IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R, v. Henneberry,2015 NSPC 96

Date: July 6 2015
Docket: 2704980
Registry: Halifax

Between:

Her Majesty the Queen

v.

Tyler HENNEBERRY

Judge:	The Honourable Judge Marc C. Chisholm, J.P.C.
Heard:	December 5, 2014
Date of Decision:	July 6, 2015
Charge:	That he, on or about the 23rd day of December, 2013, at or near Fishing Zone 3PS, within Canadian fisheries waters adjacent to Nova Scotia, did while carrying out an activity under the authority of a licence, did contravene any condition of the licence, to wit failed to hail the accurate round weight of fish on board the vessel by individual species, contrary to s.22(7) of the *Fishery (General) Regulations*, SOR/93-53, thereby committing an offence under s.78 of the *Fisheries Act*, R.S.C. 1985, c.F014.
Counsel:	Rhonda Vanderhoek, Crown Attorney Stanley MacDonald, Q.C., Defence Attorney

By the Court:

This is the decision of the Court on a Crown motion to have a Defence *Charter* motion summarily dismissed, without a hearing on the merits, due to the lateness of the filing of the Defence motion.

BACKGROUND

The accused, Tyler Henneberry, is charged that he, on or about the 23rd of December, 2013 did contravene a condition of his fishing license (condition 6.6.1(b)), by failing to hail the accurate round weight of fish on board the vessel by individual species pursuant to s.22(7) of the *Fisheries (General) Regulations, SOR/93-53*, thereby committing an offence contrary to s.78 of the *Fisheries Act*, RSC 1985, c F-14.

The accused was represented by counsel since the time of his second appearance on April 8, 2014. The accused entered a plea of not guilty on May 6, 2014 and the matter was set down for trial on October 8, 2014. On Defence motion, the trial was moved to December 5, 2014.

The Defence did not give notice, before trial, of an intention to raise a *Charter* motion.

The trial began on December 5, 2014. The Crown presented three witnesses: (1) Fisheries Officer Gary MacDonald; (2) Fisheries Officer Vince Smith; and (3) Dockside Monitor Brian Richardson. The Defence elected to call evidence. Mr. Tyler Henneberry gave evidence in his own defence. His evidence focussed mainly on the process of catching, storing and assessing the weight of the catch and his diligence in hailing the weight of his catch.

At the completion of Mr. Henneberry's evidence. The Defence closed its case. The Crown did not call any reply evidence.

Counsel were invited to make closing arguments, Defence counsel sought an adjournment to consider the evidence and review the law. The motion was unopposed and granted. The trial was adjourned to January 7, 2015. On January 7, 2015, the Defence sought a further adjournment and indicated they may file a *Charter* motion regarding the vagueness of the legislation and its arbitrary enforcement. The Defence stated that this *Charter* motion arose from the evidence

of Fisheries Officer Vince Smith who testified that, in exercising his discretion whether to lay a charge one factor was the captain's history of compliance/non-compliance.

The Crown counsel took the position that there was no valid argument to be made, but did not oppose the adjournment. The trial was adjourned to March 3, 2015. On March 3, 2015 Defence counsel sought a further adjournment due to a delay in obtaining a transcript of the evidence presented at the trial. The motion was unopposed by the Crown. The motion was granted and the matter adjourned to April 15, 2015.

On April 15, 2015, Crown and Defence counsel appeared in Court. Defence counsel advised he was filing a *Charter* motion. Crown counsel made no comment on the timing of the Defence motion. The Court set dates for the filing of briefs. The Defence brief was filed, on schedule, on May 8, 2015. The Crown brief was to be filed by June 30, 2015. On June 1, 2015, Crown counsel brought the present motion to dismiss the Defence *Charter* motions due to the lateness of their filing.

THE LAW

On January 1, 2013, the Nova Scotia Provincial Court implemented Court Rules. Rule 1.1 states:

> Fundamental Objective
>
> 1.1(1) The fundamental objective of these Rules is to ensure that cases in the Provincial Court of Nova Scotia are dealt with fairly, reasonably and efficiently.

2.5(1) states:

> Time for Trial Applications
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> 2.5(1) A trial application shall be heard at the start of the trial or during the trial, subject to the direction of a judge at a pre-trial or of the trial judge.
>
> (2) Trial Applications include,
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> (a) applications such as those under the *Charter* that,
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> (i) challenge the constitutionality of legislation,
>
> (ii) seek a stay of proceedings, except for unreasonable delay under clause 11(b) of the *Charter*,
>
> (iii) seek the exclusion of evidence; and

(b) complex evidentiary applications such as applications for the admission of,

(i) similar fact evidence,

(ii) evidence of a complainant's prior sexual activity, or

(iii) hearsay

COMMENTARY

Trial applications can take many forms. Rule 2.5 is designed to balance the benefits of certainty, as to how a complex issue should be addressed, and flexibility to ensure that the fundamental objective is properly respected.

Rule 5.3 states:

Power of Court to Excuse Non-Compliance

5.3 The Court may excuse non-compliance with any Rule at any time to the extent necessary to ensure that the fundamental objective set out in Rule 1.1 is met.

The decision of the Court must be consistent with the fundamental objective of the Provincial Court rules.

The Court's discretion must be exercised judicially and in the interests of justice. A trial judge must control the trial proceedings so as to ensure fairness to all concerned and preserve the integrity of the trial process (**R. v. Loveman**, [1992] O.J. No. 346).

"Clearly where a *Charter* right is at stake, a trial judge will be reluctant to foreclose an inquiry into an alleged violation. There will, however, be circumstances where no less severe order will prevent unfairness and maintain the integrity of the process. The trial judge ought to consider whether the basis for the *Charter* motion was known or could reasonably have been known to the Defence prior to trial." (See R. v. Loveman, supra).

