected by a fishery officer or fishery guardian under subsection (1) and every person found in the place shall

(a) give the officer or guardian all reasonable assistance to enable the officer or guardian to carry out the inspection and exercise any power conferred by this section; and

(b) provide the officer or guardian with any information relevant to the administration of this Act or the regulations that the officer or guardian may reasonably require. [my underline]

S.50**.** *Any fishery officer, fishery guardian or peace officer may arrest without warrant a person who that fishery officer, guardian or peace officer believes, on reasonable grounds, has committed an offence against this Act or any of the regulations, or whom he finds committing or preparing to commit an offence against this Act or any of the regulations.*

18. S. 43 provides for general as well as specific powers to create regulations to carry out *the purposes and provisions of this Act.* They include powers to control, conserve and manage the fisheries.

19. The right claimed by the Defendants has never been recognized in law.

20. These sections of the **Act** show the broad jurisdiction given to the officers to enforce the **Fisheries Act** or its **Regulations**, to enlist the help of those involved in the fisheries, and to arrest, without warrant, violators.

21. Given our **Constitution Act, 1867**, and the distribution of powers, only the Federal Government can legislate these measures and, under the **Fisheries Act**, only fisheries officers (or guardians) may enforce them.

22. The Supreme Court of Canada, in **R. v. Marshall (No. 1), supra,** has not in any way impaired the authority granted to fisheries officers under the **Fisheries Act**. It recognized a particular Treaty right to fish for eels in Pomquet Harbour for the Defendant Aboriginal. It has also recognized that any such right will be subject to regulations under the **Fisheries Act**: i.e. a Treaty or an Aboriginal right is not a right to be exercised unhindered since access to the resources is subject to other and competing claims, such as conservation, and others' rights.

23. It is useful to recall at this juncture what the Supreme Court had to say on this subject, in **R. v. Nikal,** [1996] 1 S.C.R. 1013, at para. 102, with respect to salmon, another highly regulated fishery:

> *"It is the federal government which will be required to manage the fishery and see to the improvement and the increase of the stock of that fishery. It is for the federal government to ensure that all users who are entitled to partake of the salmon harvest*

have the opportunity to obtain an allotment pursuant to the scheme of priorities set out in ***Sparrow****. Any system of control must commence with a licensing scheme. It is through the issuing of licenses to the various type of users that the Department will be able to know at least the number of fishers and the categories of those that are fishing. This will provide the first rough basis from which the Department can make the estimates necessary to manage the fishery resource. The license is the essential first step in the preservation and management of this fragile resource. This need to manage the stock goes far further than simply preventing the elimination of the salmon. Management imports a duty to maintain and increase reasonably the resource. The license assists this duty by providing a means of identification that helps to ensure that only those permitted to do so are fishing in the authorized areas. It serves as a means of control by eliminating those that do not have a license from fishing."* [my underlining]

24. Clearly, at the time the **Marshall** decisions were released, the officers had the necessary powers to act as they did. Did they loose these powers between the date of issuance, and the date they acted in this prosecution?

25. The Defendants suggest that an absence of relevant regulations has, in effect, created a vacuum, where no one but the Defendants may act lawfully. I respectfully disagree. Whether or not there are regulations in place, the fisheries officers have a general duty, under the **Fisheries Act** to protect the fisheries, particularly in an area which is closed to any type of lobster fishing, but for a very limited one (aboriginal fishing for *food, social and ceremonial purposes*).

26. **Marshall (No. 2)** was issued on the 17th of December 1999, some seven months before the events in this case occurred, a short time to negotiate all the relevant conditions that ought to be addressed through regulations, should the right claimed have been recognized. The absence of regulations by the 26th of July 2000 is not unreasonable.

27. There is no indication that all the evidence presented at this trial was made available to federal officials. Indeed there was no time to make it available to DFO prior to the 26th of July 2000. It was not prepared until a year later. Yet the claim asserted in this trial was very specific: an Aboriginal or Treaty right to fish for lobsters by fishers from Indian Brook in St. Mary's Bay, in the closed season. This would be an extension in species or in territory of the possible Treaty or Aboriginal right to fish, an unusual assertion which would, understandably, require a great deal of discussion if the parties were ever going to agree. Such discussions may already have taken place, relying heavily, as has been argued here, on the right recognized in **Marshall**, but extending its application. Yet, the Supreme Court is clear; at para 23 in **Marshall (No. 2)**, it states: "[t]*he decision in this particular prosecution is authority only for the matters adjudicated upon*".