On an application to dismiss a *Charter* motion without a hearing on the merits, the Court ought to assess whether there is an "air of reality" to the alleged breach. (**R. v. Bugden**, [2015] N.J. No. 161).

In Loveman, supra, Justice Doherty referred to the following factors which a trial judge ought to consider on a motion such as the present:

1) whether or not there is any statutory rule or practice direction requiring notice;

2) the notice which was given to the Crown;

3) the point during the trial proceedings when the appellants' counsel first indicated he intended to bring a *Charter* motion;

4) the extent to which the Crown was prejudiced by the absence of any specific reference to a *Charter*-based argument in the notice given to the Crown; and

5) the specific nature of the *Charter* argument which counsel propose to advance and the impact the application could have on the course of the trial.

Applying these factors to the facts before me.

1. **Rules of Court**

In Nova Scotia there are Rules of Court requiring notice of *Charter* motions, as indicated. There is also a Practice Direction - Charter Applications (PC Rule 2). The direction states, in part:

Guiding Principles

> "The leading authority on applications for *Charter* relief is **R. v. Kutynec**, [1992] O.J. No. 347 (Ont. C.A.). Prior to hearing any application for *Charter* relief pursuant to sections 24(1) or 24(2), there must be sufficient written notice to the Crown and the Court hearing the application."

The practice direction anticipates *Charter* motions being made before trial and specifies the required content thereof. The directive then states:

> "Nothing in this Practice Direction shall be interpreted as derogating from the right of an accused to make an application at any point in the trial, but the failure to give timely notice for such an application may be taken into account by the trial judge in determining
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> (a) whether to hear the application forthwith or to adjourn the trial to hear it, and
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> (b) on what terms the judge will hear the application.

While the Practice Direction does not make reference to the option that a judge may summarily dismiss the application without a hearing on the merits, I am

satisfied that a trial judge has such a discretion (see Kutynec, supra; Loveman, supra; and **R. v. Graham**, [2008] N.S.P.C. 83, Embree, P.C.J.)

2. Notice Given to Crown and

3. Point in trial when Notice Given

No notice was given to the Crown until after the completion of the Crown's case and the completion of the Defence evidence. The case was adjourned prior to closing arguments. Two weeks later, Defence counsel, by letter, gave informal notice to the Crown that he believed he must challenge the legislation. Approximately two weeks later, again, at the next court appearance, Defence counsel gave informal notice to the Court of his intention. Crown counsel took the position that there was no issue to pursue but did not oppose a Defence adjournment to further consider the possible *Charter* motion. Formal written notice of their *Charter* motion, in compliance with the practice Direction on *Charter* applications, was given to the Crown and the Court on May 8, 2015. Defence counsel conceded that, this was late notice.

4. Prejudice to the Crown

Crown counsel submitted that, if notice had been given prior to trial, the Crown may have prepared its witnesses differently, asked additional questions of the Crown witnesses, called additional witnesses, and may have asked additional questions of the accused. I accept the Crown position and find that the lateness of the Defence notice of *Charter* motion has caused actual prejudice to the Crown case.

As to the extent of the prejudice to the Crown, there is no evidence that any of the three Crown witnesses who testified at the trial would not be available to be recalled if the Crown elected to do so, and is given permission to re-open its' case. There is no evidence that any other witnesses the Crown may wish to call, if the *Charter* motion proceeds, could not be called, if an adjournment were granted and permission granted to re-open the Crown's case.

If the Defence motion were made earlier in the trial and a voir dire conducted, it is a matter of speculation whether the accused would have testified

on the voir dire. Given the Charter issues it is quite conceivable that he would not have testified on the voir dire.

The Crown had an opportunity to question the accused. The Crown's questions focussed on his compliance with the conditions of his license and due diligence. Had the Crown been aware of the *Charter* motion there may have been some additional questions relevant to these issues, but I'm not persuaded the questioning would have been substantially different. I find the loss of opportunity to question the accused with knowledge of the charter issue may have caused some limited prejudice to the Crown.

Defence counsel's position was that the evidence of the two fisheries officers, in particular officer Smith, gave rise to the *Charter* motion. One might logically ask, why then wasn't the defence motion made at the end of the Crown's case. There has been no suggestion that the delay in bringing the *Charter* motion until the end of the Defence evidence was for some strategic advantage. It is my conclusion that the Defence case proceeded, as planned, until the time of closing arguments and only then did the possible *Charter* arguments crystalize.

5. Impact on the Trial

If the *Charter* motions proceed, both Crown and Defence may wish to call further evidence and make additional submissions. This would delay the conclusion of the trial by months. These motions will substantially alter the nature of the trial, adding a significant constitutional challenge.

CONCLUSIONS

I accept that the evidence of Fisheries Officer Vince Smith, relating to the factors considered when exercising charging discretion, was not known to Defence prior to trial and was not reasonably foreseeable. Further, I accept Defence counsel's statement that, until the issue of arbitrary enforcement arose, the question of the vagueness of the legislative provision was not identified. To that extent, I accept that the two issues are inter-related and arise out of the evidence at trial. I am persuaded that there is an "air of reality" to the Defence Charter arguments.

While I find that the lateness of the Defence *Charter* motion has caused prejudice to the Crown I am satisfied that the prejudice can be addressed by the granting of an adjournment to the Crown and permitting both Crown and Defence to re-open their case.

I am not persuaded that it would be a fair exercise of the Court's discretion to summarily dismiss the Defence *Charter* motions.

The crown motion for summary dismissal of the Defence's *Charter* motion is denied.