28. This was the law in existence at the time. The Fisheries officers were entitled to apply it, and not that which the Defendants might wish be declared subsequently.

29. For purposes of this case, the major point is: before fisheries officers might exercise their

discretion or indeed apply the law as they know it, they must ascertain the facts. This can only occur through an inspection; it necessitates, for a vessel, a boarding. Yet the evidence common to both parties is that the boarding by the officers was resisted by the Defendants, well before any inspections could occur. Again, to say that the inspection amounted to a prohibition from fishing is premature, albeit it might have been its result.

30. Indeed the scheme of the **Fisheries Act** is to authorize fisheries officers, on reasonable grounds, to inspect all those who are fishing or involved in the fisheries so that the fisheries, a national asset, can be protected, and only those entitled to fish do so in accordance with their particular license or conditions. If there are no licences, and no regulations to authorize them, then, in the best and extreme scenario for the Defendants, the prohibition from fishing, should such a right to fish be recognized, is inoperative, i.e., it could not be *enforced* (**Marshall (No. 1)**, supra, at para 64), and the prosecution would fail. But such colour of right, to be discussed below, does not impair the jurisdiction of the officer who charges the defendants; it only prevents a successful prosecution, because another consideration has become of equal importance, for that defendant.

31. To present the matters in the most positive terms for the Defendants, and without deciding the appropriateness of their conduct, at the very least the fisheries officers were entitled to board and inspect to conclude whether such a fishery was conducted in accordance with the principles enunciated in both **Marshall** decisions: engage in a commercial fishery to earn a modest livelihood. Any appropriate charge under the **Fisheries Act** is a strict liability offence (**R. v. Sault Ste Marie (City of),** [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 (S.C.C.). The Defendants would have to establish, under their due diligence obligations, the appropriateness and reasonableness of the measures they would have adopted, to comply with the requirements imposed by the Supreme Court of Canada. It is, however, an extreme example, since that decision makes it very clear: these matters must be done by regulations, to more properly manage the whole fishery.

32. The defence referred this court to **R. v. Houle** (1985), 24 C.C.C. (3rd) 57 (Alta C.A.), where an officer was found not to be in the exercise of his duties when he tried to enforce a regulation that, unknown to him, had been repealed. There is quite a distinction between a law that no longer exists, and a law that does exist but does not recognize a claim of right, which has yet to be established, by agreement, or declared by a court of law. The common thread in both cases, however, is that an honest belief in the existence of some claim does not make it reality.

33. The officers were not acting in ignorance of the law, and were in the lawful execution of their duty.

POSSIBLE DEFENCES

34. Defence counsel has argued the various **Criminal Code** defences that might have an air of reality now or when the defence completes its case. Theoretically they might be:
    a. Colour of right
    b. Self-defence to a provoked or unprovoked assault;

c. Protection of personal property.

35. In light of my conclusion above, and the Defence brief, defences b) and c) may no longer be argued except, perhaps, in the case of excessive use of force on the part of the fisheries officers, when the argument with respect of being in the exercise of their lawful duties will arise again, but in a different context.

36. Whether the assault is provoked or unprovoked by the Defendants, there would be different considerations with the use of force and the duty to retreat. The defence may be invoked even in the case of a police officer being the aggressor (**R. v. MacDonald** (2000), 146 C.C.C. (3rd) 525 (Ont. C.A.).

37. Under sections 34 **(self-defence against unprovoked assault**), 35 (**self-defence in case of aggression**), 37 (**preventing assault**), 38 (**defence of personal property**), the defence is one of the person, in the face of the perceived immediate danger to which the defendant is exposed, and must immediately answer. The use of force is justifiable in the face of the present danger, as appreciated at the time. The existence of a Treaty or Aboriginal right is completely irrelevant to this issue. Indeed, as held by Gibson A.C.J., of this Court, there is no *air of reality* to argue an Aboriginal or Treaty right in defence to an act of enforcement by a fishery officer (see **R. v. Peter Paul,** [2002] N.S.J. no 384, para 34, (Prov. Ct.).

38. The Defence might argue colour of right, i.e. having an actual colour of right to do a certain thing or holding an honest but mistaken belief of having a right to do such a thing. The Defendants must show that they honestly believe that they had such colour of right: **R. v. Creaghan** (1982), 31 C.R. (3d) 277 (Ont. C.A.). It is the Defendants' belief at the time of the offence which is engaged, not what they might have learned later, through research.

39. Such defence encompasses mistake of fact: **R. v. Howson**, [1966] 2 O.R. 63, 3 C.C.C. 348 (Ont. C.A.). There, the defendant insisted on recovery of costs of removal of a car from a private parking lot, at the instance of the lot owner, before returning the car to its owner, believing, erroneously but honestly, he had the right to make such a demand.

40. Courts in Canada are not unanimous as to whether the *colour of right* defence includes a mistake of law. In Nova Scotia at least, it does not. In **R. v. Shymkowich,** [1954] S.C.R. 606 an accused, salvaging logs in a booming area, owned by the informant, was not able to claim it, since, on the facts, his mistake was one of ignorance of law, contrary to s. 22 (now s.19) of the **Code**. In **R. v. Pace** [1965], 3 C.C.C. 55 (N.S.S.C., App. Div.), the accused, charged with taking a left-over cake, knowing the owner will throw it in the garbage, admitted to the offence of theft by pleading guilty. The accused did not have any colour of rights to that cake. The result may have been different, if the defence, at a trial, had been a lack of intent to deprive:

> *He may not have understood that had the circumstances been different he would have had a good defence on the ground of no intent to deprive, absence of fraud, or colour of right, but this lack of understanding was in the circumstances immaterial and irrelevant.* (at p. 10, Quicklaw)

41. A belief in an Aboriginal or Treaty right is a belief in the existence of a legal right, a question of law, not of fact. Given the above, it is questionable, at best, whether the Defendants can invoke the defence of colour of right to justify their conduct vis à vis the officers. Clearly, in the case of s.62 *(obstruction),* under the **Fisheries Act,** a mistake of law is not a defence in a strict liability offence (**Sault Ste. Marie, supra)**.

42. At any rate, proof tending to show the existence of such right, gathered well after the facts of the case, is irrelevant.

43. We ought not to lose sight of the fact that such Treaty is titled: **A Treaty of Peace and Friendship** (**Marshall (No. 1)**, para. 3). It would be anomalous to invoke such a Treaty to excuse an act of violence; this would impair the very purpose of the Treaty.

44. I must conclude that evidence to prove a Treaty right is not relevant to the remaining charges of assault, uttering a threat, assault causing bodily harm, and obstruction.

45. The main argument has been made pursuant to the **Marshall** decisions declaring a Treaty right. The Defendants argue as well that their Aboriginal right to fish for lobster in the same location is engaged.

46. The Defendants, to establish an Aboriginal right, must show that the practice is *a central and significant part of the society's distinctive culture.* They *must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was*.(at para. 55, **R. v. Vanderpeet**, [1996] 2 S.C.R. 507).

47. The claim in that case was that the defendant had an aboriginal right to barter salmon caught under a limited license to fish for food, social and ceremonial purposes, which prohibited the sale of any fish caught under the licence. She was charged accordingly. That defence was directly relevant to the charge, but was not made out on the facts. Had it been, I infer the result would have been similar to that of **Marshall, supra:** the prohibition to sell would have been *unenforceable* against the defendant.

48. The right is one of access, without having to purchase an expensive license, but it is access to a regulated fishery. The need to overview the fisheries would remain the same: to protect, for all lawful users, access to a protected fishery. The reasons provided above with respect to a Treaty right are applicable as well in this context.

49. As stated at the beginning of this decision, with the staying of the illegal fishing charges, the Aboriginal and Treaty rights are no longer relevant to the trial of the remaining charges.

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Jean-Louis Batiot, J.P.C.

October 28th, 2004
Annapolis Royal, Nova Scotia